THE
GOVERNMENT
PROCUREMENT
REVIEW

FIFTH EDITION

Editors
Jonathan Davey and Amy Gatenby

THE LAW REVIEWS
THE LAW REVIEWS

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Welcome to the fifth edition of *The Government Procurement Review*.

We noted in last year’s preface the potentially momentous nature of a UK vote in favour of ‘Brexit’ (the UK’s vote to exit the European Union) though at the time a ‘leave’ vote seemed the less likely outcome. Indeed, the past year has been one of momentous political events in the US and Europe. And, while the UK has voted to leave the EU, elections in France and Germany this year, involving populist contenders, have the potential to force further reform and reshaping of the EU.

Brexit will have significant consequences for the laws of the UK, with 10 per cent of all UK secondary legislation being derived from the EU, and procurement law is no exception: while the status quo on exit will be maintained for a period after that exit takes effect, procurement law reform is already in the sights of the UK’s Prime Minister and Chancellor of the Exchequer, with both having referred to procurement law as a focus post-Brexit, pointing to a balance between encouraging the UK supply chain while not propping up uncompetitive domestic industries. Given the fact that the UK will seemingly not be signing up to the single market, it remains to be seen what accommodation (if any) the UK will make with the EU on procurement law. However, it must be remembered that, even if the UK were instead to opt to sign up to the WTO’s Government Procurement Agreement (GPA), much of what many EU lawyers might consider the basic nuts and bolts of EU procurement law are actually also enshrined in the GPA, examples being the obligations to run a transparent, impartial and non-discriminatory process.

Last year’s preface also contemplated ratification of the Trans-Pacific Partnership (TPP), involving 12 nations (including the US) responsible in aggregate for 40 per cent of global economic output, but the US withdrawal from the agreement, announced in January, has left the remaining TPP partners struggling to keep it alive. President Trump has also signalled the end of TTIP, the proposed trade deal between the EU and the US.

Elsewhere in the world, changes continue apace. While EU Member States have been adopting new national laws to give effect to the 2014 EU Directives, legislative changes have been made or are pending in many other countries. Among these, Mexico is introducing major reforms, particularly on combating corruption, and Australia is making changes in anticipation of joining the GPA. Meanwhile in Brazil, another country rocked by political upheaval, the government has been unable to pursue its procurement objectives in full, while in South Africa public procurement has been used as a policy tool to address economic and socio-economic issues.
When reading the chapters regarding European Union Member States, it is worth remembering that the underlying EU rules are set out at EU level. Readers may accordingly find it helpful to read the EU chapter first and then to read the relevant country chapter so as to gain a comprehensive understanding of the issues.

Last but not least, we would like to take this opportunity to acknowledge the efforts of all of the contributors to this edition as well as the tireless work of the publishers in ensuring that this work is published in good order and to time. We hope that you will find this edition a useful resource that adds value to your business or organisation.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
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ARGENTINA

Juan Antonio Stupenengo and Paula Omodeo

I INTRODUCTION

Argentina is politically organised as a federal country. This implies that the federal government has jurisdiction only on matters expressly delegated to it by the provinces through the Federal Constitution. Provinces have jurisdiction over all other matters that have not been delegated, including those intended for the exclusive provincial environment, such as matters related to contracts entered into by the provincial and municipal governments to satisfy their own requirements.

Despite such federal regime preventing the existence of a legal framework that is applicable to the entire body of public contracts entered into by all types of governmental bodies in Argentina, certain common principles are applicable both to public contracts required by the federal government as well as to those entered into by the provinces, municipalities and the City of Buenos Aires. We analyse the federal level in this chapter.

At the federal level, the General Regime for Public Procurement (GRPP) was approved by means of Decree 1023/2001, issued on 13 August 2001 by the federal executive by exercising legislative powers delegated to it by the legislative under the terms of Section 76 of the Federal Constitution. After the inauguration of the new government, on 15 September 2016 the federal executive issued Decree 1030/16, approving the new regulation of the GRPP (the Regulation of the GRPP; together, the GRPP and its Regulation) and abrogating the existing Decree 893/12. Finally, on 27 September 2016 the National Procurement Office issued Dispositions 62-E/2016 and 65-E/2016, by means of which the Contracting Procedure Manual (CPM) and the electronic contracting system were approved.

II SCOPE OF PROCUREMENT REGULATION

i Public authorities with jurisdiction over government procurement matters

The GRPP is organised on the basis of two different approaches to procurement matters: the centralisation of public procurement contracts and regulation, and the decentralisation of the operational management of government contracts.

According to the regulation mentioned above, the regulating authorities are the following:

a the National Procurement Office, a body subordinated to the federal executive that serves as the governing entity for the GRPP and its Regulation. Under Section 23, Subsection a, GRPP, it is empowered with important functions such as, inter alia:

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1 Juan Antonio Stupenengo and Paula Omodeo are senior associates at Estudio Beccar Varela.
• submitting public procurement and organisational policies;
• drafting laws and regulations regarding public procurement;
• issuing explanatory, interpretative and complementary rules; and
• drafting general specifications documents; and

b different operating units for public procurement, which operate within each of the authorities that are governed by the GRPP and its Regulation (Section 23, Subsection b, GRPP). Under Section 12, GRPP, these units have different powers and duties, such as:
• interpreting or modifying public contracts based upon public interests;
• deciding the expiry or termination of public contracts;
• modifying public contracts up to 20 per cent of the total amount of the contract, under agreed conditions and deadlines and by adjusting the contract terms; and
• monitoring, inspecting and directing public contracts by applying sanctions to bidders and contractors.

ii Types of government contracts subject to the GRPP
The GRPP and its Regulation are applicable to certain contracts entered into by the central administration – this is, by the federal executive, its ministries, departments as well as any other central government bodies – and its agencies, comprising social security institutions (Section 2, GRPP). They are also applicable to contracts entered into by the national universities (Section 2, Decree 1030/16).

Therefore, the GRPP and its Regulation are not applicable to, inter alia, the following: contracts entered into by the judicial or legislative branch; and contracts entered into by corporations in which the federal government has shareholding; for instance, YPF, Aerolíneas Argentinas. All of these entities are empowered to adopt their own procurement rules. Notwithstanding this, it should be noted that many of these specific procurement regulations are similar to those contained in the GRPP and its Regulation.

From an objective point of view, the contracts that are governed under the GRPP and its Regulation are the following: sales, supplies, services, consulting, leasing, swaps, concessions of state goods and assets, and, in general, any other agreement that is not expressly excluded by the GRPP (Section 4, GRPP).

Among the contracts that are excluded are those regarding public works, public works concessions, public service delegations, licences and those related to sovereign debt transactions (Section 5, GRPP and Section 3, Decree 1030/16). The GRPP and its Regulation are supplemented by certain sector-specific procurement legislation, including that applicable within the public utilities fields.

The GRPP and its Regulation are not applicable, either, to public-private partnership contracts, which have been recently regulated by Law 27,328 (the PPP Law). According to this special regime, public-private partnership contracts are an alternative form of public procurement by means of which federal state entities or agencies and private or public companies enter into a public contract with the aim of developing projects of public interest in the fields of infrastructure, housing, activities and services, productive investment, applied research or technological innovation (Section 1, Law 27,328). Although public-private partnership contracts are not governed by the GRPP and its Regulation, the PPP Law contains much of their principles and rules, such as, for example, the obligation to hold a public tender and to guarantee the principles of transparency, publicity, dissemination, equality, concurrence and competence (Sections 1, 7 and 12, PPP Law).
III  SPECIAL CONTRACTUAL FORMS

i  Framework agreements and central purchasing

The Regulation of the GRPP sets forth that the National Procurement Office is empowered to enter into framework agreements with private sector providers to ensure the direct supply of goods and services to governmental entities, in accordance with the form, terms and other conditions established in such agreements.

Once the framework agreement has been signed and has entered into force, the contracting entities are required to buy exclusively under such framework agreement, interacting directly with the provider that has been selected by the National Procurement Office (Section 25, subsection f, Regulation of the GRPP and Section 126, CPM).

This obligation applies to all jurisdictions and contracting entities that operate within each ministerial jurisdiction, unless they themselves can demonstrate that the goods or services included in the existing framework agreement do not fulfil their needs or, either, that they could obtain, on their own, more advantageous conditions. In such circumstances, an entity must inform the National Procurement Office (Section 126, CMP).

ii  Joint ventures

Under Argentine law, joint ventures are contractual arrangements developed to perform a certain activity, execute a specific contract or render a service for a limited period of time. They do not involve the establishment of a separate legal entity.

According to the GRPP, bidders can submit tenders individually, or as part of a group, joint venture or association, or with a different legal person.

Notwithstanding this, and according to the above-mentioned PPP Law that governs public-private partnership contracts, under certain circumstances, individuals and companies may enter into a cooperative agreement with a public authority so as to develop a project of public interest.

IV  THE BIDDING PROCESS

i  Procedures

The GRPP provides for three different kinds of procurement procedures to award government contracts:

a  public bid, which is the principal method of procuring and implies a broad call to tender;

b  private bid, which consists of an invitation to tender addressed to certain specific bidders that are already enrolled with the National Procurement Office Registry; and

c  direct award, where there are no competitive procurement procedures. This exceptional procedure is applicable only to certain special cases expressly authorised by the GRPP, including:

•  whenever the contract is valued at below 1.3 million pesos;
•  whenever, according to the applicable rules, it is not possible to apply a different procedure;
•  whenever the service to be hired or the asset to be acquired are exclusively carried out or produced by a certain company, artist or specialist (e.g., goods or services that are covered by exclusive IP rights);
•  in the event of the failure of a previous tender or competitive procedure;
whenever, for duly proved urgency or emergency reasons, it is not possible for the contracting entity to call for a public or private bid; and
whenever the procuring entity is contracting for the repair of machinery, vehicles, equipment or engines whose disarmament, removal or prior examination is essential to determine the necessary repair (Section 25, Subsection d, GRPP).

The procedure to be used in each case depends on the threshold value of the contract. In fact, if the contract to be awarded is valued at under 75,000 pesos, the contracting authority is free to award the contract at its own discretion. If the contract to be awarded is valued at over 75,000 pesos but less that 1.3 million pesos, the contracting entity is authorised to award a contract without a competitive procedure. If the contract to be awarded is valued at over 1.3 million pesos, a competitive procedure is required. In this case, if the contract is valued at over 1.3 million pesos but less than 6 million pesos, the contracting authority shall call for a private bid, submitting invitations to tender to bidders already enrolled with the National Procurement Office Registry. Public contracts valued at over 6 million pesos must be awarded after a public bid procedure, which implies a broad call to submit offers and a general announcement.

ii Notice
The GRPP and its Regulation set forth that, in cases of open tendering, procuring entities must publish notices of invitation to tender in the official publication of the government (i.e., the Official Gazette) and either on the National Procurement Office’s website\(^2\) or in the Electronic Contracting System\(^3\) (Section 40, Regulation of the GRPP). In practice, the invitation to tender is also commonly published in the relevant national or local newspapers. The aforementioned publication must take place for two days, and at least 20 or seven calendar days in advance of the date fixed for the opening of the bids, depending on whether the call is published or not, respectively, on the website (Section 40, Regulation of the GRPP). For international public tenders, at least 40 calendar days before the date fixed for the opening of the bids, notices of an invitation to tender must be published on the official website of the United Nations (‘UN Development Business’) or the World Bank (‘DG Market’) (Section 32, GRPP, and Sections 40 and 42, Regulation of the GRPP).

In the case of private bids, the contracting authority shall send invitations to at least five suppliers that are already enrolled with the National Procurement Office Registry for the category of goods or services to be awarded. Such invitations must be sent a minimum of seven days in advance of the date for the opening of the bids. In addition, calls for private bids shall be advertised on the National Procurement Office official website as from the date on which invitations were sent (Section 41, Regulation of the GRPP).

In the case of direct awards, the contracting authority must send invitations to at least three suppliers and, in certain cases, make available procurement information on the National Procurement Office website (Section 44, Regulation of the GRPP).

In accordance with the Regulation of the GRPP, certain information and documents must be published on the National Procurement Office official website, such as, for instance, notices of invitation, drafts of specification documents, specification documents that are in

\(^2\) www.argentinacompra.gob.ar.
\(^3\) www.comprar.gob.ar.
force and their clarifications, minutes of a bid’s opening, comparison tables of bids, opinions on the evaluation of the bids and the objections raised against them, awards, contracts and any other data that the regulations establish (Section 47, Regulation of the GRPP).

The Regulation of the GRPP provides a list of the information that the procuring entities must always include in the notice of invitation to tender in the case of an open tender. Such information includes the following:

- the individual details of the procuring entity;
- the type of procedure (i.e., whether or not it is an open tender);
- the identification number of the procurement administrative record;
- the prices of the tender documents;
- the place and time frame for consultation of the tender documents; and
- the email address of the procuring entity (Section 17, CPM).

### iii Submitting and amending bids

Prior to the submission of a bid, it is necessary to obtain a certificate of good standing for contracting with the federal government, established in Resolution 1814/2005 of the Federal Administration of Public Revenue and to register before the Suppliers System of Information (SIPRO). At the provincial and municipal levels, the prior registration of bidders within different local registries of suppliers is also mandatory.

According to the Regulation of the GRPP, bids must be submitted at the place and within the time frame specified in the tender documents (Section 51, Regulation of the GRPP and Section 22, CPM). Therefore, the procuring entity must reject any bid that is submitted after such deadline. Bids can also be submitted by mail, according to the rules stated in the GRPP (Section 22, CMP).

The submission of a bid implies, for the bidders, full knowledge and acceptance of all of the rules and clauses governing the tender (Section 52, Regulation of the GRPP); therefore, such rules and clauses cannot be validly challenged after such submission.

According to the Regulation of the GRPP, as a principle, the bid shall not be amended after the expiry of the bid submission term (Section 53, Regulation of the GRPP). The amendment of bids is exceptionally accepted to correct some correctable errors, such as data or information already included in databases of public bodies, being written in a foreign language, or, in general when it does not alter the principle of equal treatment of bidders.

To be admitted, every bid must accomplish certain formal requirements, such as, for instance, the bid being written in Spanish, the original bid being signed on every page by the bidder or his or her representative, or the bid being submitted with the number of copies stated in the tender documents. The bidder must also establish a special address where every notification must be issued within the tender, and the price offered that, as a rule and unless something different is stated, must be established in national currency. Any other information or document that may be required in the tender documents must be also included. Besides, although there is not established a fee to submit a bid, suppliers must give a guarantee that the offer will be maintained for the duration of the tender. The maintenance bid guarantee is 5 per cent of the final price of the bid (Section 78, Subsection a, Regulation of the GRPP).

Unless a different term is established in the tender documents, bidders must maintain their bids for at least 60 calendar days from the date of the opening of the bids. Such term can be automatically extended, for the same 60-day period, every 60 days. A bidder who has decided not to maintain his or her bid for a new time period must give notice of such decision
at least 10 days before the expiry term. As a consequence, the bidder will be excluded from the public tender, but will not lose the maintaining bid guarantee (Section 54, Regulation of the GRPP).

The bids must be opened at the place, date and time stated in the tender documents, at a public event (Section 59, Regulation of the GRPP). The original version of each bid must be available to the bidders for the following two days (Section 60, Regulation of the GRPP).

V ELIGIBILITY

i Qualification to bid

According to the GRPP and its Regulation, the following persons cannot enter into contracts with the public administration:

a bidders who have been sanctioned by the National Procurement Office for infringements committed in previous tenders or whose previous public contracts were terminated by the government due to a fault of the supplier (Section 28, Subsection a, GRPP);

b companies in which agents or employees of the federal state have sufficient shareholding so as to form their social policy; their successors, transformations, mergers or spin-offs, and even those companies that are controlled by or are the controller of any of them (Section 28, Subsection b, GRPP and Section 68, Subsection a, Regulation of the GRPP);

c bidders who have been convicted for the commission of intentional crimes are disqualified for a period equal to twice the length of the sentence imposed for their crimes (Section 28, Subsection d, GRPP);

d bidders who do not meet their tax and social security obligations (Section 28, Subsection f, Regulation of the GRPP);

e bidders that, within a term of three years prior to the submission of the bid, were sanctioned for abuse of dominant position, dumping or any other form of unfair competition (Section 68, Subsection f, Regulation of the GRPP);

f bidders that have breached previous public contracts (Section 68, Subsection g, Regulation of the GRPP);

g companies that have been convicted abroad of bribery or transnational bribery practices under the terms of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; these companies will not be eligible for a period equal to twice the sentence (Section 68, Subsection h, Regulation of the GRPP); and

h human or juridical persons that were included in the lists of disabled persons of the World Bank or the Inter-American Development Bank, as a result of corrupt practices referred to in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; they will not be eligible while such condition persists (Section 68, Subsection i, Regulation of the GRPP).

ii Conflicts of interest

Regarding the subjective grounds for disqualification listed above, those under (b) above tend to prevent potential conflicts of interest.
iii Foreign suppliers

Foreign suppliers are allowed to submit bids exclusively within international tenders – that is, those tenders that, due to the nature of the object or the service to be hired, the call to bid is extended to interested parties and bidders from abroad. According to the GRPP, a ‘foreign bidder’ is a bidder whose principal place of business is outside Argentina and that lacks a branch duly registered in Argentina (Section 26, Subsection b, point 2, GRPP).

As mentioned above, notices of invitation to take part within an international public tender must be published on the official website of the United Nations (‘UN Development Business’) or the World Bank (‘DG Market’), at least 40 calendar days before the date fixed for the opening of the bids (Section 32, GRPP and Sections 40 and 42, Regulation of the GRPP).

Foreign suppliers are only allowed to bid within a national tender as long as they have already incorporated a branch or subsidiary in Argentina.

If, due to special and grounded reasons, the contracting authority needs to purchase a specific asset or hire a certain service from abroad because such is not available Argentina, it may invite foreign suppliers to take part in direct awarding.

In procurement proceedings related to the construction of public works, as well as in cases related to the contracting of consulting services, Law 18,875 prohibits the participation of foreign construction and consulting services providers unless they enter into joint venture agreements with local companies. This restricted participation of foreign providers can only take place if the government has previously called for an international public bid.

VI AWARD

i Evaluating tenders

The period for evaluating tenders runs from the time that the procurement administrative record is sent to the Evaluation Commission up to the time of the notification of the evaluation report to all the bidders (Section 61, Regulation of the GRPP).

The Evaluation Commission is a consultative body whose main function is to issue a non-binding opinion over the submitted bids. It is composed of three members and their alternates, all of whom must be appointed by the highest authority of the contracting entity. The following cannot be appointed to the Evaluation Commission: persons who decided the opening of the public tender, and persons who have the power to finally approve the whole procedure (Sections 62 and 63, Regulation of the GRPP).

The opinion issued by the Evaluation Commission must analyse the formal requirements of the bids, the subjective evaluation of the bidders (that is, whether they meet the requirements stated in the GRPP, its Regulation and in the tender documents), and the objective evaluation of all the submitted bids. The latter analysis must objectively take into consideration all the requirements established by the tender documents for the admissibility of the bids. Regarding the admitted bids, the Evaluation Commission must take into account the different aspects provided in the specification documents in order to compare them and determine their order of merit (Section 27, CPM).

According to the GRPP, the contract must be awarded to the ‘most suitable offer’, taking into consideration the price, the quality of the good or service, and the bidders’ economic, financial and technical capabilities. Therefore, the analysis of the Evaluation Commission and the procuring entity must not be exclusively based on the economic aspects (i.e., the lowest price) but rather on the three above-mentioned aspects (Section 15, GRPP).
The non-binding opinion of the Evaluation Commission must be published on the official website of the National Procurement Office, and duly notified to all of the bidders within a term of two working days from its issuance (Section 73, Regulation of the GRPP and Section 28, CPM). As discussed below, the non-binding opinion may be challenged by the bidders as well as anyone who invokes and proves his or her interest in the subject matter of the opinion.

ii National interest and public policy considerations

Law 25,551 gives preference to the acquisition of ‘goods of national origin’, being those goods produced or extracted within the territory of Argentina, as long as the cost of imported materials or inputs does not exceed 40 per cent of its gross production value (Section 1 and 2, Law 25,551).

In general terms, the preference provided under Law 25,551 is granted to bids that, in offering ‘goods of national origin’, have the same or a lower price than those bids involving goods that are not of national origin, after the price of the latter is increased by 7 per cent when such offers are made by companies classified as small and medium-sized enterprises, and 5 per cent when made by other companies (Section 3, Law 25,551).

VII INFORMATION FLOW

According to the GRPP and its Regulation, the principles of openness and publicity are general principles that govern all procurement procedures (Section 3, Subsection d, GRPP). This is why many provisions of the GRPP and its Regulation refer to the flow of information regarding public procurement:

a the GRPP states that any interested party has the right to access the public procurement administrative record, except for those documents protected by confidentiality rules or that are declared to be either confidential or secret by the procuring entity. During the period of evaluation of the tenders, bidders and third parties are not entitled to have access to the record (Section 4, Regulation of the GRPP); and

b regarding the draft of the tender specifications, even when commonly prepared and approved by the procuring entity with no prior mandatory public consultation, the GRPP states that, when the complexity or the amount of the procurement so justifies, such entity may allow a preliminary stage, before the bid call, for receiving comments from any interested party about the tender specifications draft (Section 26, Regulation of the GRPP).

Despite the procuring entity not being bound by the comments issued by potential bidders, prior to approving the tender specification it must consider all the bidders, and justify the reasons whether they are admitted or not.

c Regarding the tender documents, the GRPP states that anyone can have access to them or purchase them either from the offices of the procuring entity or from the website of the National Procurement Office (Section 48, Regulation of the GRPP). Nevertheless, it must be noted that it is very common that the tender documents – especially those of a technical nature – are only accessible through purchasing them at the offices of the contracting entity.

Suppliers can submit written questions to the procuring entity for clarification of the tender documents. Unless otherwise stated, any questions can be submitted up to three days before the date fixed for the opening of the bids (Section 49, Regulation of
the GRPP). As a result of such questions, the procuring entity may issue explanatory circulars (up to two days before the date fixed for the opening of envelopes), or amendments to the tender documents (up to one day before the date fixed for the opening of envelopes) that are construed as amendments to the tender specifications and become mandatory for both contracting authorities and bidders. Both types of documents are available to all interested suppliers (Section 50, Regulation of the GRPP).

d Regarding submitted bids, originals must be exhibited for all bidders for two days from the date of the bid opening. Bidders may obtain a copy of such bids (Section 60, Regulation of the GRPP).

VIII CHALLENGING AWARDS

i Procedures
The Regulation of the GRPP only provides for a special procedure for challenging the non-binding opinions of the Evaluation Commission (Section 73, Regulation of the GRPP, and Section 29, CPM). It does not provide for a specific procedure for challenging an award. Despite this, as outlined below, awards may be challenged either by any of the unsuccessful bidders or by any other aggrieved person through the general administrative and judicial review procedures established in the Administrative Procedures Act, approved by Law No. 19,549, and its regulation.

ii Grounds for challenge
Challenges are submitted before the public administration or before the judiciary. In cases in which a challenge is filed before an administrative body (that is, the procuring entity itself or its superior administrative authority), the challenge may refer to the illegitimacy of the procedure or of the award, an incorrect evaluation or assessment of the tender, or the inconvenience (i.e., in those cases where challenges are submitted before the administrative body, such challenge may be based not only on legal reasons (legitimacy), but also on the fact that one bid is preferable over another for reasons unrelated to the legal aspects, such as, for example, the quality of the goods or services, the reputation of the bidder) of the successful bid in comparison to the ones that were rejected.

The grounds for challenge are considerably more restricted if filed before a court of justice. In such case, the judicial claim should be based exclusively on grounds of illegitimacy either related to the procedure or to the award. Moreover, not all forms of illegitimacy will secure the success of a judicial claim, since judges tend to be very strict in their approach to these types of cases: the federal courts have traditionally adopted a deferential approach regarding government procurement challenges.

iii Remedies
We must distinguish between the remedies provided for challenging an opinion of the Evaluation Commission from those provided for challenging an award.

According to the Regulation of the GRPP, as mentioned above, Evaluation Commission opinions may be challenged by bidders – within three calendar days from such notification – and by any other aggrieved person – within three calendar days from an opinion’s publication on the official website of the National Procurement office – and in any case, if applicable,
by previously providing the challenge guarantee (that is, the guarantee that is usually required for the viability of the claim so as to assure its seriousness) (Sections 73 and 78, Subsection d, Regulation of the GRPP).

The contracting entity must make a decision on the merits of those complaints in the same resolution whereby the public contract is awarded (Section 74, Regulation of the GRPP).

Regarding challenges of awards, The Administrative Procedures Act and its regulation provide different remedies for filing a complaint:

a the challenger has the option to first file a complaint before the contracting entity. In this case, the challenger shall request the procuring entity to reconsider its decision. The complaint should be filed before the awarding authority (which is usually the procuring entity itself) within a term of 10 calendar days from the notification of the award (Section 84, Decree 1759/1972);

b if the previous complaint was not filed, or if, having been filed, it has been rejected, the challenger must file another administrative complaint before the superior administrative authority. In this case, the complaint should be filed before the authority that awarded the contract (which is usually the procuring entity itself) within a term of 15 calendar days from the notification of the awarding of the rejection of the previous remedy (Section 89, Decree 1759/1972); and

c if the complaint before the superior administrative authority is rejected, the challenger shall request the federal judiciary, within a term of 90 working days, to review the award on grounds of its illegality (Section 25, Subsection a, Law 19,549, Administrative Procedure Act). If the judiciary nullifies the challenged award, the procuring entity can opt to re-award the contract in full adherence with the considerations set out in the court’s ruling or to cancel the procurement proceedings. Note that the court itself does not have the power to award the contract to the claimant.

As a rule, the filing of such claims does not trigger, per se, a suspension of the procurement process. However, on its own initiative or by means of a request from a claimant, the contracting entity may suspend the process for public interest reasons, to avoid the causation of damages to the aggrieved party, or when a nullity has been duly invoked and accredited by the petitioner (Section 5, Regulation of the GRPP and Section 12, Law 19,549, Administrative Procedure Act). If the contracting entity rejects the suspension request, the claimant is entitled to file before the judiciary a request for preliminary measures to obtain the provisional suspension of the public procurement proceedings while the complaint is pending (Law 26,854).

**IX INTERNATIONAL PUBLIC PROCUREMENT**

Regarding international public procurement, Argentina is an observer of the World Trade Organization’s Agreement on Government Procurement, whose fundamental aim is to liberalise government procurement markets.

Within the regional sphere, the state parties of Mercosur, including Argentina, signed the Mercosur Public Procurement Protocol to provide suppliers and service providers established in the Mercosur Member States with a guarantee of non-discriminatory treatment in any procurement processes carried out by public entities of any of the state parties. The
Congress of Argentina approved the Protocol through Decision 23/10 of the Common Market Counsel; however, the state parties decided to subject the Protocol to a review process that is currently ongoing.

Finally, it must be mentioned that, unlike its predecessor, the new Regulation of the GRPP does not contain any provision aimed at governing public procurements that take place in foreign countries.
I INTRODUCTION

i Legislation

Government procurement legislation exists for the Australian Commonwealth government, state and territory governments and local governments.

**Commonwealth – key legislation and official guidance**

At the Commonwealth level, the key legislation on government procurement is the Public Governance, Performance and Accountability Act 2013 (Cth) (the PGPA Act), which commenced on 1 July 2014. The PGPA Act brought the fundamental elements of the Commonwealth financial framework together under one piece of legislation.

Official guidance on Commonwealth procurement is primarily contained in the Commonwealth Procurement Rules (CPRs) and the Public Governance, Performance and Accountability Rule 2014, which are issued under the PGPA Act.

The Department of Finance is primarily responsible for setting Commonwealth government procurement rules. It issues policies and directions for procurement, such as resource management guides dealing with liability, indemnity, payment terms and other positions to be applied in procurement and for contracts.

There are a number of Commonwealth government procurement connected policies. Different government agencies are responsible for these policies. For example, the Department of Industry and Science is responsible for the Australian industry participation policy, and the Department of Employment is responsible for the policy to apply the Building Code 2013 incorporating the Supporting Guidelines for Commonwealth Funding Entities.

At the Commonwealth level, substantial further official guidance is given for conducting defence procurement. Defence procurement is largely subject to the same legislation and official guidelines as other Commonwealth procurement. Additionally, the Department of Defence issues a Defence Procurement Policy Manual (DPPM) and other guidelines and policies applying to defence procurement.

The Department of Defence also issues its own contract terms for a range of supply categories.

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1 Geoff Wood is head of construction for the Australian offices of Baker McKenzie and Anne Petterd is a principal at the firm.
State, territory and local government – key legislation and official guidance

State and territory governments have all enacted legislation regulating how their respective government agencies are to conduct procurement. The approach applied across jurisdictions is broadly similar. States and territories have a central body that sets procurement rules and conducts most procurement. Government agencies that undertake a substantial amount of procurement (such as health departments) tend to have greater control over their own procurement. Similar to the approach at the Commonwealth level, there are Treasurer’s Instructions or similar that provide further policy and guidance on conducting procurement.

State and territory governments tend to establish more whole-of-government purchasing arrangements than their Commonwealth counterparts. Some of these arrangements are expressed to be available for purchasing by agencies in other states and territories (or even by Commonwealth agencies), although there does not tend to be a large take-up by other governments.

Each state also has a local government structure. Legislation is enacted by each state setting rules for local government procurement. Local government bodies will set further rules that regulate their procurement activities.

World Trade Organization (WTO) Agreement on Government Procurement

In addition to the above, Australia has been an observer of the WTO Agreement on Government Procurement since 4 June 1996, but is not a member. The Commonwealth government has been working towards Australia’s accession to the Agreement, and Australia submitted its accession offer for the Agreement on 16 September 2015. Australia submitted a revised offer on 30 September 2016.

ii Fundamental procurement principles

Procurement rules generally require that contracts be awarded to the bid demonstrating the best value for money and otherwise satisfying the conditions of participation. As an example, the principles for procurement set out in the CPRs are to apply the core rule of achieving value for money. This is supported by requirements in the CPRs to:

- encourage competition;
- make proper use of public resources by efficient, effective, economical and ethical procurement;
- ensure accountability and transparency in procurement activities;
- appropriately manage and address risks in procurement activities; and
- use an appropriate procurement method.

Other governments apply procurement principles largely consistent with those in the CPRs.

II YEAR IN REVIEW

i Key developments in legislation, case law, policy and guidance

Policy and guidance

Division 2 of the CPRs (see Section III, infra) has been amended to include additional requirements for ‘covered’ Commonwealth procurements with effect from 1 March 2017. In summary, these changes are as follows:
where an Australian standard applies to goods or services being procured, tender responses must demonstrate the capability to meet that Australian standard and contracts must contain evidence of the applicable standard;

b officials must make reasonable inquiries to ensure that a procurement is carried out considering relevant regulations or regulatory frameworks (including labour regulations and occupational health and safety requirements); and

c for procurements above A$4 million in value, officials must consider the benefit of the procurement to the Australian economy in light of the various international trade agreements to which Australia is a party.

As part of Australia’s accession to the WTO Agreement on Government Procurement, the Government Procurement (Judicial Review) Bill (the Bill) was proposed for introduction in the 2016 Spring Session of the Federal Parliament. While the Bill has yet to be introduced, it is understood that the intention is to enable the Federal Circuit Court and the Federal Court of Australia to grant an injunction or order payment of compensation in relation to a contravention of the CPRs (so far as the CPRs relate to ‘covered procurements’). If passed, the Bill will provide suppliers with a statutory basis to challenge alleged non-compliance with the CPRs.

ii Case law

Litigation concerning government procurement is infrequent. Decisions in the past year have primarily reinforced existing principles.

*Roo Roofing Pty Ltd v. Commonwealth*² is an interlocutory decision in a class action proceeding concerning the Commonwealth’s abandoned Home Insulation Program (HIP). The plaintiffs in the action claim, *inter alia*, that the Commonwealth engaged in misleading or deceptive conduct under what was then the *Trade Practices Act 1974* (Cth) in carrying on a business in trade or commerce through various statements and announcements it made regarding the HIP before its premature termination. The Commonwealth applied for summary judgment in relation to this claim, relying on Australian courts’ traditionally narrow interpretation of when government will be regarded as ‘carrying on a business’. Its application was rejected, with the Victorian Supreme Court concluding it was not ‘fanciful’ that some elements of the activities undertaken by the Commonwealth in connection with the HIP (including issuing work orders, selecting eligible tradespeople, setting terms on which work would be performed and paying contractors for that work) had a real connection with commercial activity and a context that bore a business or commercial character.³ These comments are interesting given the view of some commentators that Australia’s competition and consumer laws should be amended so that they apply to a broader range of Commonwealth commercial activity, including government procurement.

*Aurukun Bauxite Development Pty Ltd v. State of Queensland*⁴ confirms that procurement decisions are generally not reviewable under principles of administrative law because such decisions are not made ‘under an enactment’. In this case, the applicant was shortlisted by the Queensland government for participation in further phases of a competitive bid process for an Aurukun mining project. The government subsequently terminated the competitive

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³ Ibid., [114] and [115].
⁴ [2016] QSC 263.
bid process, before reinstating it and ultimately awarding the contract to develop the project to another corporation, Glencore. The Queensland Supreme Court rejected the applicant’s submission that the decision to select Glencore to develop an Aurukun project was impliedly authorised by the Mineral Resources Act 1989 (QLD) (MRA), and therefore reviewable. The Court held that there was nothing in the MRA to support such a submission and that the selection of Glencore was ultimately made by the Queensland government in its capacity as the executive government of the State of Queensland.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities
There are typically two types of regulated government bodies for procurement purposes:

a departments and agencies that do not have a legal identity separate from the Crown. Complying with the procurement laws and policies in most cases is mandatory for these bodies; and

b other government-created bodies that have a legal identity separate from the Crown (e.g., bodies created by statute or government-owned companies). Treatment of these bodies differs. Sometimes they may choose whether to subject themselves to the procurement laws and policies. In other cases they can be directed to comply.

ii Regulated contracts
Any contracts awarded by government bodies using public money or relating to public property will generally be regulated (or covered) by the procurement rules.

Under the CPRs, activities that are not considered to be ‘covered’ procurement activities are:

a grants;

b investments and divestments;

c sales by tender;

d loans;

e purchases of goods or services for resale, or of goods or services used in the production of goods for resale;

f any property right not acquired through the expenditure of public money (e.g., a right to make a claim for negligence);

g statutory or ministerial appointments; or

h engagement of employees.

Rules still apply to spending public funds on non-procurement activities. For example, the Commonwealth Grant Rules and Guidelines contain rules for grant programmes that are similar to the CPRs.

At the Commonwealth level, the CPRs contain rules in two divisions. Division 1 applies to all procurements regardless of value. Division 2 applies additional rules to procurements valued at or above the relevant procurement threshold (unless an exception applies). The Division 2 rules require a higher level of transparency (e.g., stronger requirements to conduct open tenders and to follow certain rules in conducting the procurement).

The procurement thresholds are:

a for non-corporate Commonwealth entities, other than for procurements of construction services, A$80,000;
for prescribed corporate Commonwealth entities, other than for procurements of construction services, A$400,000; or
for procurements of construction services by non-corporate Commonwealth entities and prescribed corporate Commonwealth entities, A$7.5 million (a reduction from A$9 million).

For states and territories, the financial threshold for a contract usually determines the procurement method that must be used.

There are some exceptions to the obligation to advertise or hold a competitive procedure. Sole sourcing (or direct sourcing) is permitted in limited circumstances, such as:
- where, in response to an approach to the market, no suitable submissions were received;
- for reasons of extreme urgency;
- for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals or unsolicited innovative proposals; or
- where the property or services can only be supplied by a particular business and there is no reasonable alternative.

Sole sourcing cannot be used to avoid competition or discriminate against any domestic or foreign supplier.

In any sole or direct sourcing arrangement, the general procurement policy framework still applies, including the requirement to achieve value for money.

Free trade agreements containing a non-discrimination in procurement obligation may also allow certain procurements to be conducted without being advertised or on a sole sourcing basis. For example, Australia’s free trade agreements in many cases do not cover defence procurement or the procurement of health and welfare services, education services, utility services or motor vehicles.

For defence procurement, there is further policy guidance issued about the basis upon which defence procurement might be conducted on a sole sourcing basis.

Contracting parties are generally free to agree to vary a contract or transfer the contract to a different supplier. However, in the case of contract variations, the customer will need to consider whether the extent of the variations is so substantial as to constitute a different procurement to the one already conducted. If so, the variation may fall outside the sole sourcing rules and require a new approach to the market.

### IV SPECIAL CONTRACTUAL FORMS

#### i Framework agreements and central purchasing

One agency is usually appointed as the lead agency to conduct a coordinated or whole-of-government procurement. At the Commonwealth level, the lead agency is usually the Department of Finance.

The Commonwealth, state and territory governments all use whole-of-government procurement arrangements for certain types of supplies. Where there is such an arrangement for a type of supply, it is usually mandatory for government customers to purchase under the arrangement (unless an exemption applies). In some jurisdictions, local governments participate in joint procurement arrangements where they appoint a party to conduct procurement for a number of local government bodies.
The supplies typically subject to whole-of-government arrangements are items routinely purchased by government bodies without the need to be further customised prior to use (e.g., supplies for hospitals, computer equipment, telecommunications services, cleaning services).

Some panel arrangements are established for more bespoke services, such as to pre-qualify suppliers able to provide certain IT services. From the pre-qualified list, government bodies may then conduct a further procurement to select a provider for particular projects (e.g., to select a systems integrator to implement a new system).

Defence establishes panel arrangements for some types of supplies (such as IT services or to pre-qualify to participate in defence research programmes).

ii Joint ventures

Government-owned bodies (regardless of whether they are part of a joint venture) are typically subject to less procurement rules than government departments. However, in practice they tend to apply procurement rules consistent with those applying to government bodies. Most of these bodies will be subject to requirements to make effective and efficient use of public resources and other requirements that usually result in them having policies requiring that they conduct open procurements in much the same way as other government bodies.

Public-private partnerships (PPPs) are not typically established with a requirement that they be bound by government procurement rules when buying, but accountability for use of public resources will still influence how the PPP conducts procurement. At the Commonwealth level, guidance issued under the PGPA Act includes accountability obligations on officials to cooperate with others (including participants in PPPs) to achieve common objectives, where practicable.

The National Public Private Partnership Policy and Guidelines, endorsed by the Council of Australian Governments on 29 November 2008, address partnering with the private sector for the provision of public infrastructure and related services, including on procurement. The Commonwealth and state and territory governments have agreed that PPPs must be considered for any project with a value in excess of A$50 million.

PPPs typically incorporate a significant consideration of whole-of-life costs, allowing the government to lock in long-term allowances for project maintenance, asset and quality control. In most PPPs, the government allocates the risk of additional future costs to the private sector concessionaire. This impacts the procurement approach. For example, the concessionaire usually has discretion to determine how to best manage these risks (e.g., by subcontracting them to a builder or operator, pricing for risks or building in contract measures to give relief for risks).

V THE BIDDING PROCESS

i Notice

The Commonwealth government and each state and territory government maintain public websites where procurement opportunities must be advertised.

At the Commonwealth level, as part of the CPRs’ requirement to show accountability and transparency in procurement, the CPRs require that that each agency publish, by 1 July each year, the agency’s annual procurement plan containing details about planned approaches to market on the AusTender website. AusTender must also be used to publish multi-use list opportunities, open tenders above the procurement threshold and, where practicable, request documentation.
The CPRs also require details about awarded and amended contracts to be published on AusTender if the contract is valued at or over the reporting threshold, which is A$10,000 for non-corporate Commonwealth entities. For prescribed Commonwealth entities bound by the CPRs, the reporting threshold is A$400,000 for procurements other than procurement of construction services, or A$7.5 million (reduced from A$9 million) for procurement of construction services.

**ii  Procedures**

Procurement rules generally require that contracts be awarded to the bid demonstrating the best value for money and otherwise satisfying the conditions of participation.

At the Commonwealth level, if a procurement is above the procurement threshold, the CPRs require that, unless contrary to the public interest, an agency must award a contract to the bidder that the agency has determined:

- satisfies the conditions for participation;
- is fully capable of undertaking the contract; and
- will provide the best value for money, in accordance with the essential requirements and evaluation criteria specified in the approach to market and tender documentation.

It is common for tender terms to give the agency some flexibility in awarding contracts. Tender terms will typically state that the lowest price bid will not necessarily be accepted, and that the customer may exercise discretion to accept a non-compliant or alternate bid, or decide not to proceed at all.

The majority of procurements conducted have online lodgement requirements. For example, at the Commonwealth level most tenders are required to be lodged via AusTender. Defence procurements will require lodgement via AusTender or other electronic means where appropriate. If, for example, the request for tender documents involves security classified or other sensitive information, then lodgement via hard copy or physical delivery to a tender box may be used.

**iii  Amending bids**

At the Commonwealth level, the CPRs permit customers to change terms applying to the procurement provided all bidders are treated equitably. Where a procurement is above the procurement threshold, additional change notification requirements apply.

The tender terms will usually define the basis upon which final tenders may be changed pre-award. Tender terms will typically give the customer flexibility to discuss proposals with one or more short-listed bidders and seek further responses from them without needing to go back to excluded bidders.

It could be more difficult for a customer to justify that a significant change made during the preferred bidder stage does not breach procurement rules. For example, if the issued tender terms stated a requirement was mandatory and bidders were excluded for not meeting that requirement, it could be problematic for the customer to keep dealing with a preferred tenderer who, at the preferred bidder stage, said it did not meet the mandatory requirement. This could be unfair to the excluded bidders (and, if so, could breach the procurement rules).
VI ELIGIBILITY

i Qualification to bid

The tender terms will typically give the customer discretion to exclude a bidder for breach of the tender conditions or inappropriate behaviour in connection with the tender.

If a party has been involved in an earlier stage of the project being tendered (e.g., in preparing the requirements document), such party may find itself excluded from competing in the later tender. Alternatively, the party may need to implement measures to quarantine its staff involved in that earlier work from the tender. This issue often arises for large defence procurement and in PPPs (partly because they can take place over several years).

Bidders can be excluded through conditions for participation or for failing to meet the mandatory requirements. A bidder might also be excluded for failing to comply with mandatory procurement policy.

Procurement frameworks usually enable government agencies to exclude bidders on grounds such as insolvency, false declarations or significant deficiencies in performance under a prior contract.

It is not uncommon, particularly in PPPs and large defence projects, where tendering costs can be very high, for the initial selection phase to be an ‘expression of interest’ process where those consortia interested in tendering are reduced to a small number (often two or three) on the basis of demonstrated technical experience and financial capacity, with only those selected invited to continue in the next ‘request for proposal’ phase.

ii Conflicts of interest

Tender terms usually require tenderers, to avoid an actual or apparent conflict of interest arising, to promptly report any such conflict and to comply with any directions issued for how the conflict is handled.

Defence procurements and PPPs usually contain more detailed terms for handling conflicts of interest. Procurement terms will typically contain a prohibition on improper assistance, and on a bidder using recently departed customer personnel or a contractor who may have been involved with the project. What is an actual or apparent conflict of interest is typically left as a matter for the judgement of the customer.

iii Foreign suppliers

Foreign suppliers may bid for government procurement opportunities. Foreign suppliers are not required to set up a local branch or subsidiary or have local tax permanent establishment presence to do business with public authorities.

Government bodies are required to comply with Australia’s sanctions regime, which applies the United Nations Security Council as well as autonomous sanctions. As a result, a government customer would be unable to do business with a foreign supplier if that would breach Australian sanctions.

Free trade agreements (FTAs) have impacted Australia’s procurement rules and requirements. Australia has agreed several FTAs containing requirements to eliminate preferential treatment of local suppliers and provide transparency in the government procurement process. These goals have been incorporated into procurement frameworks across all Australian governments. For example, the CPRs prohibit discrimination that would otherwise favour local suppliers. However, the FTA non-discrimination in government procurement requirements contain exemptions, for example, to allow Australian governments
to apply preferences to small to medium-sized enterprises. Moreover, it is not yet clear how the FTA non-discrimination requirement will interact with the new requirement in Division 2 of the CPRs that officials must consider the benefit of a procurement above A$4 million in value to the Australian economy in light of the various international trade agreements to which Australia is a party.

Foreign suppliers are generally eligible to bid for defence contracts, but may face restrictions where the project would involve access to classified information. For example, the DPPM reflects that in the case of a foreign tenderer or contractor, under most circumstances, only companies from those countries with which Australia has a bilateral security instrument for the reciprocal exchange of classified information are eligible for access to Australian security classified information.

VII AWARD

i Evaluating tenders

Most tender terms will set out evaluation criteria (sometimes, however, stated to be not necessarily exhaustive).

At the Commonwealth level, the CPRs require agencies to include relevant evaluation criteria in tender documentation to enable the evaluation of bids on a fair, common and appropriately transparent basis. If a procurement is above the relevant procurement threshold, the CPRs require that the tender requirements include evaluation criteria to be considered in assessing submissions. Value for money is usually the over-arching criterion.

ii National interest and public policy considerations

National interest and local, social and environmental considerations are taken into account in different ways in procurement. Some public policy requirements are included in tender evaluation criteria. Others operate as a bar to doing business with the government. Examples of those requirements at the Commonwealth level are:

a for procurements over A$4 million, the new requirement in Division 2 of the CPRs that officials must consider the benefit of the procurement to the Australian economy in light of the various international trade agreements to which Australia is a party;

b the Australian Industry Participation (AIP) National Framework, which applies to major Commonwealth government procurements (generally above A$20 million): tenderers for certain Commonwealth procurements are required to prepare and implement an AIP Plan; and

c the Workplace Gender Equality Procurement Principles and User Guide require government agencies to obtain a letter of compliance from certain tenderers (employers with 100 or more employees) that indicates compliance with their obligations under the Workplace Gender Equality Act 2012 (Cth).

VIII INFORMATION FLOW

The tender terms will usually contain a term giving bidders the opportunity for a debriefing.

The CPRs require that after the rejection of a bid, officials must promptly inform affected bidders of the decision. Debriefings must be made available, on request, to
unsuccessful bidders, outlining the reasons their submissions were unsuccessful. There are mixed approaches by government bodies as to whether they are willing to provide a debrief before a contract is executed or afterwards.

Confidentiality obligations for tenders are governed by the tender terms. There is usually an obligation on each party to use and disclose each other’s confidential information only for the purpose of conducting the procurement.

IX CHALLENGING AWARDS

There is no specific legislation or court system for challenging public procurement decisions. However, as noted in Section II, supra, this may shortly change due to Australia’s accession to the WTO Agreement on Government Procurement. Historically, legal challenges to procurement decisions have been infrequent and, in the absence of serious wrongful conduct by a government body, challenges do not tend to succeed.

Procurement decisions are unlikely to be undone unless the complainant acts quickly (and usually before a contract is entered into between the government body and the preferred bidder).

i Procedures

There are processes for handling procurement complaints. They are purely administrative, and the complainant has no legal rights. However, they can provide a quick solution.

At a Commonwealth level, the CPRs require government bodies to have a fair, equitable and non-discriminatory procurement complaint handling procedure.

There is an administrative process run through the Department of Finance allowing some types of complaints to be made to the Procurement Coordinator. Complaints about current tenders will only be considered where the Procurement Coordinator determines the issue raised is sufficiently material and relevant to warrant being raised with the procuring government body, and if there is sufficient time to deal adequately with the complaint before the tender closes.

The Procurement Coordinator has no authority to compel a government body to reconsider the conduct or outcome of tender processes for which that body is accountable.

Legislation also allows a complaint about procurement to be made to the Commonwealth Ombudsman. The Ombudsman has powers to investigate and make a recommendation but no power to change a decision.

The person with standing to bring the relevant legal cause of action may commence litigation to challenge the award of a tender. Usually this will be an aggrieved tenderer. The party will need to find a public or private law cause of action.

The limitation period for applying for a remedy will usually be set out in the limitation legislation for the relevant jurisdiction. Some causes of action found under legislation will specify a limitation period in that piece of legislation (e.g., the Competition and Consumer Act 2010 (Cth), and usually legislation giving administrative law remedies).

The general limitation period is six years from the date the cause of action accrued. Different periods are set for particular causes of action. If the cause of action arose under an agreement executed as a deed, the limitation period could be 12 or 15 years from the date the cause of action accrued, depending on the jurisdiction.
ii Grounds for challenge
In practice, challenging procurement decisions can be difficult in the absence of serious wrongful conduct.

Administrative and private law actions may be available to provide a remedy for a procurement complaint. For example, administrative law may allow a claim based on denial of natural justice, a lack of procedural fairness or on the legitimate expectation doctrine; or legislation allowing the review of administrative decisions made under an enactment. However, these cases are rare, as procurement decisions are not usually found to have been made under an enactment.

Depending on the circumstances, private law remedies may be available. For example:

a most procurements will be conducted under a tender process contract. Where a process contract has been created, an action in breach of contract may be available if the government body fails to follow the procurement process;
b if the government body has acted in a misleading manner in conducting the procurement, it may be liable for misleading conduct in breach of the Competition and Consumer Act 2010 (Cth), or under corresponding state and territory fair trading legislation. However, there are differences between jurisdictions in whether the government can be liable under the legislation; or
c the doctrine of estoppel may be available to provide redress for a tendering complaint where representation, reliance and detriment can be shown to have occurred.

There are few cases where remedies have been obtained against the government for procurement practices.

Hughes Aircraft Systems International v. Airservices Australia\(^5\) established that under Australian law, a public tender could be governed by a 'process contract'. In Hughes, the process contract contained the express tender terms (which relevantly included confidentiality obligations that were found to have been breached) and the implied term that the government body was to evaluate all tenders fairly and in good faith (which was breached as tenderers were not treated fairly).

JS McMillan Pty Ltd v. Commonwealth\(^6\) is the leading Australian authority for procurement disputes based on misleading conduct by government. In McMillan, the Commonwealth government conducted a procurement to outsource its printing operations. McMillan accused the government of having engaged in misleading conduct under the predecessor to the Competition and Consumer Act 2010 (Cth). For the government to be liable, the test for applying the Act to the Crown's activities needed to be satisfied. The test was whether the government could be treated as carrying on a business. It was held that outsourcing printing operations was not carrying on a business, and so the Act did not apply.

iii Remedies
For private law causes of action, the courts may grant injunctions, set aside contracts, order new tenders and award damages for breach of tender process contracts. However, contracts are rarely undone. If a bidder obtains a court decision in its favour concerning the conduct of the procurement, the most likely remedy is damages to compensate the bidder for loss.

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\(^5\) (1997) 146 ALR 1.
\(^6\) (1997) 147 ALR 419.
There is no separate body of procurement law under which damages can be awarded. No fines are available for breach of procurement procedures.

For private law causes of action, the remedies may be quite limited. For example, powers to review an administrative law decision may only grant the court the power to require that the decision be remade (which may not change the outcome). Damages are also not available for all administrative law remedies.

**X OUTLOOK**

The focus in government procurement over the next few years is likely to remain on Australia’s accession to membership of the WTO Agreement on Government Procurement. The proposed implementation of a formal review procedure for suppliers aggrieved by a procurement decision is the most significant change expected as a result of this agreement. It is not clear what effect (if any) the changes to the CPRs regarding ‘consideration of Australia’s national interest’ will have on Australia’s accession process.
I INTRODUCTION

The main sources of law for public procurement in Austria are the Federal Public Procurement Act 2006 (BVerfG) and the Federal Act on the Award of Contracts in the Fields of Defence and Security (BVerfGViS). Due the country’s federal structure (federal state, provinces and municipalities), there are a further nine separate public procurement acts at the regional level.

The BVerfG applies for the entirety of public tenders awarded by the nine Austrian provinces and the communities and public bodies governed by them. In contrast, the review proceedings at the regional level are exempted from the BVerfG; these are regulated by the nine distinct regional laws. However, these regional laws do not deviate significantly from the review proceedings stipulated in the BVerfG.

The BVerfG transposes the 2004 Public Sector Directive, the 2004 Utilities Directive and the Remedies Directive. In addition, the case law of the Federal Administrative Court (FAC), the nine administrative courts, the Supreme Administrative Court (VwGH), the Supreme Constitutional Court (VfGH) and the Court of Justice of the European Union (CJEU) applies.

Austria has implemented its obligations under the World Trade Organization’s Agreement on Government Procurement (GPA). As an EU Member State, Austria is at the same time a contracting party to the Agreement between the European Community and the Swiss Confederation on Public Procurement (and another six sectors).

The general principles of public procurement were formulated in compliance with the EU directives, the EC Treaty and the Federal Constitution. Accordingly, the basic principles for public procurement are free and fair competition, equal treatment of all candidates and tenderers in due consideration of the Community rules on fundamental freedoms, and non-discrimination. Pursuant to Section 19 Paragraph 1 BVerfG, contracts shall be awarded to authorised, capable and reliable entrepreneurs at reasonable prices.

II YEAR IN REVIEW

The past year was marked by the arrival of the totally new Anti-Wage and Social Dumping Act (LSD-BG) and significant draft amendments to the BVerfG and the BVerfGViS which completed the first part of respective amendments (‘small amendment 2015’) that entered into force on 1 March 2016 (as to the draft amendments, see Section X, infra).

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The new LSD-BG became effective on 1 January 2017. It consolidates provisions on labour law, administrative criminal law and social insurance law, which were formerly scattered across diverse national acts and statutes. Similarly to one of the key objectives of the 2015 amendment to the BVergG, the LSD-BG seeks to combat wage and social dumping by enhancing the protection of posted employees from foreign countries and of the competition in the Austrian labour market. These goals shall be achieved, *inter alia*, through an improved enforceability of the employees’ entitlements and an added preventive effect of obligations imposed upon employers. Moreover, the LSD-BG extends and substantiates the catalogue of activities that are exempted. In order to be effective, the LSD-BG fosters both cross-border enforcement and cooperation between national authorities.

As to public procurement, contracting authorities are obligated to verify whether an economic operator or bidder has been convicted due to a breach of certain LSD-BG provisions (which had formerly been enshrined in the Employment Contract Law Amendment Act). In case of respective evidence, this may or must result in the exclusion of the concerned economic operator or bidder.

Apart from this obligation to verify the suitability of undertakings, the LSD-BG widens existing liability provisions of contracting authorities and adds new ones. Essentially, three types of liabilities are provided for as follows:

a. liability for remuneration vis-à-vis employers established in a third country;

b. liability provisions applicable to the construction sector; and

c. general contractor’s liability for remuneration entitlements vis-à-vis contractors established in an EU Member State or the Swiss Confederation.

Furthermore, the LSD-BG imposes a new information obligation on contracting authorities acting as general contractor. They shall truthfully provide the employee with information about the companies they have contracted, about subcontracting of contracts and the respective subject matter within 14 days of receiving the request for information.

Concerning jurisprudence, one ruling in particular stood out in the preceding year. The VwGH\(^2\) held, confirming a respective decision by the BVwG, that it was lawful to oblige an economic operator or bidder to submit the Criminal Records Bureau’s checks not merely of all managing directors but likewise of all authorised officers in order to prove their professional conduct. This decision was partly criticised as overburdening enterprises, above all big international groups. However, undertakings will have to be observant in future to comply therewith.

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

The ‘classic’ contracting authorities covered by the BVerfG are the federal state, the provinces (regional states) and municipalities, associations formed by the previously mentioned bodies, and ‘bodies governed by public law’.

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\(^2\) Ra 2015/04/0081, 12 September 2016.
A body governed by public law is an entity that is controlled, financed or supervised by contracting authorities and established for the specific purpose of serving needs in the general interest, not having an industrial or commercial character.

Within the utilities sector, three groups of contracting authorities may be differentiated: the classic contracting authorities, public undertakings engaging in a utility activity, and (private) entities carrying out utility activities on the basis of special or exclusive rights. Thus, in practice, the utility regime also applies to a variety of private-sector utilities including, for example, water companies.

ii Regulated contracts

In general, supply contracts, service contracts and works contracts awarded by the aforementioned contracting authorities are subject to the procurement regulations. In the utilities sector, a less strict regime applies. The contracting authority benefits from more freedom in the execution of the procurement procedure (e.g., a wider choice of eligible tender procedures).

In addition, the BVergG sets forth specific rules and provisions applicable for awarding service and works concession contracts. Service and works concession contracts are contracts of the same type as service and works contracts, except for the fact that the consideration for the services or works to be carried out consists either solely of the right to exploit the services or construction, or of such a right together with a specific amount of payment. Both service and works concessions are regulated by the BVergG, but a less strict regime applies to the former. Regarding the awarding of service concessions, (only) the EC fundamental principles (i.e., equal treatment and transparency) and the principle of non-discrimination must be adhered to. The BVergG states that – depending on the subject and the value of the contract – a service concession shall be, in principle, awarded through a competitive procedure. Procedures for the awarding of service concessions do not fall under the jurisprudence of the administrative courts, but must be challenged before civil courts. Regarding works concessions, only certain provisions of the BVergG apply (e.g., minimum deadlines, provisions regulating pre-qualification and the content of the tender documents, as well as the rules on the contract award and the remedies section). Again, the general principles of transparency and equal treatment must be observed.

The BVergG does not apply when the special provisions of the BVergGVS prevail. The latter provides special rules for defence and security procurement. It covers the supply of military or sensitive equipment, including any parts, components or subassemblies thereof. Moreover, the BVergGVS regulates works, supplies and services directly related to the aforementioned equipment and works and services for special military purposes, or sensitive works and sensitive services. However, neither the BVergG nor the BVergGVS shall be applicable to public contracts when they come under the exemption pursuant to Article 346(1)(b) of the TFEU. Pursuant thereto, EU countries may take the measures they consider necessary for the protection of the essential interests of their security that are connected with the production of or trade in arms, munitions and material. Austria has exercised this exemption right in Section 10 Subparagraph 2 BVergG.

Pursuant to Section 12 Paragraph 1 and Section 180 Paragraph 1 BVergG, and Section 10 Paragraph 1 BVergGVS, the following application thresholds for the procedures for the awards of contracts apply:
Note that the BVerG and the BVerGVS also apply below these thresholds. Whether the contract exceeds the thresholds is relevant for the scope of the applicable regulations (e.g., with regard to the number and conditions of the eligible tender procedures). The rules for contracts below the thresholds are in general less stringent (e.g., providing for simplified rules on publication obligations). In contrast, more formalised and transparent procedures apply above the thresholds.

Moreover, contracts that do not exceed a value of €100,000 may be awarded directly. Direct awards with a prior market survey are applicable to supply and service contracts with a contract value less than €130,000 in the classic sector and €200,000 in the utilities sector, respectively; the contract value of works contracts must not exceed €500,000. When resorting to direct awards with a prior market survey, the contracting authority is obliged to publish a notice prior and subsequent to the awarding procedure. The course of the awarding procedure may be determined by the contracting authority, but in due consideration of the general principles of the TFEU.

The BVerG allows various exemptions for contracts. The procurement regulations shall not apply, for instance, to:

a. contracts on the acquisition or lease of rights to real estate or buildings or other immoveable property;
b. employment contracts;
c. arbitration and conciliation services;
d. certain international contracts;
e. central bank services and certain financial services;
f. in-house procurement;
g. certain research and development services; and
h. certain broadcasting services.

The applicability of these exemptions must be demonstrated and documented by the contracting authority and is subject to review proceedings before the administrative courts. The majority of the above-mentioned exceptions correspond to the exceptions provided for the utilities sector, irrespective of minor differences, (e.g., in relation to contracts on financial services). However, certain exemptions are reserved to the utilities sector exclusively, such as specific contracts awarded for purposes of resale or lease to third parties.

IV  SPECIAL CONTRACTUAL FORMS

i  Framework agreements and central purchasing

Framework agreements are widely used, in particular in market sectors characterised by significant price dynamics (e.g., information technology or the power and gas markets). However, framework agreements are merely available in open, restricted or negotiated procedures. In principle, the term of a framework agreement must not exceed a three-year...
period. Framework agreements can be concluded between one or several contracting authorities on the one side and one or several entities on the other. This results in enhanced competition and flexibility – both advantages widely appreciated by contracting authorities.

Contracting authorities are entitled to conduct tender procedures jointly. Moreover, the BVerfG allows the establishment of central purchasing entities. One such entity is the Austrian Federal Purchasing Agency (BBG). Its main task is to provide procurement services to the federal state, the provinces and municipalities, as well as to associations formed by the previously mentioned bodies.

ii Joint ventures

Public–public joint ventures are common in Austria. In practice, one the most relevant forms thereof is the ‘intercommunal cooperation’. According to the jurisdiction of the CJEU, the regulations on public procurement are, under certain conditions, not applicable to intercommunal cooperation.

According to the ground-breaking Stadtreinigung Hamburg decision, the CJEU pointed out that a public authority is entitled to perform the public interest tasks conferred on it by using its own resources without being obliged to call on outside entities not forming part of its own departments; thus, without the obligation to conduct a procurement procedure. Moreover, the public authority may do so in cooperation with other public authorities. One of the most remarkable clarifications made by the CJEU refers to the fact that, in this case, it was undisputed that the four public authorities concerned did not exercise any control that could be qualified as similar to that which they exercise over their own departments. This means that the CJEU did not merely hold that projects of intercommunal cooperation are exempt from the procurement regime, but also, in particular, that this exemption was not subject to a control criterion. Especially for this reason, the Stadtreinigung Hamburg decision is of utmost significance.

Another important exemption is the ‘in-house’ exemption. The in-house provisions of the BVerfG correspond to the jurisdiction of the CJEU (in particular, Teckal and Stadt Halle). The in-house exemption, even if the contracting authority is an entity legally distinct from the contracting authority, applies only if two conditions are met. First, the public authority, which is a contracting authority, must exercise over the distinct entity in question a control that is similar to that which it exercises over its own departments. Second, it is required that the entity carries out the essential part of its activities with the local authority or authorities that control it. In this respect, it is not admissible to include any private ownership or participation.

Moreover, the BVerfG does not apply if sectoral entities award contracts to an affiliated company, or if a joint venture (formed by several sectoral entities for the purpose of performing sectoral activities) awards the contract to one of those sectoral entities or to an affiliated company, provided that at least 80 per cent of the average annual turnover of the seller has been realised by performing such services to the joint venture.

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3 C-480/06, Commission v. Germany.
4 C-107/98, Teckal Srl v. Comune di Viano.
5 C-26/03, Stadt Halle, RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna.
There is no specific legislation applicable to the awarding of concessions or PPP projects, but rather they are regulated by general public procurement rules (i.e., the BVergG). The notion of PPP is not recognised by Austrian public procurement law, and PPPs are typically classified as service or works concessions.

V THE BIDDING PROCESS

i Notice

Contracts that come under the procurement regulations must be advertised in the OJEU. In addition, they have to be published at a nationwide level. With regard to tenders of a public authority at a regional level, the legislator provides its own regional publication platform. Contracts not exceeding the thresholds are advertised on national portals, exclusively.

Besides compulsory advertising, contracting authorities have the option to publish ‘ex ante transparency notices’ on a voluntary basis. This option is used if contracting authorities have awarded a contract through a direct award or subsequent to other admissible tender procedures without prior publication. Voluntary transparency aims above all at reducing the deadline for applications to declare the contract ineffective (see Section IX, infra).

ii Procedures

Contracting authorities must use one of the tender procedures provided for in the BVergG: open, restricted or negotiated procedures, direct award (with or without prior public market survey), competitive dialogue, dynamic purchasing system, electronic auction, design and realisation contest or framework agreement.

Whereas the open procedure and the restricted procedure can be chosen regularly, other procedures are subject to certain conditions. In the open procedure, an unrestricted number of economic operators are publicly invited to submit tenders. In restricted procedures (with prior notice), any undertaking may submit an application for participation, whereupon the contracting authority merely invites a restricted number of qualified undertakings among the applicants to submit tenders. Subsequently, the full scope of the contract is negotiable.

In principle, the negotiated procedure may be chosen unless an open or restricted procedure with prior notice has resulted in any tenders, or in any tenders appropriate for the purchase. However, the original terms and conditions for the contract must not be modified and amended materially. Moreover, the negotiated procedure may be selected if the special characteristics of the contract do not allow an open or a restricted procedure, or the services of the contract cannot be stipulated in contractual specifications.

In the negotiated procedure without prior notice, the contracting authority calls upon economic operators designated preliminarily to submit an offer. Subsequently, the terms and conditions of the contract are negotiated. The admissibility of this procedure is subject to particular conditions, such as, for instance, extreme urgency, recurrence of similar circumstances or if only one specific economic operator is able to execute the contract.

The competitive dialogue is most appropriate if solutions to particularly complex projects are sought. This is the case when the contracting authority is not capable of determining the technical specifications or legal or financial conditions of the project. An electronic auction is, in the strict sense, to be qualified as a part of a tender procedure rather than a tender procedure as such. Therefore, it can merely be held subsequent to a procurement procedure.
Framework agreements do not entail a purchase obligation but a non-binding basis for future purchases. A dynamic purchasing system is an entirely electronic process that is restricted to certain services in line with standard market conditions. Generally, the term of a dynamic purchasing system is restricted to four years.

Design contests are procedures in which plans or designs are selected by a jury; they can be conducted with or without prizes or payments to participants. Realisation contests are followed by a negotiated procedure to award a service contract.

iii Amending bids
Whether amendments to bids are admissible, and the scope thereof, depends on the tender procedure chosen. In open or restricted procedures, bidders are not allowed to amend their bids when the time limit for receipt of tenders has expired. However, queries to the contracting authority for clarification are admissible provided that all bidders are treated equally. In contrast, in negotiated procedures, generally, the entire content of the contract is negotiable. However, such negotiations must not modify the essential characteristics of the contract.

VI ELIGIBILITY
i Qualification to bid
To be qualified to bid, the bidders must prove their suitability, their technical and professional ability, and their economic and financial standing.

In this respect, the bidder is entitled to submit a self-declaration pursuant to Section 70 BVerG. This declaration serves as preliminary evidence of the qualification requirements. If the proofs of suitability are not complete, the bidder can hand them in later within an appropriate time limit. The evidence of technical ability and economic and financial standing can be substituted by a third party (Section 76 BVerG); however, each bidder has to be reliable on its own account.

Tenderers shall be excluded from participating in award procedures in cases of:

- a final judgment against them or natural persons on their managerial body because of participation in a criminal organisation, corruption, fraud or money laundering;
- bankruptcy or composition (reorganisation) proceedings against them, or bankruptcy proceedings rejected in the absence of sufficient assets;
- liquidating or winding up the business;
- guilt of grave professional misconduct, in particular violation of provisions of labour or social laws, according to evidence available to the purchaser or a final judgment against the tenderers or natural persons on their managerial body challenging their professional conduct;
- violation of their obligations to pay social security contributions or taxes and levies; or
- guilt of serious misrepresentation in providing information.

However, in certain cases, tenderers may be permitted to participate in a procedure despite one of the above-mentioned exclusion grounds if they ‘self-clean’ themselves. To do so, they are obligated to clarify the facts and circumstances in a wide-ranging manner by actively collaborating with the investigating authorities, and by taking technical organisational and personal measures that are suitable to prevent further criminal offences or misconduct.
ii Conflicts of interest

Pursuant to Section 20 Paragraph 5 BVergG, economic operators that have participated, directly or indirectly, in the elaboration of the tender documents must be excluded from participation in the pertaining tender procedure if their participation would distort equal and fair competition. However, the contracting authority may prescind from the exclusion if in exceptional cases the participation of certain economic operators is indispensable.

iii Foreign suppliers

In principle, foreign (non-EU or EEA) suppliers may also participate in public tender procedures. However, they are obligated to comply fully with the conditions and requirements of the tender documents including, *inter alia*, the minimum eligibility and qualification criteria. The establishment of a local branch or subsidiary is generally not a precondition to participate.

In the utilities sector, a contracting authority can exclude a foreign candidate or bidder from an award procedure above the thresholds with regard to products originating from countries that are not signatories of the EEA Agreement or have no agreement with the EU according to which actual access to their national markets is guaranteed in favour of EU-based entities and that have a legal situation comparable to the one provided by the BVergG. Moreover, the bidder can be excluded if 50 per cent of the required products stem from a country that is not a signatory of the EEA Agreement or has not concluded an agreement with the EU on the aforementioned terms.

The GPA establishes the principles of equal treatment and non-discrimination in favour of candidates and bidders originating from the signatory states and parties to the GPA.

VII AWARD

i Evaluating tenders

Tenders may be evaluated either on the basis of the most economically advantageous tender or merely on the lowest price. If the most economically advantageous tender is chosen, all awarding criteria must be specified and notified. These may refer to quality, price, running costs, aesthetic and functional characteristics, environmental characteristics, technical merit, cost-effectiveness, after-sales services and technical assistance, delivery date and delivery period or period of completion. In addition, for the sake of transparency, the contracting authority is compelled to notify the weighting that is linked to each awarding criteria. Ultimately, the award should be made in accordance with what the individual contracting authority considers the most economically advantageous solution among those offered.

Alternative bids are exclusively admissible if explicitly mentioned in the tender documents. They are allowable only in the context of contracts to be awarded on the basis of the technically and economically most advantageous tender. Unless stated otherwise in the tender documents, alternative tenders are, however, only permissible if submitted in addition to a ‘main’ offer in conformity with the tender conditions.

In contrast, bids marginally amending the tender are permitted unless explicitly stated otherwise in the tender documents. However, bids marginally amending the tender may merely entail minor technical modifications of the contract. Bids marginally amending the tender are allowable with regard to both contracts to be awarded on the basis of the technically
and economically most advantageous tender or the lowest price. Unless stated otherwise in the tender documents, bids marginally amending the tender are, however, only permissible if submitted in addition to a ‘main’ offer in conformity with the tender conditions.

### National interest and public policy considerations

National interest and, in particular, public policy considerations, can be taken into account exclusively to the (limited) extent conceded by the legislator and, in particular, in due consideration of the procurement principles. Consequently, when elaborating their award procedures and tender documents, contracting authorities are entitled to take into account, for instance, the following aspects: environmental justice; energy efficiency; and employment of women, long-term unemployed individuals, persons in training, handicapped people or elderly workers. Likewise, the interests of small and medium-sized undertakings may be taken into account in award procedures.

### VIII INFORMATION FLOW

Contracting authorities are obliged by law to assure fair and transparent award procedures in accordance with the procurement principles, above all the principle of equal treatment and non-discrimination. On the one hand, this means, essentially, that candidates and bidders must be notified with the same information to guarantee a level playing field. On the other hand, contracting authorities are compelled by law to protect the confidential character of all information provided to them, especially trade and business secrets.

Tenderers are entitled to request clarification with regard to the tender or pre-qualification documents. The contracting authority must respond to such requests. It must summarise the anonymised questions and the answers, and communicate them to all participating candidates or bidders.

The contracting authority is obliged to notify the bidders other than the successful tenderer to which the award shall be made. Moreover, it must indicate the award sum, the characteristics and advantages of the winning tender, the reasons for the bidder’s non-selection and the end of the standstill period.

### IX CHALLENGING AWARDS

#### i Procedures

There are two distinct main types of proceedings before the administrative courts: review proceedings that can be brought in prior to the award of the contract, and proceedings for declaratory decisions subsequent thereto. Applications for review proceedings seek to have decisions by the contracting authority declared null and void. Applications for declaratory decisions tend to seek to have award procedure faults declared unlawful.

Subject to the type of proceedings and the means of communication of the decision concerned, there are distinct time limits. Applications for review proceedings must be filed within 10 days if the decision was transmitted by electronic means or fax, and within seven days in cases concerning sub-threshold procurements. Applications for declaratory decisions have to be submitted within six weeks from the moment in which the applicant had or should have had knowledge of the challenged decision (e.g., award) and within six months subsequent to the challenged decision. However, contracting authorities may shorten the aforementioned term to 10 days if they publish a voluntary ‘ex ante transparency notice’ on
an awarded contract without compulsory publication. However, since the CJEU’s Fastweb II ruling was implemented into the law in 2016, the contracting authority is obliged to have had verified the conditions for the exemption from a formal award procedure diligently and explained these conditions in a ‘clear and precise way’ in its notice. Tender documents have to be challenged at the latest seven days prior to the deadline for submitting applications to participate or bid.

ii Grounds for challenge

According to BVergG, only certain explicitly enumerated decisions by the contracting authority may be challenged by economic operators and bidders. These decisions refer, inter alia, to the selected award procedure, the tender documents, the invitation to tender, the selection (or exclusion) of the bids and the award decision.

The legitimacy to file a complaint is subject to an interest in obtaining the appertaining contract. In addition, the plaintiff must be harmed by the alleged infringement or at least face the risk of being harmed.

Challenges are quite frequent in Austria. As to the chances of success, in 2015, 37 per cent of appeals filed with the FAC were granted.

For each application, a fixed basic fee has to be paid. The amount depends on the contract and the type of proceeding, and varies from €308 to €6,156. The basic fee may be further increased (e.g., trebled when the estimated contract value is more than 10 times higher than the relevant thresholds) or reduced (e.g., quartered in the case of applications for review of tender documents).

The decision deadline for the courts is six weeks.

iii Remedies

The main remedies, which correspond to the two main types of proceedings, are applications for review proceedings and for proceedings for a declaratory judgment. The administrative courts have the power to annul decisions taken by the contracting authority (e.g., the award decision). The contracting authority is obliged to adhere to the court’s ruling and release a corresponding decision, anew. To safeguard the effectiveness of the review proceedings, the authority is entitled to grant interim relief (upon a respective application) and suspend the tender procedure or certain decisions.

The courts may declare contracts null and void. If they refrain from doing so, they must impose fines instead. In 2015, a sanction of €367,000 was imposed on BBG, constituting the highest fine imposed to date. In 2016, the VwGH held that an imposed fine still has to be paid even if the incriminated contract has been terminated.

Judgments in procurement cases are rendered in both the first and last instance. They can be further challenged exclusively through complaints before the VwGH or VfGH.

Infringements of the procurement law entitle disregarded economic operators to claim forbearance, abatement and damages under the Unfair Competition Act. In addition, they may claim damages under civil law. However, entitlement to bring a claim before the civil courts is conditional upon a declaratory judgment of violation of the procurement law.

6 C-19/13, Fastweb SpA.
X OUTLOOK

i Belated implementation of the New Directives
The New Directives\(^7\) had to be transposed by 18 April 2016. Austria was still failing to comply with its implementation obligation; however, on 8 February 2017, the government presented a draft bill.

ii Proposed amendment of the BVergG and BVergGVS
Subsequent to a ‘small amendment 2015’ effective as of 2016, the 2017 draft bill tackles the entirety of the issues provided for in the New Directives. As the 2017 amendment is therefore ‘big’, the Austrian legislature opted for a totally new ’BVergG 2017’ rather than merely further amending the current law. The key changes are as follows:

\(a\) extension of the applicability of the negotiated procedure with prior notice;
\(b\) introduction of the new procedure ‘innovation partnership’;
\(c\) common cross-border procurement procedures of (two or several) EU/EEA contracting authorities;
\(d\) compulsory e-procurement as of October 2018;
\(e\) codification of the intercommunal cooperation;
\(f\) codification and extension of in-house procurement;
\(g\) new category of ‘special services’ replacing the former distinction between ‘priority services’ and ‘non-priority services’ accompanied by proposed thresholds of €750,000 in the classic sector and of €1 million in the utilities sector;
\(h\) extension and tightening of exclusion grounds;
\(i\) enhanced consideration of ecological, social and innovative aspects;
\(j\) new obligation to cancel contracts under certain conditions;
\(k\) extended application deadline in proceedings for a declaratory judgment;
\(l\) new definition of preliminary works prior to the procurement procedure;
\(m\) further strengthening of the most economically advantageous tender principle; and
\(n\) clarification of the extent of permissible modifications of existing contracts (‘safe harbour rule’).

Due to constitutional requirements, the BVergG 2017 is subject to approval by the nine provinces in order to become effective. In this respect, there might also be further modifications. As to the date of the probable entry into force of the BVergG 2017, the period before Parliament’s summer break seems a fair guess.

Chapter 4

BELGIUM

Frank Judo, Dirk Lindemans, Aurélien Vandebrurie, Stijn Maeyaert and Kenan Schatten

I INTRODUCTION

The Belgian Public Procurement Act of 15 June 2006, which replaced the former Act of 24 December 1993, is the transposition of the Public Procurement Directives 2004/17/EC and 2004/18/EC. As from 1 July 2013, this Act contains the essential rules on Belgian public procurement.

The Act was implemented in several Royal Decrees, which are:

a Royal Decree of 15 July 2011 concerning the award of public procurement contracts in the broader public sector;

b Royal Decree of 16 July 2012 concerning the award of public procurement contracts in the utilities sector; and

c Royal Decree of 14 January 2013 concerning the general contracting conditions for public procurement contracts and for concessions of public works.

The Act of 15 June 2006 also covers contracts below the European threshold levels. For these contracts, very similar rules apply as compared with ‘European’ contracts. Basically, the main differences relate to:

a publication obligations (in principle, contracts below the threshold levels are only to be announced in an annex of the Belgian Official Gazette); two

b the extended possibility to apply the negotiated procedure without notice (which is possible for all contracts with a value up to €85,000,³ and for research and development, financial, legal services and all Annex II B services up to €209,000);⁴ and

c the standstill period, which does not apply to contracts below the European threshold levels, except for works contracts of half this estimated value.⁵

Recently Belgium implemented the 2014 Directives: on 14 July 2016 two new Acts were published, which were adopted by Parliament on 17 June 2016. The first applies to concessions and the second to public procurement in general. The next and last step in the implementation of the 2014 Directives will be to adopt Royal Decrees containing the award

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2 Moniteur belge/Belgisch Staatsblad.
3 €170,000 in the utilities sector.
4 €418,000 in the utilities sector.
5 €2,612,500.
and execution rules, and to determine the date of entry into force of the Acts of 17 June 2016. Observers expect a fully fledged implementation for the second half of 2017 at the earliest. Wherever possible, legal changes brought by 2016 Acts will be mentioned hereunder.

Directive 2009/81/EC on defence and security procurement has been transposed into national law through the Act of 13 August 2011 on public contracts and certain contracts for works, supplies and services in the field of defence and security, and through two Royal Decrees implementing this Act. This legislation entered into force during the course of 2012 (see Section II, infra).

In addition to this legislation, tendering authorities are subject to the fundamental principles of the Treaty on the Functioning of the European Union (TFEU) (principles of transparency, non-discrimination, equal treatment, free competition and proportionality), particularly for those concession contracts which are not covered by the Act of 15 June 2006. These principles are also part of the principles of general Belgian constitutional and administrative law. Moreover, it appears that provisions from 2014 Concessions Directive may, under certain conditions, already have a direct effect on concessions agreements in Belgium. Therefore, Belgian authorities might already be supposed to apply some provisions of this 2014 Directive, even if it has not yet been transposed in Belgian law (see below).

In Belgium, there are no specific bodies with responsibility for setting government purchasing or procurement policy and enforcing compliance. Thus, public procurement law can only be enforced by means of a judicial review or through proceedings before the Belgian supreme administrative court (i.e., the Council of State) or the civil courts, or both.

II YEAR IN REVIEW

From a legislative perspective, only limited changes were made to the 2006 Public Procurement Rules concerning threshold levels. Nevertheless 2015 and 2016 saw some significant case law. The Council of State admitted for instance that provisions from the 2014 Concessions Directive are directly applicable as long as they are unconditional and sufficiently precise, due to the expired transposition deadline. This implies that that direct effect of such rules could be asserted by every person having an interest even though the 2016 Concession Act has not yet entered into force.

The Council of State also decided that a bidder who does not have an official and personal certification to realise work in Belgium cannot be selected, regardless of whether his or her subcontractor has this certification. This decision is quite surprising and is contrary to earlier decisions of the Council of State and to current practice. One can doubt whether this interpretation of the Belgian law complies with the Directives. This probable incompatibility with European law might be the reason for the Council of State changing, again, its position: in August 2016 it validated the exclusion of a bidder who did not, himself, possess a certification on the basis that the commitment from his subcontractor (who had a certification) was not

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6 Royal Decree of 23 January 2012 on public contracts and certain contracts for works, supplies and services in the field of defence and security, and Royal Decree of 24 January 2012 on the entry into force of the Act of 13 August 2011 on public contracts and certain contracts for works, supplies and services in the field of defence and security, and on the rules on motivation, information and legal remedies for these contracts.


8 Council of State, 21 August 2015, No. 232.070, S.A. Cofely Fabricom.

sufficiently clear. By the latter decision, the Council of State has accepted in principle that a tendering authority selects a bidder who does not personally hold a certification, if his or her subcontractor has such certification and committed in a sufficiently clear manner to execute himself all works requiring to be covered by the certification.

Recently the Council of State had to rule again on the award of PPP contracts based on the competitive dialogue procedure. It decided that the DBFM contract for the Neo project in Brussels was not illegal.11

The Council of State also referred a question for a preliminary ruling to the Court of Justice, asking if a tendering authority has the obligation to disclose information about the evaluation methodology before doing, as such, this evaluation.12 The European Court of Justice decided that neither Article 53(2) of Directive 2004/18 and other provisions thereof nor the case law of the Court lays down an obligation on the contracting authority to bring to the attention of potential tenderers, by publication in the contract notice or in the tender specifications, the method of evaluation applied by the contracting authority in order to effectively evaluate and assess the tenders in the light of the award criteria of the contract and of their relative weighting established in advance in the documentation relating to the contract in question. Therefore, it decided that only in the event that the determination of the method of evaluation is not possible for demonstrable reasons before the opening of the tenders, the contracting authority may establish this method after having reviewed the content of the tenders.

The Council of State decided that rejection of a tender is mandatory once individual prices have been established abnormal.14 Unlike in the past, the triviality of these individual prices (e.g., 0.01 per cent of the total tender sum) is no longer a reason to bypass this sanction. It is questioned whether this severe case law is in accordance with the Directives.

The Supreme Court ruled that the final acceptance of a public work contract can be granted tacitly. A formal notification of the tendering authority is not always necessary but can, depending on the circumstances, be tacit.15

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The scope of Belgian procurement legislation is currently defined in Article 2 of the Act of 15 June 2006.

The Belgian legislature has opted for a double approach: first, a non-exhaustive list of bodies and categories of bodies governed by public law is set out in the Act (among which are the state, the regions, the provinces, the municipalities and the associations formed by one or more of these entities). Second – in line with the European directives – public procurement rules are applicable to a category of bodies ‘governed by public law’, which are defined based on a set of cumulative criteria in the Act.

10 Council of State, 23 May 2016, No. 234.812, S.A. D.TA.
12 Council of State, 6 January 2015, 229.723, NV TNS Dimarso.
13 CJEU, c-6/15, 14 July 2016.
15 Supreme Court, 4 December 2015, C.13.06.16.F.
This concerns entities established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, having legal personality and financed, for the most part, by the public bodies mentioned in the list of Article 2 of the Act; or entities that are subject to management supervision by these bodies, or that have an administrative, managerial or supervisory board, more than half of whose members are appointed by the bodies mentioned in Article 2.

In the utilities sector, ‘public undertakings’ (i.e., any undertaking over which the public authority has a dominant influence) and certain private entities are also subject to public procurement rules, in addition to the aforementioned public entities that are subject to procurement rules in the ordinary sectors.

ii Regulated contracts

In accordance with the Public Procurement Directives, Belgian public procurement rules cover all contracts in writing for consideration between a contractor, a supplier or a service provider and a public purchaser for the undertaking of works, supplies and services.

These ‘works’ and ‘supplies’ and ‘services’ have the same meaning as in the 2004 Public Procurement Directives.

Public services are enumerated in Annex 2 of the Act of 15 June 2006. In principle, Part B services are not treated differently from Part A services, except that they do not have to be published in the European Official Journal. In line with the new European rules, Annex 2 disappeared from the 2016 Acts and specific execution rules will apply to public services.

In principle, all contracts, regardless of their value, are subject to the public procurement rules. However, in practice, a competitive procedure is hardly ever organised for contracts with a value of up to €8,500.

Land agreements and service concessions are not subject to public procurement obligations. However, as there are no specific rules, obligations regarding the award of land agreements and service concessions can be said to correspond to the basic standards regarding advertising and contract award embodied in the European Commission Communicative Interpretation on the Community Law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02). Other principles of administrative law to be taken into account are the requirement of due care and the principle that reasons must be given. Moreover, service concessions will be regulated by the specific 2016 Concession Act and, until then, attention must be given to the above-mentioned decision issued by the Council of State. Indeed, pending the entry into force of the 2016 Concession Act, some provisions from the 2014 Concession Directive can benefit from the direct effect.

Neither are ‘in-house’ contracts subject to the 2016 public procurement obligations. New rules have indeed incorporated criteria established by the CJEU and exclude from their own application contracts (1) in which legal persons are monitored by the contracting authority in the same way as a service belonging to the contracting authority itself; (2) when more than 80 per cent of the activities performed by the legal person are intended for the contracting authority or another legal person monitored by the contracting authority; and

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(3) in which the monitored legal person is not financed, even partly, by private funds, unless such private funds do not allow any significant influence on the legal person. All of the conditions must be cumulatively met to exclude the compliance with 2016 rules.

The Royal Decree of 14 January 2013 concerning general contracting conditions, which in principle applies to all contracts with a value of or above €30,000, entitles the contracting authority to modify unilaterally the original contract without organising a new tender, provided the object of the contract remains the same and, if necessary, on condition of lawful compensation. The Royal Decree of 14 January 2013 also allows contractors to apply for a review or revocation of the contract or for an extension of its duration, under specific conditions. Finally, this Royal Decree also provides that contractors are to execute any additional works if the total value of the additional works is no more than 15 per cent of the initial amount of the tender; under strict circumstances mentioned in the Public Procurement Act (e.g., unpredictability, severe necessity), a limit of 50 per cent can be adhered to as well.

A change of contract partner can only be accepted if the contracting authority expressly agrees to it, yet the authority cannot unreasonably refuse to accept this change.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements have the same meaning as in the 2004 Public Procurement Directives, and are governed by rules which are exactly identical to those encompassed in the 2004 Public Procurement Directives.

It is very common in Belgium for different contracting authorities to set up the joint realisation of a public contract (e.g., a region and a local authority jointly contracting for road works). It is also possible to make purchases through a central purchasing body.

ii Joint ventures

There are no specific rules in Belgium regarding the establishment of public-public joint ventures. As a general principle, the public procurement rules also apply to relations between contracting authorities, unless the in-house criteria or the criteria for cooperation between public authorities admitted by the Court of Justice are fulfilled.

In the case of public-private partnerships, the private sector partner has to be competitively tendered if the partnership is set up for providing public works, supplies or services contracts in the sense of the directives. This tender can be organised in one phase. It is not necessary to tender the selection of the private partner and the execution of the public contract separately.

V THE BIDDING PROCESS

i Notice

All contracts, whatever their value, must be advertised in advance in the Belgian Public Tender bulletin (BDA), which is an annex to the Belgian State Gazette.

Contracts meeting the European threshold levels are also to be published in the Official Journal, with an exception made for contracts awarded on the basis of a negotiated procedure without notice.
Once awarded, all contracts meeting the European threshold levels have to be published in both the BDA and the Official Journal, with an exception made for contracts that were awarded on the basis of a negotiated procedure without notice. This exception is based on public safety or secrecy.18

**ii Procedures**

Belgian legislation distinguishes between the following types of procurement procedures:

- **a** adjudication: award on the basis of the lowest price only;
- **b** quote request: award on the basis of the award criteria, but not solely the price;
- **c** negotiated procedure; and
- **d** competitive dialogue.

The tendering authority can in principle freely choose between the adjudication and the quote request. The grounds for use of the negotiated procedure and the competitive dialogue are the same as the grounds stipulated in the European directives. Moreover, the negotiated procedure without notice can be applied for all contracts with a value up to €85,000,19 and for research and development, financial, legal services, and all Annex II B services up to €209,000.20

The procedures of adjudication and quote request may be awarded by means of an open or restricted procedure. In an open procedure, all interested providers can tender. In a restricted procedure, only a limited number of these providers are invited to tender, selected in a first phase by the tendering authority.

The 2016 rules have essentially brought changes on the level of the terminology in order to reflect as closely as possible terms used in European directives. More remarkably, the 2016 Act extends the amount of situations in which competitive procedures (ex-negotiated procedure) and competitive dialogue can be used. A new procedure – innovative partnership – has been embedded in the 2016 Act. It allows, by one single public procurement and agreed-upon performance levels and maximum costs, the development of innovative products, services or works and the subsequent acquisition of the resulting products, services or works.

The design contest and concession for public works have been implemented in Belgian law.

Electronic purchasing has become quite successful in Belgium. There is one official channel for Belgian public procurement contracts: the website e-notification.21 Companies can find all Belgian public procurement notices on this platform.

To present or award a bid, the use of e-tendering is permitted, required or prohibited depending on the public body that procures (the state, Flemish Region, Walloon Region, Brussels-Capital Region, local authorities). The federal authorities have developed IT tools, which are made available to the other levels of government by the federal authorities, to process public contracts electronically so that companies can normally use the same environment.

By 2020, the 2016 Act will require all procurement procedures to be concluded electronically. Furthermore, electronic invoicing should become functional in 2019 in order to meet European invoicing standards.

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18 These contracts are in principle outside the scope of the Public Procurement Directives.
19 €170,000 in the utility sector.
20 €418,000 in the utility sector.
21 [https://enot.publicprocurement.be](https://enot.publicprocurement.be).
As previously mentioned, the Act of 15 June 2006 warrants a new reform in a restructured context, especially regarding the transposition of some of the ‘optional’ provisions of the 2004 Directives. Such is the case for the electronic auction, the dynamic purchasing system and the framework agreement in the classic sectors.

Electronic auctions can be used for recurring supplies or services for which the specifications can be determined with precision. Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders. The electronic auction can only be applied if the price is the sole award criterion. In the event of several tenderers who offered the same lowest price, the contracting authority must, as a rule, organise a raffle.

Contracting authorities are permitted to apply a dynamic purchasing system (i.e., an exclusively electronic system to award contracts relating to reiterative supplies or services that are generally available on the market and fulfil the requirements of the contracting authority). This system, which has a limited validity, is open throughout this time to any economic operator that suits the selection criteria and has submitted an indicative tender. It can use not only a solely price criterion, but also other supplementary criteria.

Furthermore, contracting authorities may also enter into a framework (or umbrella) agreement that determines prices (aspects) and, if the occasion arises, desired quantities. Thus, individual contracts can be arranged with regard to this basic agreement.

iii Amending bids
After the closing date for submission of tenders in the procedures of the adjudication and quote request, it is no longer possible to amend the bids. The tendering authority may only contact tenderers to ask for clarifications or to complete the offer, as long as the content of the offer itself is not modified.

During the negotiated procedure, the offers may be amended, as long as the object of the contract remains the same, and the principles of transparency and equal treatment are respected. There are no specific legal provisions concerning changes at the preferred bidder stage. However, it is generally accepted that ‘substantial’ changes to the contract are no longer possible at that stage, taking into account the aforementioned principles. The tendering authority has a margin of discretion to decide whether changes are to be considered substantial.

During the competitive dialogue, the alternatives proposed by the candidates, on the basis of which the candidates chosen are invited to tender, can be amended as long as the tenderers do not deviate from the ‘essential’ elements mentioned in the contract notice and contract documents. The ‘essential’ elements of the final offers cannot be modified, once these offers have been submitted. Once the most economically advantageous tender has been selected, only minor changes may be brought to this offer.

22 With regard to e-tendering, the Council of State judged that a contracting authority violates not only the contract documents themselves, but also the principle of equal treatment if it states, on the one hand, in the contract documents that signed offers must be submitted before a certain deadline and, on the other hand, allows a tenderer who merely deposited an unsigned offer and, therefore, strictly speaking missed the deadline, to ‘regularise’ the situation afterwards by uploading a signed copy so that he or she can still join the negotiated procedure (Council of State, 10 December 2013, No. 225,775, www.raadvst-consetat.be).
VI ELIGIBILITY

i Qualification to bid
The Belgian legislature has faithfully reproduced the rules set in the 2004 European directives concerning the criteria for qualitative selection.

Note that grounds for exclusion from a tender have been added in the 2016 Act. They can be of an optional or obligatory nature. The 2016 Act allows bidders to make use of corrective measures in both cases in order to prove their reliability as to the execution of the tender. The tendering authority will have to decide afterwards whether it will re-admit the bidder.

ii European Single Procurement Document (ESPD)
The ESPD is a standard form issued by the European Commission according to which candidates demonstrate that they do not present any grounds for exclusion and that they meet the selection criteria established by the contracting authority. If need be, the candidate must bring by additional proof. The ESPD being considered a common and preliminary proof, it largely facilitates the procedures and the access to public procurements throughout Member States.

iii Conflicts of interest
The Act of 15 June 2006 contains a general prohibition for any person involved in public purchasing to be involved in the award or the supervision of a public contract if he or she has interests in the tendering company. Any infringement of this rule may be sanctioned by criminal sentences. A federal government recommendation of 5 May 2014 gives specific guidelines in cases where conflicts of interest could arise following ‘revolving doors’ situations.

In accordance with the case law of the Court of Justice, a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services can only be excluded from a tender if he or she has been given the opportunity to prove that, in the circumstances of the case, the experience that he or she has acquired in the course of the research, experiments or studies is not a reason for distorting competition.

iv Foreign suppliers
Foreign suppliers do not have to set up a local branch or subsidiary, or have local tax residence to do business with public authorities in Belgium.

VII AWARD

i Evaluating tenders
The contracting authority must award the contract either to the lowest price tender or to the most economically advantageous tender. In the latter case, the contracting authority has large discretionary power to determine the economic and quality criteria for awarding the contract, insofar as these criteria relate to the object of the contract and enable tenders to be compared and assessed objectively. Under the new 2016 provisions, the tendering authority is allowed to make use of a cost criterion as well as a life cycle cost criterion when it awards to the most economically advantageous tender. In the case of a life cycle cost criterion, the tendering authority will require useful data from bidders to assess the life cycle cost. Equally,
the tendering authority can require experience, qualification and organisation from the bidder as a criterion to award the public contract, provided that such criterion must be justified in regard to the object of the procurement.

These award criteria must be notified in advance.

As far as assessing the award criteria is concerned, Belgian legislation follows the rules set in the 2004 European directives.

In restrictive procedures, the selection criteria must be notified to the candidates before the contracting authority selects who is to be invited to tender. However, no assessment of these criteria is required, and there is no general obligation to provide information on the principles on which the criteria will be applied; for example, what minimum turnover is required.

According to the established case law of the Council of State, contracting authorities are not currently supposed to disclose information about the evaluation methodology. This was recently confirmed by a preliminary ruling of the European Court of Justice, as long as the determination of the method of evaluation by the tendering authority is not possible for demonstrable reasons before the opening of the tenders (see above).

Unsuccessful tenderers will be able to assess the evaluation by the contracting authority, because decisions on the selection of tenderers and on the award of the contract should contain adequate reasons to allow tenderers to decide whether to start legal proceedings.

ii National interest and public policy considerations

In principle, domestic suppliers may not be favoured for reasons of public interest. However, until recently, in defence procurement, offsets could (under strict conditions) be an evaluation criterion. It remains unclear whether this practice will persist under the new Belgian defence and security public procurement Act of 13 August 2011, which recently entered into force.

Reference to national quality marks is only possible if products of ‘equivalent quality’ are also accepted. Moreover, any reference to specific (quality) marks is prohibited, unless this reference is necessary to define the subject matter of the contract.

Social and environmental considerations can be taken into account under strict conditions. Environmental considerations can in principle only be applied as award criteria insofar as they are related to the subject matter of the contract. The Brussels-Capital Region has adopted a Regional Act23 in this field. This example was followed by the federal government in 2014, when the recommendation of 16 May 2014 gave very specific guidelines to federal authorities on how to implement social and environmental considerations. A similar recommendation has been adopted for the Walloon Region.

VIII INFORMATION FLOW

During the procurement process, tenderers may ask the contracting authority for clarification on the information provided in the tender documents, or to request additional information. The contracting authority can decide whether it will provide this information. However, the principle of equal treatment should be respected at all times. Information provided to one tenderer shall also be provided to the others. In open procedures, this would normally require an additional publication.

23 Regional Act of 8 May 2014 concerning the use of social considerations in public procurement.
The principle of equal treatment implies that tenderers may at no stage before the award decision have access to (information on) other offers, even in a negotiated procedure. Immediately after the award decision, the contracting authority must notify:

a every non-selected candidate about the reasons for the non-selection, by sending a copy of the relevant part of the motivated decision;

b every tenderer with an irregular or unacceptable tender about the reasons for the exclusion of their offer, by sending a copy of the relevant part of the motivated decision; and

c every tenderer whose (regular) offer has not been considered to be the most economically advantageous tender (in the case of a quote request) or who does not offer the lowest price (in the case of an adjudication), by sending a copy of the relevant part of the motivated decision.

For contracts meeting the European threshold levels and for works contracts of half this estimated value, a standstill period of 15 calendar days is to be granted to unsuccessful bidders. During this period, which starts the day after the above-mentioned notification, a suspending procedure of extreme urgency before the Council of State or a summary procedure before the civil courts can be introduced (see further below). If the contracting authority were to conclude the contract before the end of this period, proceedings before a civil judge may be instituted to declare the contract ineffective.

The Public Procurement Act prohibits contracting authorities from divulging information that would violate the public interest, legitimate commercial interests or the principle of fair competition. This provision is open to interpretation.

In practice, contracting authorities rarely provide a full copy of the bids of other tenderers to their competitors. Especially for works contracts, tendering authorities are generally very reluctant to divulge any unit prices. To date, the Council of State has never obliged a contracting authority to provide a copy of these bids or specific information in these bids during summary proceedings (the suspending procedure of extreme urgency). However, it has regularly awarded injunctions against contracting authorities to provide detailed information about the prices in proceedings on the merits of the case (annulment procedure) for instance, when an unsuccessful bidder has criticised the possibly ‘abnormal’ prices of its competitor.

IX CHALLENGING AWARDS

Challenging award decisions, especially by applying the suspending procedure of extreme urgency, is occurring frequently.

Before the Council of State, a summary procedure will take between three and nine weeks, and an annulment procedure between 18 and 36 months. Before the civil courts, the duration of procedures is harder to forecast.

The successful party can obtain compensation for procedural charges of up to €2,800 before the Council of State, and €1,320 before the civil courts.

Procedures

In Belgium, there is no mechanism for review by an enforcement body. Legal proceedings may be installed by any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
Belgian legislation does not oblige such a person to notify the contracting authority of the alleged infringement and of his or her intention to seek review. In practice, before starting legal proceedings, the tendering authority is often requested to voluntarily withdraw its decision, but this request is not mandatory.

The following legal proceedings are possible.

**Suspension and annulment procedure**

In accordance with Directive 2007/66/EC, the concerned person may start proceedings to suspend the implementation of any decision taken by the contracting authority. If the tendering authority is an administrative authority, these proceedings should be brought before the Council of State in a procedure ‘in extreme urgency’. In other cases (for example, if the tendering authority is a private hospital, a private university), a summary procedure before the civil courts should be started.

For contracts meeting the European thresholds and for works contracts of half this estimated value, Belgian legislation imposes a standstill period of 15 calendar days, starting the day after the notification of the award decision. During this period, the contracting authority is not allowed to conclude the contract. For other contracts, the tendering authority may voluntarily apply the standstill period.

If proceedings in suspension have been started within the standstill period, the contract can only be concluded when the suspension has been rejected by the competent judge. A judicial decision regarding suspension is only temporary. It has effect only until the competent judge decides on the annulment. Such an annulment procedure is to be introduced within 60 days from the day following the notification of the decision. In practice, tendering authorities will often withdraw the decision once it has been suspended, so that the annulment procedure will lose its object.

**Claim for damages**

Belgian legislation does not require that a decision is set aside by the competent legal body before damages can be claimed. Thus, the fact that no suspension or annulment request has been filed does not prevent the judge from awarding damages.

Damages can be claimed before the civil courts. This should be done within a time limit of five years from the unlawful decision.

To obtain damages, the harmed party has to prove that, if there had been no illegality, he or she would at least have had a realistic chance of obtaining the contract.

Damages can be claimed to compensate for all (tendering) costs that have been made and for the expected economic profit lost. The burden of proof lies with the claimant. However, judges often estimate the damages *ex aequo et bono* at 10 per cent of the amount of the tender. Sometimes a judicial investigation is ordered to determine the amount of the damages.

In the case of an adjudication, the Public Procurement Act stipulates that the bidder with the lowest regular tender is allowed to receive as compensation 10 per cent of the amount of the tender.

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24 For contracts within the scope of the Defence Directive, the standstill period only applies to European contracts.

25 If the competent judge is a civil judge, the standstill period is limited to proceedings in the first instance.
The Council of State is also competent to give ‘fair compensation’ instead of the damages to be claimed before the civil courts. This compensation should be claimed within a time limit of 60 days from the annulment decision.

ii Grounds for challenge

Challenges may be based on an infringement of the following legal grounds:

a the Public Procurement Act, the Defence Procurement Act and their implementing decrees;  
b the European Procurement Directives;  
c the principles of the TFEU (principles of transparency, non-discrimination, equal treatment, free competition and proportionality);  
d the principles of general Belgian constitutional and administrative law; and  
e the tender documents.

Companies of all economic sectors have become increasingly aware of the public procurement rules and the opportunities of legal proceedings. The number of cases brought before both the Council of State and the civil courts has increased dramatically over the past 10 to 15 years. Currently, the Council of State has to decide every month on some 20 summary cases, fewer than one-third of which are successful.

Although, statistically, the majority of the challenges related to the suspension and annulment of decisions in matters of public procurement is rejected, and although it is generally accepted that tendering authorities have broad discretionary power, courts in general do not hesitate to ensure an effective implementation of the law.

iii Remedies

If the contracting authority has awarded a contract without the obligatory prior publication of the contract notice in the Official Journal, or if it has not respected the obligatory standstill period, an unsuccessful bidder may start proceedings before a civil judge to obtain the ineffectiveness of the contract.

This judge may stipulate the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations that still have to be performed.

In accordance with Directive 2007/66/EC, the judge may also decide to reject the request if he or she decides, after having examined all relevant aspects, that overriding reasons relating to a general interest require the effects of the contract to be maintained. In the latter case, the judge may impose other penalties. In accordance with the Directive, these alternative penalties consist either in the imposition of fines on the contracting entity, or in the shortening of the duration of the contract. The fine is limited to 15 per cent of the contract value (without VAT).

X OUTLOOK

With the 2014 Directives26 a new era of public procurement legislation began. The Belgian authorities have partly succeeded in implementing these directives before the end of 2016,
as the Public Procurement Act and the Concessions Act have both been adopted. These new Directives will be fully implemented when the Royal Decrees containing the award and execution rules, and the date of entry into force of the Acts of 17 June 2016 will be adopted. The challenge will be to ensure, with these Royal Decrees, a steady transition between the ‘old’ Act of 2006 and the ‘new’ 2016 Act.
I INTRODUCTION

The Brazilian Constitution establishes that, as a default, all purchases and sales made and all services and works hired by the public administration shall be subject to a public bid. Federal Law 8,666/1993 establishes the general framework applicable to all public bids in the country, which must be observed by all three branches of government.

The Constitution also establishes the principles that guide Brazilian public administration and, consequently, public bids. These principles are legality, impersonality, morality and efficiency. Federal Law 8,666/1993 added the principles of isonomy, equality, publicity, administrative probity, ‘strict compliance with the request for proposal’ (RFP), and ‘objective judgement’ as principles that must be observed in public bids.

Note that Congress has raised the compliance with the terms of the RFP to principle status. This highlights the importance of RFPs in Brazil: not only is the administration bound by the limits set forth in the RFP throughout the entire bidding process, but also all terms and conditions set forth in the RFP must be complied by the winning bidder throughout the entire execution of the contract.

Because of the publicity principle, all acts taken by the administration in the course of a public bid and all documents presented by the bidders are public.

There are other relevant laws regarding public bids. For instance, Federal Law 8,987/1995 sets the regime for concessions and permissions of certain public services, such as power generation and transportation. This law was passed at a time the federal government was selling several important assets and granting concessions on key industries to the economy. As concessions usually involve contracts that are valid for long periods, this law continues to be of utmost importance in our legal framework. In 2004, Federal Law 11,079/2004 created the concept of public-private partnerships (PPPs), which consists, in Brazil, in a concession in which the private party can be paid by the government in addition to possible tariffs charged from users.

In 2011, Congress passed Federal Law 12,462/2011 that created the RDC – Differentiated Government Procurement Regime. This regime was created in order to expedite the bidding procedures for the infrastructure works necessary for Brazil to host the 2014 FIFA World Cup and the 2016 Olympic Games in Rio de Janeiro, but the law was amended in 2012 and 2015 to allow this regime to be applicable to other things, such as (1) infrastructure works included in the Growth Acceleration Program created by the federal
government; (2) works and engineering services related to public healthcare; (3) works and engineering services for the construction and reform of criminal facilities; (4) actions in public safety; and (5) works and engineering services related to urban mobility and logistics infrastructure.

More recently, Federal Law 13,303/2016, passed in June 2016, set out specific rules that must be observed by state-owned companies in public bids as well as a corporate governance framework that must be put in place in these companies as well.

II YEAR IN REVIEW

2016 will be marked as one of the most turbulent years in Brazilian modern history. President Dilma Rousseff was impeached amid corruption scandals that involved high-ranking politicians from essentially all political parties in the country; her Vice-President, Michel Temer, took the presidency in August, but his government was also hit hard by scandals of the same nature. The moving force behind all these political changes was the ‘Car-Wash Operation’, a sophisticated operation orchestrated by the Federal Police and the Federal Public Ministry that is investigating senior politicians and privately owned infrastructure companies in corruption and money laundering schemes in Petrobras – the state-owned oil company. The Federal Public Ministry has recently affirmed that over 38 billion reais was stolen from Petrobras because of the corruption scheme investigated by the Car-Wash Operation, which essentially consisted in a cartel of some of Brazil’s biggest infrastructure companies that would bribe senior politicians and Petrobras officers to win contracts with Petrobras in public bids.

The Car-Wash Operation revealed (and continues to reveal, as the operation has not been terminated yet) countless episodes of corruption in public bids with Petrobras – which eventually led to episodes of corruption in public bids held by other state-owned companies.

The fact is that, with public bids being constantly reported as rigged in the news, all players that deal with public bids have become more conservative: state-owned officers, legal departments and committees in charge of public bids have constantly been found to take conservative approaches to the multiple legal questions that occur during the bid proceedings. Also, auditing companies have put in place more rigorous routines and even banks providing financing to the operations are reviewing the administrative law portions of government contracts more thoroughly in order to lend money to contractors. Even though this ‘conservative wave’ may be deemed to have started a couple of years back, as of 2016 it was clearly consolidated across the country.

Furthermore, the political changes in 2016 also caused significant developments in the country’s economy. President Michel Temer made significant changes to the economic model that President Dilma Rousseff had put in place, in an attempt to be more aligned with ‘market’ interests. Thus, for example, the federal government has proposed laws to increase flexibility in labour relations and to modify the retirement regime and has taken actions to grant important concessions to the private sector.

As far as the law and public bids are concerned, there were many relevant novelties in 2016. First, Congress passed the ‘Bill of the State-Owned Companies’ (Federal Law 13,303/2016), which created a specific framework for public bids held by state-owned companies, which is supposed to be more flexible than the general rules on the basis that

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state-owned companies compete in the market. Second, a new governmental body named PPI – ‘Programa de Parcerias de Investimentos’ – was created to coordinate the most important infrastructure projects at the national level, and to serve as a one-stop shop for investors and other interested private parties. The PPI comprises (1) a Council, headed by the President himself and formed by central and sectoral line ministries, alongside presidents of federal banks (BNDES, Caixa and Banco do Brasil); and (2) a Secretariat, staffed to exert advisory functions to the Council, with support from the state-owned company EPL. Third, the presidency passed Provisional Measure 752/2016, which contains provisions for the anticipated return or the anticipated renewal of concessions as a means to resolve special cases selected by the PPI.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The Brazilian Constitution states that entities directly or indirectly controlled by the federal, state or municipal governments must comply with the government procurement rules. In other words, federal, state and municipal governments, autonomous government entities, public foundations, regulatory agencies, state-owned companies, and mixed capital companies controlled by the government are subject to those rules.

States and municipalities are allowed to pass their own legislation regarding public bids as long as they do not modify the regime set forth in Federal Law 8,666/1993 (or in any other laws regarding public bids passed by the National Congress).

An exemption to the general rule, Petrobras, the state-owned oil company, adopted a simplified bidding proceeding under the Decree 2,745/1998. Although the simplified rules follow the general ideas structured in Federal Law 8,666/1993, Decree 2,745/1998 has been heavily criticised over the years, especially after the beginning of the Car-Wash Operation. Decree 2,745/1998 enlarges the possibility of direct hiring by Petrobras, which has been appointed as one of the reasons why the company was involved in many episodes of corruption. Because of that, as of mid-2018, Petrobras shall follow the rules set forth in the Bill of the State-Owned Companies.

ii Regulated contracts

In Brazil, as a general rule, any contract involving a public entity (entities directly or indirectly controlled by the federal, state or municipal governments), such as contracts for supply of goods, services, works, transfer of lands, among others, must be regulated by government procurement rules and subject to a prior public bid and its principles.

However, Federal Law 8,666/1993 sets forth some exceptional and specific cases in which the prior public bid may be deemed unnecessary. For example, the competitive procedure can be dismissed in cases of extreme urgency, war or state of emergency, failed prior procurement, services or products estimated at less than US$5,000, providing materials to army forces, transference of real estate between public entities, among others. In addition, the competition can be considered unfeasible and, as a result, unnecessary, when the nature of the product or service required is singular and only one supplier has the expertise needed by the Public Administration. In such cases, the public entity must justify the reasons why the public bid is unnecessary, appointing the situation of emergency, the singularity of the object of the contract, the study of the market, etc.
The transference of the contract to third parties is only accepted when the RFP and the contract itself expressly allows so, and usually it is subject to the prior consent of the public entity, who will check whether or not the new party meets the requirements of the RFP and the contracts.

Therefore, any merger, spin-off, partial or total subcontracting, association with other company, total or partial assignment or transfer of the contractual object that is not previously authorised in the RFP or the contract can lead to its termination, according to Brazilian law.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Central purchasing is still a relatively new concept in Brazil and has only been implemented in a few contexts. For example, aside from other state-level initiatives, in 2014 a Central Purchasing Department was created under the Ministry of Planning for common purchases at the federal level, but its activities have so far been limited to the direct online acquisition of flight tickets and other travel agency services, mobile telecommunication services, internet and satellite images.

A more widely used framework relevant to common purchases is the reverse auction and, especially, its electronic version. These procedures were created in 2002 and 2005 and have been paramount ever since. Among the reasons for their large acceptance was the possibility to use the online system 'Portal de Compras Governamentais' (ComprasNet), and the inversion of phases such that only the winning bidder would have its qualification documents analysed. The use of this online system is not mandatory, but many bidding authorities have preferred it for its agility and convenience.

Furthermore, when using such online system, providers file their common qualification evidence (legal and tax regularities and financial-economic requirements) within the Unified System for the Registry of Providers (SICAF), dispensing them to supply the same documentation again in each new bid. Bidding authorities within the federal level are obliged to previously consult SICAF before purchasing common goods and services. Besides SICAF, other bodies and entities can maintain complementary supplier registries, such as, for example, the ‘CADTEC’ within the Ministry of Defence.

ii Joint ventures

When allowed by the RFP, a group of bidders can participate jointly in a bid. The common structure required for this participation is the consortium or the commitment to create a consortium, and if the group of bidders win, they are required to either create a special purpose company (SPE) or a consortium before signing the public contract.

The bidders are bound by the rules on public contracts since they provide a bid bond or offer a proposal to a given item of the RFP, and penalties can apply if they refuse to participate in the bid after such actions. The consortium can provide jointly the technical qualification documents, and must maintain pro rata the minimum net worth required in the RFP (which can be up to 30 per cent higher for consortia). Further specific rules applying to the SPE or the consortium are set out in each RFP, including provisions about subcontracting with a consortium member.

PPPs are a type of concession, in Brazil, and require a competitive tender for the selection of the private partner. However, the RFP may allow the winning bidder to contract with third
parties, in which case such contract may require the prior consent from the bidding authority, but by default does not require a new tendering process. In very specific cases, the RFP may also allow the use of qualification evidences from this contracted party.

V THE BIDDING PROCESS

i Notice
The public authority must publish the bidding notice as an RFP in the Official Gazette. In the RFP, the public authority defines all the conditions for the bidders’ participation, the bidding and contracting time frames, acts and procedures adopted in the course of the bidding proceeding and, eventually, the guarantees required to the bidders. In addition, the RFP must contain a draft form of the intended public contract, designs and other forms relevant to the RFP and/or the future public contract.

Moreover, the public authority must define the tender model adopted for the public bidding in the RFP. Federal Law 8,666/1993 allows the following models: (1) competitive bidding (most commonly used); (2) price quotations (preferred for routine purchases using a pre-selected list of providers); (3) invitation to bid (used for lower value purchases); (4) bidding contests (used for technical, scientific, or artistic works); and (5) auction (used for selling of goods). With respect to the auction, Federal Law 10,520/2002 prescribes simplified conditions to procurement for the purchase of ordinary goods and services by the public authority (Federal Decree 5,450/2005 also prescribes conditions to the electronic version of auctions).

Pursuant to the principle of the entailment to the bidding notice, which is one of the most important principles prescribed in Federal Law 8,666/1993, the conditions set forth in the RFP bind the public authority and the bidders during the bidding proceeding and the performance of the public contract.

ii Procedures
Following the publishing of the RFP, the bidders must present their qualification documentation and commercial (and technical, if applicable) proposals in the form and date prescribed in the RFP’s conditions. The qualification documentation serves to evidence the due legal existence and the financial good standing of the bidders and to attest that the bidders comply with the conditions and requirements established by the public authority in the RFP to perform the future public contract. Foreign bidders, when allowed to participate, must present documentation from their jurisdictions, observing the rules related to the public appositive prescribed in Hague Convection (in force in Brazil since August 2016).

Through the ordinary procedure prescribed in Federal Law 8,666/1993, the analysis of the bidders’ qualification takes place before the opening of the commercial proposals. The public authority will rank only the qualified proposals under the RFP’s conditions, and adjudicate the winning bid in accordance with the criteria chosen for the bidding proceedings, which may be (1) best price; (2) best proposal in technical terms; or (3) a combination of best price and best technical proposal.

Additionally to the procedure established in Federal Law 8,666/1993, there are some special procedure forms set forth in specific legislation. For instance, in the case of reverse auctions, after the presentation of the relevant documentation by the bidders, the public authority should initiate a phase of oral bidding or an electronic auction with the purpose of
increasing the value of the proposals offered by the bidders. The main difference in that case is the inversion of phases of the bidding proceeding, which means that the public authority will analyse the qualification documentation of the winning bidder.

It is worth mentioning that the trend to simplify the bidding procedure (such as the inversion of phases prescribed to reverse auctions) has been incorporated in the Brazilian public procurement framework. Specific legislation on the regulatory agencies for certain market sectors (such as telecommunication and oil and gas) already prescribed the adoption of simplified procedures to the bidding proceedings that were not concerned with the hiring of civil engineering works. In addition, the recent Federal Law 13,303/2016 established that all state-owned companies should adopt simplified bidding rules in their internal proceedings.

iii Amending bids

In accordance with the ordinary procedure, after the presentation of the relevant documents to the public authority, bidders are not able to change or amend their qualification documents or commercial proposals.

VI ELIGIBILITY

i Qualification to bid

The main qualification requirements to be met by each bidder include legal, tax and labour regularity, and technical and financial requirements:

a Legal regularity: constitution documents and power of attorney or corporate resolution appointing a legal representative with powers to represent the bidder (additional requirements may be set, such as a corporate structure diagram for groups of bidders and power of attorney to a legal representative in Brazil for foreign bidders).

b Tax and labour regularity: certificates of compliance issued by tax authorities within the federal, state and municipal levels, by labour guarantor funds (FGTS) and by labour judicial courts.

c Technical requirements: companies’ registration with the competent association, if any, and evidence that the bidder, the contractor or the employees maintain the record of accomplishment relevant to the bid object.

d Financial requirements: certificates that the company is not insolvent or under judicial restructuring proceedings, last financial statements, good financial conditions according to current and overall liquidity ratios, and minimum net worth (which may be increased by 30 per cent in the case of consortia).

These requirements must be met in the exact form established in the RFP. Public bidding is a very strict and formal procedure in Brazil, which may give cause to disqualification due to minor defects in the documentation. The Brazilian Administrative Law entitles bidders to file administrative and judicial defences and appeals to preserve their rights, such as in cases of wrongful disqualification of proposals and non-compliance with the RFP with applicable legal requirements.

ii Conflicts of interest

The RFP can provide requirements to avoid conflicts of interest, such as, for example, the prohibition on bidders hiring staff from the bidding authorities. The RFP may also have provisions for the bidders with requirements or limitations on contracting with third parties.
Additionally, in some states, such as São Paulo, private sectors can be allowed an exclusive authorisation to perform previous studies and project planning for a PPP, within the expression of interest (EOI) procedure. In such cases, when an exclusive authorisation is granted, the private partner authorised may not participate in the future bidding, nor can the future bidders be affiliated to such party, to avoid conflicts of interest. These limitations do not apply to EOI within the federal level, when authorisations are granted in a non-exclusive manner.

iii Foreign suppliers

When allowed by the RFP to participate directly, foreign entities functioning in the country should provide an authorisation decree duly registered with the competent body according to the company’s activity; and foreign entities not functioning in the country must establish a legal representative in Brazil with express powers to be served and to respond administratively and judicially.

In such cases, equivalent qualification evidence available in the relevant jurisdiction should be provided and all foreign documents must be certified by a notary public as according to the originals and, if signed, must have the signatures certified by a notary public, and the notarisations must be legalised with the Brazilian consulate incumbent in the jurisdiction. Legalisation of documents is not needed in the event the acquirer is from a country party to the Apostille Convention. Furthermore, documents must be translated into Portuguese by a sworn translator in Brazil.

When submitting documents that are equivalent to Brazilian documents and/or in case there are no equivalent documents; the foreign entity must obtain a statement from the applicable consulate declaring that the documents are equivalent to Brazilian documents and/or that there are no equivalent documents, as the case may be.

If the foreign entity decides to set up a local subsidiary to participate in the bid, attention must be given to the requirements of technical qualification, since the RFP can request evidence of the company’s or its employees’ track record. When consortia and SPEs are allowed, these requisites may be supplied by a Brazilian partner.

Depending on the activity, there may be limitations or restrictions for foreign suppliers in areas such as nuclear energy; newspapers, magazines and other publications; television and radio networks; health services; business on frontier zones and rural lands; post office and telegraph services; domestic flight concessions and the aerospace industry.

VII AWARD

i Evaluating tenders

For competitive biddings, only the proposals presented by the bidders qualifying under the RFP should be ranked, and the winning bid should be adjudicated according to the criteria chosen for the public bid described in the RFP, which may be one of the following:

a best price;
b best proposal in technical terms; or
c a combination of best price and best technical proposal.

For reverse auctions, following the presentation of the initial proposals by the bidders, an oral bidding or an electronic auction takes place, increasing the value to the tender authority.
The main difference of this modality is the inversion of the phases of qualification and competition described above, with only the qualification documentation of the winning bidder being analysed. Under Federal Law 8,987/1995, which establishes the regime for concessions and permissions of certain public services, the possible criteria may be one of the following:

- lowest tariff;
- highest offer;
- best technical proposal, with the price established in the RFP;
- lowest tariff combined with the best technical proposal;
- highest offer combined with the best technical proposal;
- highest offer after the technical proposal qualification; or
- a combination of two of the lowest tariff, highest offer and highest offer after the technical proposal qualification.

Federal Law 11,079/2004 that created the PPP sets as awarding criteria the lowest tariff with predetermined government compensation or the lowest government compensation with a predetermined tariff.

ii National interest and public policy considerations

National products and services can be preferred in public biddings in certain cases, such as those related to science and IT systems considered strategic for the federal government, since Law 12,349/2010 has been approved. The preference must be disregarded whenever the price of the Brazilian product or services exceeds the price of the foreign product by at least 25 per cent.

Under Complementary Law 123/2006, micro-enterprises and small businesses may also be given preference in certain bids, when the winning bid is up to 10 per cent better than their proposals. In these cases, such companies must be given the opportunity to present the last bid.

VIII INFORMATION FLOW

The Brazilian public authority must carry out the bidding proceeding through an administrative proceeding that should observe the guiding principle of transparency. This means that the public authority should disclose all available information not only to the bidders, but also to the public in general. That is why the public authority must publish the RFP in the Official Gazette.

Once the public authority publishes the RFP, the interested parties can raise questions or challenge the conditions of the bidding procedure. Additionally, Federal Law 8,666/1993 sets forth that any citizen may file an opposition to the RFP in case of irregularities or any violation of the law.

IX CHALLENGING AWARDS

All formal decisions issued by the authority in charge of the bidding process may be challenged administratively or judicially in Brazil.
It is common for some level of litigation to occur in public bids. Bidders commonly file administrative appeals and (less frequently, but still commonly) judicial lawsuits in order to challenge bids’ final or partial results (such as decisions that find certain bidders qualified to continue in the bidding process).

The chances of success of a challenge to any given decision will obviously depend on the quality of the facts and argument of law. Administrative authorities are usually more conservative in their interpretation of the law, so they tend to adhere more to literal interpretations than the judiciary.

Litigation in public bids is one of the most common reasons why bidding processes are stalled, sometimes for long periods, as injunctions may be granted to freeze the proceedings until the judiciary resolves the case. How long a dispute will take to be resolved varies dramatically depending on the complexity of the case and whether the challenge was brought administratively or judicially (administrative proceedings are usually very quick and may be resolved in a matter of few days, while judicial proceedings may take several months).

Disputing an award administratively will typically not involve the payment of fees. Also, administrative challenges do not need to be written by licensed attorneys, and this may contribute to keeping costs low. On the other hand, judicial litigation does involve payment of fees (which are usually calculated considering the amount in dispute), require the involvement of a licensed attorney and, in the event the plaintiff loses the dispute, he or she may have to pay attorneys’ fees to the opposing party’s counsel.

i Procedures
Federal law 8,666/1993 sets the general framework for administrative appeals in bidding processes. It states that a bidder may file an administrative appeal to a higher administrative authority within five days from the date in which a decision was officially rendered. As a default, only challenges to decisions that (1) qualify or disqualify bidders to continue in the contest and (2) that decide the winner of the bid entail the suspension of the proceeding until the appeal is decided; yet, the competent authority may determine the suspension of the proceeding in other cases if it considers it to be in the public interest. The RFP usually defines who is the competent authority to review an administrative appeal.

Judicial challenges are commonly brought by bidders in the form of a writ of mandamus, in which the bidder (plaintiff) alleges that there was a clear violation of a given right that may be demonstrated by documental evidence only. Parties usually prefer the writ of mandamus because it has an expedited procedure compared to the other types of civil lawsuits – which can also be filed in more complex cases. A writ of mandamus can be filed up to 120 days after the date on which a party discovered the violation of the right that will be litigated.

Judicial review of administrative decisions can also be initiated by any citizen (in the form of a ‘popular lawsuit’, a special type of lawsuit provided for in Federal Law 4,717/1965 that allows any citizen to request the nullity of acts that cause harm to the Public Administration) and by the public prosecutors.

Audit courts also review awards and performance of contracts executed by the Public Administration and may determine the suspension of a given act or contract (which must be subsequently decided by the legislative branch). Audit courts are inspecting bodies that assist the legislative branch in controlling the acts taken by the Public Administration that entail expenditures of public money.
ii  **Grounds for challenge**

Decisions in public bids may be challenged for violations of the rules set forth in the RFP or violations of any applicable laws, or both.

iii  **Remedies**

Courts have wide discretion in establishing the applicable remedies in the course of litigation. For instance, they may (1) grant injunctions suspending acts or allowing acts to occur, and (2) annul acts or decisions taken by the administration in the course of the public bid.

Judicial review of administrative acts, however, is typically limited to the analysis of the legality of such acts. Courts are not allowed to second-guess decisions regarding discretionary administrative acts with regard to their convenience or efficiency, but they may scrutinise whether or not the administration has abused its discretion.

X  **OUTLOOK**

As described above, the political scenario in Brazil in 2016 was very turbulent. This prevented the government from pursuing some of the public projects it had previously planned.

As of 2017, there is great expectation that the country will undergo a period with several high-profile public bids and concessions. The PPI has staged a series of roadshows in many countries, presenting the projects expected for launch in the following semesters. The schedule includes concessions in railways, roads, ports, oil and gas, mining and power plants, and the privatisation of the Brazilian lottery company LOTEX and several electrical energy distributors, most of which are brownfield projects that were already under consideration by past governments. The auction of four airports that took place in mid-March 2017 was deemed as a sign of the success of these efforts, attracting investors from France, Germany, and Switzerland.

In addition to that, in December 2016, the Brazilian Senate approved the bill of Federal Law 559/2013, which intends to replace Law 8,666/1993 in order to make the bidding procedure easier and faster, adopting some rules of the RDC system and limiting the appeals against the administrative decision. This bill still depends on the approval of the National Congress and the president to become effective.
Chapter 6

CANADA

Theo Ling, Daniel Logan and Jonathan Tam

I INTRODUCTION

Canada’s legal framework for government procurement is based on a number of bodies of rules including trade agreements, statutes, regulations, case law, policies and custom. The legal framework does not apply uniformly across Canada. As a federation, Canada has two distinct jurisdictions of political authority: the nationwide federal government and 10 provincial governments. Canada also has three territories, Yukon, Northwest Territories and Nunavut, which are not discussed in this chapter. The legal rules that apply to government procurement at the federal level are different from those that apply to the provinces, and the rules that apply to public bodies at the provincial level differ from province to province.

At the federal level, the central piece of legislation regulating government procurement is the Government Contracts Regulations (GCRs) issued pursuant to the Financial Administration Act (FAA). The FAA contains general provisions applicable to federal government procurement, while the GCRs contain more detailed provisions. The federal government is also subject to binding and enforceable commitments made pursuant to trade agreements with other nations, such as the World Trade Organization’s Agreement on Government Procurement (GPA) and the North American Free Trade Agreement (NAFTA), which are discussed in greater detail below. There are also numerous policies and directives that apply to federal government procurement. Public Works and Government Services Canada (PWGSC), which is the department responsible for the federal government’s internal servicing and administration, develops, implements and maintains the Supply Manual, which specifies the procedures of procurement and includes standard clauses for the procurement process. The Supply Manual does not have the force of law, and procuring authorities have no legal obligation to include the standard clauses contained therein. In addition to these and other statutes, policies and trade agreements, there is a compendious volume of case law that serves to define the rules and principles applicable to federal government procurement.

Different provinces have taken alternative approaches to procurement. Most provinces have enacted little legislation respecting government procurement and leave it largely up to public agencies to develop internal policies by which public purchasing will take place. Some provinces have enacted more comprehensive legislation. For instance, Quebec has enacted an Act respecting contracting by public bodies that, along with its regulations, prescribes specific

1 Theo Ling and Daniel Logan are partners and Jonathan Tam is an associate at Baker McKenzie. The authors would like to thank Randeep Nijjar, student-at-law, for his assistance on this chapter.
2 SOR/87-402.
3 RSC 1985, c F-11.
4 CQLR c C-65.1.
rules that apply to public purchasing by all public agencies in Quebec. In the same vein but to a lesser extent, Nova Scotia, New Brunswick, Saskatchewan and Newfoundland and Labrador have enacted government procurement legislation of broad provincial application. Ontario has taken something of a hybrid approach. The Broader Public Sector Accountability Act, 2010\(^5\) authorises an executive committee of Ontario to issue directives governing public procurement, which resulted in the Broader Public Sector Procurement Directive being issued in 2011. The Directive does not have the force of law, but nevertheless applies as a general best practice to all designated public agencies in Ontario. The international trade agreements to which Canada is a signatory do not have the force of law in the provinces. That said, the provinces have entered into domestic treaties among themselves; these treaties are binding and subject to dispute resolution processes. As is the case federally, each province has its own body of case law regarding government procurement.

One of the most significant contributions that the judiciary has made to the procurement framework for tenders in Canada relates to what is generally referred to as ‘Contract A/Contract B’. Under this analytical framework, which applies to competitive procurement for tenders throughout Canada, a bidder enters into ‘Contract A’ with the procuring authority when it has submitted a compliant bid in response to a request for bids (or similar document) as part of a legal tender process. ‘Contract B’ refers to the contract to be awarded to the successful bidder. Public agencies enjoy a significant amount of freedom to establish criteria that bidders must satisfy to be eligible to bid on a contract, which correspond roughly with the ‘terms and conditions’ of Contract A. By the same token, pursuant to the tender process, public agencies are bound to the terms of Contract A and are therefore generally prohibited from, \textit{inter alia}, awarding the contract to a non-compliant bidder, awarding a contract that differs materially from the one offered through Contract A and evaluating bidders based on criteria that differ from those set out in Contract A. These obligations, which will be discussed in further detail below, flow from the fundamental principle that government procurement in Canada is to be open, fair and transparent, which is generally considered to support the principle of value for money. Accordingly, while other means of procurement are technically open and available to the government, the tender process, which supports transparency and fairness, is the means by which the government most typically undertakes procurement.

II YEAR IN REVIEW

i Comprehensive Economic and Trade Agreement (CETA)

In July 2016, the European Commission officially referred the Comprehensive Economic and Trade Agreement (CETA), a proposed trade agreement between Canada and the European Union, to the Council of the European Union with a proposal for its approval and signature. In October 2016, during the European Union–Canada Leaders’ Summit in Brussels, Belgium, CETA was signed by both the European Union and Canada, and Bill C-30, the legislation to implement CETA in Canada, was subsequently introduced in Canada’s Parliament.\(^6\) In February 2017, CETA was approved by the European Parliament.\(^7\) At the

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\(^5\) SO 2010, c 25.

\(^6\) Available at: www.parl.gc.ca/LegisInfo/BillDetails.aspx?Bill=C30 (last accessed 31 March 2017).

time of writing, Bill C-30 has passed second reading in Canada’s Senate and has been referred to the Standing Committee on Foreign Affairs and International Trade. CETA can enter into force provisionally on the first day of the second month following the date that the European Union and Canada have notified each other that their respective internal requirements and procedures necessary for the provisional application of CETA have been completed.8 CETA is expected to enter into force provisionally once Canada completes its ratification procedures and CETA will be fully ratified once all parliaments in the European Union’s Member States approve the deal in accordance with their respective domestic constitutional requirements.9

Assuming that CETA is ratified in its present form, it is clear that CETA will affect virtually every sector of the economy on both sides of the Atlantic, including the area of government procurement. The Ministry of International Affairs has previously stated that ‘access to Canadian government procurement was one of the main reasons, if not the main reason, that the EU agreed to negotiate a trade agreement with Canada’.10 On the Canadian side, CETA opens up procurement at the federal, provincial and municipal levels, making concessions by Canadian provinces and territories, which have yet to approve the treaty, necessary for CETA to succeed. CETA likewise opens up procurement at the central, regional and local level on the EU side.

ii Trans-Pacific Partnership (TPP)
In February 2016, 12 nations including Canada signed the Trans-Pacific Partnership (TPP).11 However, with the withdrawal of the United States from that agreement on 23 January 2017, the TPP in its present form can no longer be ratified in Canada.12

iii Canadian Free Trade Agreement (CFTA)
In July 2016, the Canadian provinces and territories reached an agreement in principle on a new Canadian Free Trade Agreement (CFTA),13 to replace the Agreement on Internal Trade that has governed interprovincial trade since 1995. The CFTA is expected to introduce rules to make it easier and less costly for companies to sell goods and services across Canada. In addition, the CFTA is expected to extend trade rules to cover goods and services in all emerging sectors of the Canadian economy, establish a reconciliation programme to align regulations, remove barriers and reduce business costs, and align with international rules

8 CETA, Article 30.7.
Canada

to ensure that Canadian businesses receive as favourable treatment as foreign businesses. The CFTA is also expected to introduce rules to foster broader, more transparent access for Canadian companies to government procurement contracts. The CFTA is anticipated to come into force and effect during 2017.

iv Provincial government procurement legislation

The past year also marked the introduction of a number of changes to the government procurement legislative framework. For example, in December 2016, the Newfoundland and Labrador government enacted new legislation to modernise the procurement framework within the province. An Act Respecting Procurement by Public Bodies, also known as the Public Procurement Act, will repeal and replace the Public Tender Act, which has governed the public procurement process in Newfoundland and Labrador since 1990. The Public Procurement Act will govern the acquisition of goods, services, public works, and leasing of space by public bodies in the province. The Newfoundland and Labrador government anticipates that the Public Procurement Act will enter into force some time in the second half of 2017.

The Public Procurement Act aims to establish a statutory framework which, through its operation, enables public bodies to achieve best value, transparency and accountability in procurement. Key features of the new legislation include increased oversight over a broader range of procurement activity, more transparency in the procurement process, increased consistency in procurement practices, and greater flexibility for public bodies in making decisions to award contracts. The new legislation will enable public bodies to consider a broad range of factors in making a decision to award a contract, to determine which bid offers the ‘best value’. The introduction of the concept of ‘best value’ will be a significant departure from the framework established under the Public Tender Act, which generally requires public bodies to award contracts to the bidder offering the lowest price.

Similarly, in June 2016, the Quebec government introduced Bill No. 108: An Act to facilitate oversight of public bodies’ contracts and to establish the Autorité des marchés publics. The Bill was introduced in the wake of a number of high-profile fraud cases relating to public contracts in Quebec that prompted a four-year public inquiry and a comprehensive report that was published in November 2015. Bill 108 proposes the establishment of a new agency, the Autorité des marchés (the Authority), to oversee all public procurement in the province. In addition, the Bill provides the Authority with the responsibility to apply the Act respecting contracting by public bodies, as regards ineligibility for public contracts, prior authorisation to obtain public contracts or subcontracts and contractor performance

14 Available at: www.assembly.nl.ca/Legislation/sr/Annualstatutes/2016/p41-001.c16.htm (last accessed 31 March 2017).
17 CQLR c C-65.1.
evaluations in relation to the performance on contracts. Bill 108 was adopted in principle on 24 November 2016, but as of the date of this writing it has not yet been enacted by the Quebec National Assembly.

Bill 108 confers various powers on the Authority, including the powers to audit and investigate and, following an audit or investigation, to make orders or recommendations or suspend or cancel a contract. The Authority is empowered to examine the compliance of a tendering or awarding process for a public contract on its own initiative, after a complaint is filed by an interested person, or on the request of the Chair of the Treasury Board of Canada or a bidder. The Bill also proposes several amendments to the Act respecting contracting by public bodies, including a requirement that public bodies publish a notice of intention before entering into certain contracts by mutual agreement and a requirement that public bodies establish a procedure for receiving and examining complaints that they receive regarding their procurement activities.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

On the federal level, government procurement rules generally apply to procurements by federal government departments, corporations that were incorporated under a federal statute, corporations that receive the majority of their funding from the federal government and their agents. However, federal government entities that are creatures of statute and that are mandated to compete with the private sector are generally not subject to the public procurement laws.

Government procurement rules likewise apply in general to all public bodies at the provincial level. Although the details may differ from province to province, the procurement rules that have been developed by the Supreme Court of Canada apply generally to all public bodies in Canada. This includes the Contract A/Contract B framework described above for tenders, and the corresponding duties that are incumbent upon the purchaser, such as the duty to conduct a fair competition.

In addition, certain legislative instruments prescribing procurement rules specify the entities to which they apply. For instance, Quebec’s Act respecting contracting by public bodies applies to, among other entities, municipalities, government departments, entities like universities, health institutions and social services agencies that are part of a group commonly referred to as the MASH sector, and bodies that are wholly or partly funded by the National Assembly of Quebec. Similarly, Ontario’s Broader Public Sector Procurement Directive applies to most entities in the MASH sector as well as publicly funded organisations that received funds of C$10 million or more in the previous fiscal year from the government of Ontario. Markedly, municipalities are not covered by the Directive. In provinces where no public procurement legislation has been enacted, courts have stepped in to develop a regulatory public procurement framework that generally applies to all public entities.

ii Regulated contracts

All contracts for the supply of goods, services or works with the above-described public bodies are regulated by government procurement rules. Which rules apply depend on the contracting public body at issue and the type of contract at issue. For example, the GCRs apply to federal government entities and set out certain requirements that apply to all federal procurement contracts. However, some contracts, such as National Film Board
contracts, Veterans’ Land Act construction contracts and legal services contracts, are exempt from the bulk of the requirements in the GCRs. These exempt contracts are nevertheless subject to certain core requirements, such as the contractor warranting that it has not been convicted without pardon of prescribed offences that would put into question the integrity of the contractor. Prescribed monetary thresholds respecting the value of the public contract may also determine the extent to which the government procurement rules apply, as will be touched upon below.

The procurement rules applicable to utilities are generally the same as for other procurement processes. Defence contracting, which is the realm of the federal government, is also generally subject to the same rules as those for other procurement processes, although exemptions to the duty of non-discrimination imposed by international trade agreements may apply where issues of national security are at stake. As many as three federal departments will be involved in major procurements of military services and equipment: Innovation, Science and Economic Development Canada (formerly Industry Canada), which is responsible for industrial and regional benefits (also known as offsets); the Department of National Defence, which defines the requirements of the acquisition; and PWGSC, which manages the procurement process, negotiates the contract and then manages it once signed.

Major military procurements may be subject to the Industrial and Regional Benefits Programme, which requires successful bidders to make investments in advanced technology in certain sectors and areas of Canada in amounts sometimes equal to the value of the specific contract. Where procurement is deemed to be subject to the federal Defence Production Act, the underlying documents will be exempt from the rigorous disclosure requirements applicable under federal laws, which helps to ensure that sensitive technology and information are appropriately protected.

There are no financial thresholds below which public contracts are completely free from regulation. However, there are financial thresholds below which certain free trade obligations do not apply to federal government entities, as explained below.

On the federal level, the GCRs generally require bids to be publicly solicited for all contracts and thereby subject to full competitive public tendering where anyone who complies with the applicable requirements can bid. The exceptions to this are when:

- the need is one of pressing emergency in which delay would be injurious to the public interest;
- the estimated expenditure does not exceed C$25,000 (and it would not be cost-effective to solicit bids) or C$100,000 for specific types of contracts;
- the nature of the work is such that it would not be in the public interest to solicit bids; or
- only one person is capable of performing the contract.

The rules are generally more flexible on the provincial level, where the circumstances in which public entities are not required to hold a competitive procedure will be governed by applicable trade agreements, legislation and, to a lesser degree, policies and directives.

Any changes to or transfer of the awarded contract must be conducted in accordance with the rules and procedures that the procuring authority established in the rules of the

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18 GCRs, s 3.
19 RSC 1985, c D-1.
20 GCRs, s 6.
procurement. Generally, *bona fide* changes to the contract are permitted where the contracting parties mutually agree to them. The policies of public entities usually include rules that restrict the transfer of public contracts. For instance, the PWGSC Supply Manual contains clauses that impose limitations on a contractor's capacity to assign contracts without the consent of the purchaser. The Canadian International Trade Tribunal, which adjudicates certain complaints with respect to the procurement process, has suggested that it does not object to contracts being assumed by a third party.

**IV SPECIAL CONTRACTUAL FORMS**

**i Framework agreements and central purchasing**

Framework agreements and central purchasing on behalf of other public authorities are viable and in some cases encouraged methods of procurement in Canada. In practice, government entities in Canada employ procurement practices that run the gamut between centralisation and decentralisation. For example, New Brunswick's Procurement Act requires all provincial government departments and various other public bodies to purchase services and supplies through the Ministry of Government Services unless certain narrow exceptions apply. On the other hand, public procurement on the federal level is conducted in a relatively decentralised manner. As long as the procurement processes conducted through such arrangements comply with the obligations referred to in this chapter, such as the duty to conduct a fair competition, the duty to disclose all material evaluation criteria and the duty to reject non-compliant tenders, as well as all applicable international trade obligations, procuring authorities and teams are free to establish framework and central purchasing agreements among themselves.

**ii Joint ventures (JVs)**

Structural and cooperative or contractual public-public JVs are both viable vehicles for procuring goods and services in Canada. Public bodies entering JVs may be found to be in a fiduciary relationship, which involves legal duties of fidelity and good faith. Public bodies seeking to avoid these duties may seek to structure their relationship as a 'buying group' instead. The common thread among these arrangements is that there are typically one or several parties who are responsible for procuring goods or services on behalf of the other participants. The precise obligations of the parties involved will depend on the form of legal vehicle assumed and the specific procurement framework in which the public bodies operate. Nevertheless, JVs, JV companies and buying groups are all bound by the rules on public contracting outlined in this chapter. Typically, all of the public bodies participating in a JV or buying group will be involved in the procurement process for which the JV or buying group was formed, obviating any concerns associated with one public body supplying another public body without a prior procurement process.

Public-private partnerships (PPPs) are subject to the procurement rules outlined in this chapter. Thus, the PPP generally must be competitively tendered by means of a procedure run in accordance with the rules and principles applicable to all public procurements.

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22 *Re IBM Canada Ltd* (2003).

23 Procurement Act, SNB 2012, c 20, s 2(1).
Many levels of government in Canada have imposed rules that require procuring authorities to seriously consider PPPs as a delivery mode for a proposed project worth over certain monetary thresholds. For example, federal projects intended to develop an asset with a lifespan of at least 20 years and having capital costs of at least C$100 million must be subject to a business case to determine whether a PPP may be a suitable procurement option.24 P3 Canada is the public body responsible for advancing the use of PPPs on the federal level.

V THE BIDDING PROCESS

i Notice

Federal government entities advertise contract opportunities electronically on the Government Electronic Tendering System. Public provincial contract opportunities may be advertised electronically on the following websites:

a Alberta: tendering and contracting opportunities;25
b British Columbia: e-Procurement in BC;26
c Manitoba: government tenders;27
d Newfoundland and Labrador: the Government Purchasing Agency;28
e New Brunswick: New Brunswick Opportunities Network;29
f Nova Scotia: Nova Scotia tenders;30
g Ontario: supply chain management;31
h Prince Edward Island: Prince Edward Island tender opportunities;32
i Quebec: Sous-secrétariat aux marchés publics (Sub-Secretariat of Procurement);33 and
j Saskatchewan: SaskTenders.34

ii Procedures

Public agencies are generally permitted to use a broad range of approaches, provided they comply with the requirements of Canada’s trade agreements, the common law, and the agency’s own internal policies and procedures. Typically, a public agency will establish internal policies and procedures governing the circumstances in which procurement may be conducted and the manner in which such procurement is to be conducted. These policies and procedures often provide guidance on the procurement documents and procedures, including:

a request for information, which is used as an information-gathering tool;
b request for expressions of interest, which is commonly used to identity which participants in the market are able and willing to provide goods or services;

28 www.gpa.gov.nl.ca.
29 https://nbon-rpanb.gnb.ca.
30 www.doingbusiness.mgs.gov.on.ca/.
34 https://sasktenders.ca/content/public/Search.aspx.
c request for qualifications, which is used to pre-screen bidders based on a set of qualification criteria established by the public agency;
d request for proposals (RFP), which typically prescribes the outcome desired but not how the successful bidder will deliver the goods or services. The terms and conditions of the RFP typically vary significantly, depending on the needs of the public agency. The proposals may be legally binding or non-binding, depending on the intent of the public agency; and
e tender, which is normally used when what is being acquired is well defined (often a commodity product) and all that matters is price.

Electronic bidding is permissible and offered on selected tenders.

iii Amending bids
As public entities enjoy a significant amount of freedom to define the rules of the bidding process, bidders should review the terms set out in the tender documents to determine whether there are any limits on amending submitted bids during the bidding process.

Purchasers are generally not permitted to allow a bidder to rectify deficiencies in a bid after the deadline for bid submissions has passed. This flows from the obligation of purchasers to reject non-compliant tenders, which flows from the duty to run a fair competition. Where the rules of the bidding procedure permit suppliers to clarify aspects of their bids, such right should only be used in limited circumstances for the \textit{bona fide} clarification of a genuine ambiguity in a tender.

VI ELIGIBILITY

i Qualification to bid
Public entities enjoy a significant amount of freedom to stipulate any criteria that bidders must satisfy to be eligible to bid, and to define situations in which a bidder will be disqualified. This freedom is subject to certain restrictions. First, under the federal procurement framework and those of certain provinces, bidders are automatically liable to be disqualified if they have committed certain prescribed offences that would call into question their integrity (such offences will be listed in the tender documents). Some levels of government – notably the provincial government in Quebec – also implement a blacklist for suppliers with a track record of questionable conduct.

Second, where the bidder and purchaser have a conflict of interest, the bidder may be liable to be disqualified. Third, the eligibility criteria must comply with any applicable trade agreements. Fourth, purchasers have a duty to run a fair competition, and such duty may be breached where purchasers establish eligibility criteria that unduly favour one or more bidders. Finally, there may be additional restrictions specific to certain levels of government. For example, the procurement regime in Quebec generally requires purchasers to specify in their compliance requirements that the filing by a supplier of several bids for the same call for tenders entails automatic rejection of all of that supplier’s tenders.\footnote{See Regulation respecting certain supply contracts of public bodies, CQLR c C-65.1, r 2, s 7; and Regulation respecting service contracts of public bodies, CQLR c C-65.1, r 4, s 7.}
Once public entities have established the requirements to which bidders must comply, they must only consider compliant bids. Any deviation from this principle creates a risk of the procurement process being declared unfair, although some leeway is permitted for bids that may not have strictly complied with all of the requirements but that have substantially complied with all material requirements of the tendering process.

ii Conflicts of interest

Purchasers are subject to a duty to avoid any conflict of interest that could compromise the integrity of the tendering process. This obligation flows from the duty of purchasers to conduct a fair competition when soliciting bids. Purchasers will typically specify in the tender materials any circumstances that constitute a conflict of interest sufficient to disqualify a potential supplier. Bidders should review the tender documents carefully to ensure that they do not meet any of these conflict of interest criteria. In addition, bidders may be subject to a positive duty to declare any actual, potential or perceived conflict of interest or else risk adverse consequences upon the discovery of the conflict of interest. Case law suggests that more than the simple appearance of a potential conflict is necessary to establish a conflict of interest at law.

iii Foreign suppliers

Public bodies may open RFPs to foreign suppliers, and are required to do so under certain circumstances. The monetary thresholds referenced below are in effect during the period from 1 January 2016 to 31 December 2017 and are revised periodically in accordance with their respective treaties.

As a signatory to NAFTA, Canada has agreed to provide suppliers of the United States and Mexico with equal opportunity to compete for certain contracts involving specified classes of goods and services bought by a prescribed list of over 100 federal government entities. NAFTA is not applicable to provincial or municipal governments or to private industry or private individuals. The value of the government procurement must meet certain monetary thresholds for the equal opportunity requirement under NAFTA to apply. With respect to procurements by federal government departments and agencies, the monetary thresholds are in most cases C$89,600 for goods, services or any combination thereof; and C$11.6 million for construction services contracts. With respect to federal government enterprises, the monetary thresholds are C$448,100 for goods, services or any combination thereof; and C$14.3 million for construction services contracts. As between Canada and the United States, the monetary threshold for the procurement of goods by departments and agencies is C$28,900.36

As a signatory to the GPA, Canada has agreed to provide suppliers of more than 40 trading partners in Europe, Asia and North America the right to bid without discrimination on a broad range of public sector tender calls by federal government entities. The GPA is not applicable to provincial or municipal governments, or to private industry or private

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individuals. The monetary thresholds applicable to procurements by federal government agencies, departments and enterprises are C$200,900 for goods, services or any combination thereof, and C$7.7 million for construction services contracts.37

International free trade agreements such as CETA, the Canada-Korea Free Trade Agreement (CKFTA) and the Canada-Honduras Free Trade Agreement (CHFTA) also prescribe monetary thresholds over which contracts must be offered to Canada’s trading partners.

Other agreements facilitate trade among governments within Canada and their corresponding public entities. These include:

a the Agreement on Internal Trade, of which the federal and all provincial and territorial governments are signatories;
b the New West Partnership Trade Agreement, which applies to the British Columbia, Alberta and Saskatchewan governments;
c the Atlantic Procurement Agreement, which applies to the New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island governments;
d the Quebec-New Brunswick Trade Agreement; and
e the Ontario-Quebec Trade and Co-Operation Agreement.

There is no requirement that foreign suppliers set up a local branch or subsidiary, or have local tax residence to do business with public bodies. Nevertheless, public bodies may choose to establish such criteria during the procurement process if doing so would not breach their free trade obligations or other duties (e.g., duty to conduct a fair competition), if any.

VII AWARD

i Evaluating tenders

Public entities issuing a call for tenders must disclose all criteria by which the purchaser will evaluate bidders. Purchasers that use undisclosed criteria to evaluate bidders risk being found liable for doing so. Although purchasers are allowed to include significant reservations in a call for bids, courts may not enforce such reservations if doing so would be at odds with the duty to run a fair competition. Changes made to evaluation criteria during the bidding process can likewise result in a breach of the purchaser's legal duty to run a fair evaluation process.

Public entities are generally free to establish the terms by which they will evaluate bids. Where the estimated price of the contract is likely to be low, public entities typically evaluate bidders based on the lowest-priced bid. Otherwise, public entities generally evaluate bidders based on, *inter alia*, the best value, which gives them more leeway in taking into account other attributes besides just the price of the bid.

It is up to public entities to establish the rules that govern the award of a contract to a selected supplier. Purchasers are under a general duty to award the contract as tendered. Suppliers may be found liable where the awarded contract deviates in a material respect from the contract terms contemplated by the call for tenders. Purchasers are also required

to distinguish the selection of one or more preferred bidders from the actual award of the contract in question. If the purchaser stipulates that it will negotiate with a number of preferred bidders before awarding the contract, then it is entitled to do so as long as it also complies with its other obligations, such as its duty to be fair to all bidders.

ii National interest and public policy considerations
As previously noted, procuring authorities enjoy significant freedom to determine which considerations they will take into account when deciding who will be awarded a contract. Procurement authorities have the duty to disclose these considerations in the tender documents and are generally not permitted to take any considerations that have not been disclosed into account when evaluating bids. This duty flows from the general duty of procuring entities to conduct a fair competition. Consequently, national interest, local, social and environmental considerations can be and often are taken into account by procuring authorities.

The main restrictions on favouring domestic suppliers during the procurement process are imposed by trade agreements. For example, the GPA, which binds the federal government, imposes an obligation of non-discrimination and transparency on government procurement. Nevertheless, exceptions exist with respect to, *inter alia*, national security and national defence (Article XXIII). Likewise, Article 1018(1) of NAFTA exempts ‘protection of […] essential security interests’ and procurements ‘indispensable for national security or for national defence purposes’.

VIII INFORMATION FLOW
Public entities holding a competitive bidding process are subject to a duty to disclose all material information about the contemplated contract to all bidders. In general, what is deemed material for the purposes of the disclosure duty is any information that could influence a bidder’s decision to bid or influence the price quoted by the bidder. As noted above, this also includes criteria that the purchaser will be relying on when evaluating bids.

Public entities often provide unsuccessful bidders with the opportunity to learn why they lost a contract and why another bidder won. Pursuant to freedom of information legislation, the federal, provincial and in some cases municipal governments and their agents are required to furnish certain information upon request to persons entitled to such information. In many cases, this includes information about why the public entity awarded public contracts to certain parties and not to others. Debriefing unsuccessful bidders gives them an opportunity to improve their bids on future tenders and keeps purchasers accountable with respect to their obligations.

Subject to the specific rules of a particular procurement process, public entities are generally under no obligation to notify unsuccessful bidders of the outcome before contract signing.

Public entities are required to balance their disclosure obligations with their confidentiality obligations. Bidders are entitled to privacy interests over information disclosed during the procurement process, with the strength of those interests intensifying in proportion to the sensitivity and confidentiality of the information at issue. Courts have recognised that releasing supplier information may impair the willingness of others to participate in public procurement processes. Courts have ordered the disclosure of documents with confidential
information redacted from them. Confidentiality obligations are stricter during the bidding process, but a more balanced approach to confidentiality and transparency is taken after the contract has been awarded.

IX CHALLENGING AWARDS

i Procedures

A supplier that seeks to complain about a federal government procurement process has a number of choices, which can be taken simultaneously, serially or individually. To begin with, it can sue under the common law of Canada (typically for breach of contract and any applicable tort grounds). The supplier can also sue for breach of the GCRs. The supplier can also complain to the Canadian International Trade Tribunal (CITT) for a breach of Canada’s obligations under applicable trade agreements such as NAFTA, the Agreement on Internal Trade (AIT) and the GPA.38

The GCRs and Canada’s trade agreements all contain different language, meaning that the federal government is subject to a host of obligations that may look similar in substance but that diverge in nuanced ways. It should also be noted that the CITT’s procedural approach to complaints is significantly less formal than that of the courts. In sum, a dissatisfied supplier suing the federal government has at its disposal a range of choices with respect to complaint procedures.

A supplier that seeks to complain about a provincial government procurement process is generally limited to suing under the common law of Canada and pursuant to any specific provincial public contracting regulations. A supplier may be able to seek redress for a breach of the AIT, which is an internal trade agreement among the different levels of government in Canada. However, there is no dedicated dispute resolution mechanism for breaches of the AIT by provincial entities. Suppliers looking for redress under the AIT may avail themselves of government-to-government protest procedures, any applicable dispute resolution process that has been established by the particular public body at issue and the courts. Public bodies’ internal policies do not have the force of law, and so breaches of these policies cannot found a lawsuit. Nevertheless, breaches of policies can be relevant to determining whether some wrongdoing occurred. The rules of the procurement process may also include a dispute resolution process.

Awards are challenged primarily by parties who bid on the contract at issue.

The CITT hears complaints respecting procurement involving the federal government covered by NAFTA, the AIT, the GPA and certain other international trade agreements. Section 6 of the Canadian International Trade Tribunal Procurement Inquiry Regulations39 provides that a complaint must be filed with the CITT within 10 working days from the date on which the potential supplier first became aware, or reasonably should have become aware, of its ground of complaint to either object to the contracting authority or file a complaint with the CITT. The CITT provides quick remedies, usually issuing its decision within 90 days of the complaint having been made. Costs vary depending on the complexity of the matter.

Besides communicating directly with the contracting authority, courts are the preferred forum for all other procurement-related complaints. Limitation periods on judicial

39 SOR/93-602.
proceedings differ depending on the court and jurisdiction. The Limitations Act (Ontario) assigns a basic limitation period of two years. Costs vary depending on the complexity of the matter.

ii Grounds for challenge
Challenges may be brought on the grounds of a breach of one or more applicable international trade agreements, statutes, regulations and contracts. Breach of contract encompasses a number of grounds that are unique to the procurement framework, such as breach of the purchaser's duty to conduct a fair competition, to make full disclosure of, inter alia, evaluation criteria and to reject non-compliant bids. A purchaser's failure to disclose material information and honour the representations made in its tender call can also give rise to concurrent tort claims.

iii Remedies
The CITT has the power to postpone the award of a contract, to order a procurement to be undertaken again or to award damages to a complainant. Courts have more sweeping powers that include the granting of injunctions, setting aside contracts, ordering procurements to be undertaken again and awarding damages to the complainant.

Apart from civil liability for breaching government procurement rules, bid rigging is a criminal offence under Canada's Competition Act. Bid rigging occurs when two or more persons agree that, in response to a call for bids, one or more will not submit a bid, withdraw a bid or submit a bid arrived at by agreement, and the person requesting the bids is not informed beforehand about the agreement made between the parties. Parties found guilty of bid rigging may be liable to a fine in the discretion of the court, imprisonment for a term of up to 14 years, or both.

X OUTLOOK
New inter-provincial and international free trade agreements and new provincial public procurement legislation indicate that there will be significant changes to the public procurement landscape in Canada in the near future. These developments are aimed largely at opening up Canadian procurement markets while making the public procurement more transparent and consistent, and all stakeholders more accountable to the public.

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41 RSC 1985, c C-34.
42 Ibid., s 47.
Chapter 7

CHILE

José Luis Lara and Antonia Schneider

I INTRODUCTION

Chile’s public procurement market has undoubtedly generated great interest among foreign investors and entrepreneurs during the past decade. Since the last major reform of the regulatory framework, which occurred in 2003, the public procurement market has undergone explosive growth: 6.8 billion Chilean pesos was traded on the Public Market website during 2016, which represents an increase of 4.4 per cent compared with the amounts traded in 2015, and amounts to a saving of more than 6.7 per cent in the use of public resources in comparison to 2015.

A similar trend has been seen regarding public work concessions and contracts. For example, Latin America’s largest suspension bridge is currently under construction. This bridge represents a public investment of US$740 million, with an international consortium of companies from, inter alia, Brazil, Korea, Norway and France handling its construction.

The success of the Chilean experience is due to the following causes:

- a clear and stable regulatory framework;
- an open investment regime that promotes and ensures safe trading conditions for foreign investors;
- numerous free trade agreements that avoid international double taxation;
- an independent judiciary; and
- a government that over the past few decades has openly promoted foreign investment and entrepreneurship.

While it is true that, depending on the specific contract in question, the public procurement market is subject to regulatory fragmentation, there are principles and rules that are applicable to all public contracts. Many of these are contained in the Constitutional Organic Law of General Basis of the Government. For instance, the Law establishes as a general rule that every contract has to be preceded by a public tendering process where the contractor will be selected. It also mandates that free competition among competitors must be secured at every public tendering procedure. Moreover, it requires that the tendering procedures must be transparent, and it also regulates conflicts of interest, prohibiting the participation of any party that is conflicted.

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2 www.chilecompra.cl.
Additionally, many rules and principles are also included in Chile’s laws that regulate each public contract, such as Law No. 19,886 in the case of supply contracts; the sale, maintenance and leasing of moveable property; and service contracts concluded by public entities.

These, and many other reasons that will be discussed in this chapter, explain the success of the Chilean public procurement market over the past decade.

II YEAR IN REVIEW

There were no particular regulatory modifications in 2016, but the year was marked by the integration of the Ministry of Public Works with the online platform of ChileCompra, geared towards administrating the national public procurement system – an integration that has resulted in greater productivity, efficiency, competitiveness and transparency, principles that are central to public procurement. Moreover, this modification will mean an estimated increase of US$2.3 million in transactions of the Procurement Office, and about 18,000 new contracts per year.3 The first public bid entered into the online system was uploaded in January 2017.

Additionally, the Office entered into the #SheTrades agreement with the International Trade Center of the United Nations, which seeks to empower women and to increase their participation in the trading community up to a total of one million by 2020.

Finally, Chile signed up to the Paris Declaration of the Open Government Partnership in order to promote and develop the use of open data in public procurement in order to provide a more effective and efficient management of public resources.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

Generally speaking, the rules on public contracts are intended to govern government procurement processes. Thus, the enforcement of these rules is obligatory for the executive branch, every public service and the municipalities, as this follows on from the Constitutional Organic Law of General Basis of the Government. The application of the Law on Administrative Contracts of Supply and Services is also obligatory.

Notwithstanding the foregoing, Congress, the judiciary and the General Comptrollership have been voluntarily submitted to the mechanism recognised in the Law on Administrative Contracts of Supply and Services. Consequently, the basic rules on public procurement are applicable in practice to the entire state apparatus, regardless of which branch is concerned.

Finally, even though state-owned enterprises are covered by the constitutional principle whereby they are ruled by the legislation that regulates private entities, the jurisprudence issued by the General Comptrollership has ruled that the principles of public procurement are applicable. Likewise, the General Comptrollership has also ruled that the principles of public procurement are applicable to foundations and associations that participate in or belong to public entities, even though they have a private nature.

3 www.chilecompra.cl.
ii Regulated contracts

The Constitutional Organic Law of General Basis of the Government regulates any contract entered into with the government regardless of its subject or purpose. Under the Law, the contract must be preceded by a public tender; the principle of equality of competitors and free concurrence among them must be ensured in the public tender by the procuring entity; and the procuring entity may use only exceptionally a private tender procedure as a contracting mechanism, and must precede such procedure with a reasoned decision.

In general terms, Law No. 18,803 authorises the executive branch to enter into contracts under which it entrusts to private entities all actions to support its functions that do not correspond to the exercise of its powers. Contracts concluded under the Law must be preceded by a public tender and may also include arbitration clauses.

That said, it must be remembered that a special feature of Chilean legislation on public procurement is that each contract has a particular regulation. However, generally speaking, the following areas can be highlighted:

Supply and services administrative contracts

These contracts are regulated by Law No. 19,886 and Decree No. 250/2014 of the Ministry of Finance, and cover contracts of supply; contracts of sale, maintenance and leasing of moveable property; and services contracts.

In addition, Law No. 19,886 is used in practice as a supplementary law to address any loopholes or gaps that exist in another specific rule’s treatment of different administrative contracts. As such, it is the law that is most often used in the public procurement market.

In Chile, this technical expression refers to the duty of the state to ensure free competition among competitors, which is broader than equal treatment.

Contracts for the construction of state civil works

There are special rules in Chilean legislation for:

a the awarding of a concession contract for public works (Decree No. 124/2004, Ministry of Public Works);

b construction contracts for social housing entrusted by the Housing and Town Planning Service (Decree No. 236/2003, Ministry of Housing); and

c when urban financing shared between public and private actors is required (Law No. 19,865) that is destined for the award of properties, or for the execution, operation and maintenance of urban works.

Lease, sale or concession of state-owned immoveable property

Decree-Law No. 1,939 regulates the sale, lease, concession and occupation of state-owned immoveable property, and entrusts the Ministry of National Property with negotiating, executing and overseeing these contracts. Generally, concessions may not be granted for a period longer than 20 years and leases for more than five years.

An arbitral tribunal will settle differences that may arise between the parties in connection with the execution of the concession contract.

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4 In Chile, this technical expression refers to the duty of the state to ensure free competition among competitors, which is broader than equal treatment.
Contracts with the armed forces

There are special rules regarding contracts related to war materials and military vehicles, and systems and equipment for information, command, communication, intelligence and computational services. The general legislation would not be applicable to contracts concerning goods and services necessary to prevent exceptional risks to national security or public security. Therefore, these contracts would be ruled by Law No. 13,196, Law No. 18,928 and Decree No. 124/2004 of the Ministry of Defence.

Municipal concessions

Municipal concessions are awarded to private entities for the administration of properties that belong to a municipality, and for municipal services (e.g., refuse collection). They may also be used for awarding to private companies the use of underground land for various purposes (e.g., underground parking).

Contracts for the provision of health services

Health services that the government contracts to private establishments would be ruled by special rules (Decree-Law No. 2,763).

Finally, it should be noted that as a general rule contractors cannot transfer public contracts. Article 14 of Law No. 19,886 states that the rights and obligations arising during the development of a tender procedure (and from the consequential contract) shall not be transferable unless a law expressly permits it. For example, Decree-Law No. 1,939 prohibits the transfer of leases for state-owned immovable property unless this is expressly authorised by the Ministry of National Property.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements are covered by the legislation on contracts for supply and services (Decree No. 250/2014 of the Ministry of Finance). They consist of a large number of contract procedures with catalogues and lists elaborated by the Office of Public Procurement.

The products and services under these framework agreements are previously selected through a competitive public tender and, when they become effective, the procuring entity may contract directly through the Public Market website.

If the procurement process conducted through the framework agreement exceeds approximately US$65,000, the procuring entity shall convene a process called a large purchase. In this case, the procurement entity must give public notice to the market at least 10 days in advance about its intention to purchase. During this period, all interested competitors who are registered in the relevant specific list or catalogue may submit their offers, and the contractor will be chosen from among them as if the process were a public tender.

It is important to note that if a particular good or service is available under any of the catalogues or lists, the contracting entity is forced to purchase it through the existing framework agreements, and is forbidden to call for a public tender and contract directly.

As an exception, these rules are not mandatory for municipalities and the armed forces. However, in practice, the framework agreements have been used for these cases.
Joint ventures

Article 19 No. 21 of the Constitution prescribes that public entities are not allowed to develop economic or enterprise activities unless there is a special law that specifically allows this. As such, the possibility for public entities to participate in public-private partnerships or in joint ventures is in reality very limited.

In the case of state-owned enterprises, three circumstances must be considered:

1. State-owned enterprises can provide goods and services to public entities, but this must be done on an equal basis to private suppliers and in compliance with all legal provisions;
2. State-owned enterprises may participate in a tender process as part of a consortium with other private competitors on an equal basis; and
3. State-owned enterprises may participate in public-private partnerships or joint ventures with private parties to provide the government with a particular good or service (e.g., ENAP, the national oil company, holds public-private partnerships with private entities for the exploration and exploitation of natural gas).

Different laws specifically allow public-private partnerships or joint ventures. For example, Law No. 19,865 outlines a shared financial mechanism between municipalities and housing services with private entities for the award of properties, or the execution, operation and maintenance of urban works. In the same way, private entities can offer to public entities the realisation of different concessional projects, such as public work concessions for sewage system, water or geothermal energy services.

THE BIDDING PROCESS

Notice

In compliance with the principles of transparency and the free concurrence of competitors, there is abundant case law on the duty of contracting entities to disseminate their tender processes as widely as possible. Thus, calls to tender processes will always be published in the major newspapers, and will also be posted on the websites of the respective procuring entities.5

The Public Market website deals with supply and services administrative contracts. Potential competitors can review on its website any procurement processes called by public entities.

Procedures

Broadly speaking, there are four main procurement processes that can be used by public entities:

Framework agreements

As previously mentioned, these consist of a massive number of contract procedures with catalogues and lists elaborated by the Office of Public Procurement. For the elaboration of the catalogues, the Office of Public Procurement will call a tender process during which every

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5 For example, www.concesiones.cl regarding public work concessions.
bidder that complies with the requirements indicated in the tender bases will be selected. Once this list is finished, it is uploaded to the Public Market website, and public entities can contract directly through the website.

If the good or service required is available under a framework agreement catalogue or list, its utilisation is mandatory, and it is forbidden to call a tender process. As an exception, these rules are not mandatory for municipalities and armed forces. Nevertheless, in practice, the framework agreements have been used in these cases.

**Public tender**

Under this contest procedure, a public entity makes an open call inviting interested actors to present their offers. It will then select and accept the most convenient offer from among these.

If the good or service is not available under the framework agreements, a public tender would as a general rule be used and, in the case of contracts above US$72,000, it is always mandatory to use the public tender procedure.

The public tender procedure can start with a pre-qualification or pre-selection stage to indicate which interested parties will be able to participate in the tender process. The evaluation at this stage must be based only on technical criteria. In any case, the tender is initiated with the publication of the tender bases on the Public Market website.

Following this, competitors can ask questions of and clarify doubts with the public entity, which must provide answers within a time frame that ensures a competitors have adequate time for preparing their offers. The offer submission must be made on the date and at the time previously indicated, and generally contains a technical offer and an economic offer.

For example, www.concesiones.cl regarding public work concessions.

After this, the offer will be opened at a public event that guarantees adequate transparency and publicity. The procuring entity must then evaluate every offer on equal conditions, for which task it may appoint an evaluation committee.

Finally, the decision to select a competitor must be done in a transparent way, and must be communicated to the other, non-successful competitors.

**Private bid**

Under this contest procedure, a public entity invites certain competitors that, on the basis of certain bidding criteria, make offers, from which the public entity will select and accept the most convenient. This procurement mechanism only proceeds if there is a reasoned decision that authorises it, and only if there is a cause foreseen for it (e.g., when there are no participants in a public bid, in emergency situations, for confidential services or when the announcement of the procedure could affect national security).

Private bids follow the same procedure as public bids.

**Direct contracting**

Direct contracting is a contracting procedure where the contract conditions are negotiated directly with a private contractor without a previous tender process.

As in the case above, this procurement mechanism can only proceed after a reasoned decision authorises it, and only if it is strictly necessary due to the subject matter of the contract.
iii Amending bids

In relation to the pre-contractual stage, once the call to tender has been made, modifications to the contract or the timeline are allowed as a general rule, with the limitation that they cannot affect the essence of the tender bases or cause damages that affect the participation of competitors. The Comptrollership General has also ruled that if the nature of the tender bases is altered as consequence of multiple modifications, the procuring entity shall call a new tender process.

Any modification to an offer is forbidden after its submission. In the same way, the awarded offer is not allowed to be modified prior to concluding the contract. Exceptionally, modification is allowed to correct formal errors, but only if this situation does not affect the equality of competitors.

With respect to the contractual stage, even though the legislation allows public entities to modify the contractual conditions (*ius variandi*), there are two limitations to the execution of this power:

a the alteration of the contractual conditions cannot affect the essence of the tender bases, because these prevail over the contract. Thus, the only changes that are currently allowed by the Comptrollership General are quantitative ones, such as changes to timescales; and

b the contractual modifications must respect the economic equality of the parties to the contract. As such, in cases of alteration of contract conditions, economic elements must be renegotiated.

VI ELIGIBILITY

i Qualification to bid

Interested parties may not participate in a public tender called by procuring entities that, at the date of the tender call:

a are public officials of the procuring entity that calls for the public or private tender, or that maintain family ties with any such public officials;

b have been judicially condemned, within the previous two years, for antiunion practices or actions affecting the fundamental rights of employees;

c have been judicially condemned, within the previous two years, for bankruptcy offences; or

d have been judicially condemned for a breach of contract with regard to a previous contract arising from negligence or lack of diligence in the discharge of their contractual duties, as long as the procuring entity that had previously contracted with the interested party had requested that the Office of Public Procurement suspend such parties.

Neither may those interested parties that, even having been awarded a contract under a public tender, have unpaid social security debts due to their workers at the time of the conclusion of contracts with public entities.

Any interested party who is not in one of the above-described situations shall be entitled to participate in the tender process, and may only be disqualified if it has not fulfilled the tender bases. Such disqualification shall be declared by the procuring entity through a reasoned decision, specifying the exact reason why an interested party was disqualified.
ii Conflicts of interest

Article 4 of the Law on Administrative Contracts of Supply and Services forbids procuring entities from concluding contracts with their public officials or their family members. In the same way, procuring entities are forbidden from contracting with companies or firms in whom their officials or their families have some degree of participation or relation.

In addition, those who have the task of evaluating the offers submitted in a tender may not have any conflicts of interest with the participants.

A conflict of interest is considered to exist if an official involved in the evaluation:

a has a personal interest in the outcome of the tender process or the execution of the contract;

b has a family relationship with one of the participants, or if a family member is involved in a company that participates as a competitor;

c has any friendship or enmity with one of the competitors; or

d the official has had professional or business relationships with one of the competitors during the previous two years.

iii Foreign suppliers

As a general rule, a procuring entity that calls a public or private tender cannot make any distinction between foreign and Chilean competitors or discriminate against foreign competitors. This is a consequent on the fact that Article 57 of the Civil Code states that the law shall not recognise any difference between Chilean and foreigner competitors.

Exceptionally, Article 4 of the Law On Administrative Contracts of Supply and Services states that a public entity is entitled to require that a foreign competitor that has been awarded a contract under a tender process must constitute a subsidiary in Chile or a local branch of the foreign company with whom the contract will be concluded. In similar terms, Article 9 of the Law on Public Work Concessions establishes the obligation of a foreign competitor that is awarded a contract under a public tender to constitute a subsidiary or a local branch in Chile as a precondition for the conclusion of the contract.

VII AWARD

i Evaluating tenders

The evaluation of offers will be conducted by a commission specially appointed for such purpose, and will involve an economic and technical analysis of both actual and future benefits and costs of the proposals submitted by those competitors whose offers have previously been declared admissible.

The criteria under which the offers will be evaluated must be those previously declared in the tender bases. Inter alia, the following may be considered as technical and economic criteria: price, experience, methodology, technical quality, technical assistance or support, after-sales services, deadlines, transportation surcharges, environmental considerations, energy efficiency, previous contractual behaviour and the accomplishment of formal requirements.

As prescribed in Article 10 of the Law on Administrative Contracts of Supply and Services, the contract will be awarded to the competitor who presents the best offer with regard to the procuring entity's interests, considering the conditions and an evaluation of the economic and technical criteria established in the tender bases. It is noteworthy in this regard that numerous judicial decisions have pointed out that the cheapest offer is not necessarily the most advantageous, as this is just one of the criteria to be evaluated.
ii  National interest and public policy considerations

As previously mentioned, a procuring entity that calls a tender process cannot differentiate or introduce discriminatory measures favouring national competitors, unless expressly authorised by law. As an example, Decree-Law No. 1,939 expressly prohibits the granting to foreigners of a concession or lease of public land that has been previously declared borderland.

VIII  INFORMATION FLOW

As prescribed by Law 20,285 on Access to Public Information, all documents of public entities shall be public and, as such, may be requested by any interested party. All information about tender processes and contracts must be made available on the website of the Public Market or on the website of the respective procuring entity, or on both. Furthermore, any news about or decision of a procuring entity about the development of a tender process shall be notified to the involved competitors and shall be made public. Thus, a procuring entity shall communicate simultaneously its decision on the evaluation of offers to each competitor, whether such competitor was awarded the contract or not. At the same time, it should be reported if offers have been found inadmissible for failing to meet the minimum requirements.

Exceptionally, tender processes called by the armed forces and the Ministry of Defence may be confidential if they have as their purpose the acquisition of war materials.

As an exception to the above, the offers of competitors are not considered to be public information. In fact, it is held by legislation and jurisprudence that these may contain private financial or technical information that can often be strategic for the company or even considered to be an industrial secret. Thus, offers are not published. Only the evaluation report of the admissible offers is handed to each competitor, and it is also published on the Public Market website.

IX  CHALLENGING AWARDS

i  Procedures

There are several ways to challenge an act or omission of an arbitrary or illegal nature committed by a procuring entity during a tender procedure or in the subsequent execution of the contract.

At both stages, the procuring entity can always be requested to make an administrative reconsideration of its decision, which should be conducted within five working days. In cases of refusal, it can be requested that the administrative hierarchical appeal be made known to its administrative superior. Likewise, a complaint of illegality, in which the procuring entity is accused of having committed arbitrary or illegal acts, can always be filed before the Comptrollership General.

During the pre-contractual stage, a special action exists to challenge an arbitrary or illegal act committed during the bidding process that may be brought before the Public Procurement Tribunal. Through this action for annulment, any arbitrary or illegal act committed by the procuring entity from the time it called for the public tender up to its award of the respective contract may be challenged. During this stage, complaints denouncing malpractices during tender processes can also be filed before the Office of Public Procurement, which acts as an enforcement body with respect to public entities that have called tender processes.
With regard to the execution stage of the contract, a constitutional action for protection can be brought before the Court of Appeal if such execution is injuring any constitutional right. Similarly, ordinary actions recognised under public law, such as an action regarding the pecuniary liability of the state and an invalidity action, can also be filed before the common tribunals.

The following table provides an outline of the actions that can be taken:

<table>
<thead>
<tr>
<th>Action</th>
<th>Entity involved</th>
<th>Deadline</th>
<th>Processing time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative reconsideration of a decision</td>
<td>The same procuring entity</td>
<td>Five business days</td>
<td>One to two months</td>
</tr>
<tr>
<td>Administrative hierarchical appeal</td>
<td>The same public entity that issued the challenged decision</td>
<td>Five business days (the appeal must be filed simultaneously with the administrative reconsideration of the decision)</td>
<td>One to two months</td>
</tr>
<tr>
<td>Complaint of illegality</td>
<td>Comptrollership General</td>
<td>No deadline</td>
<td>Six to eight months</td>
</tr>
<tr>
<td>Action for annulment</td>
<td>Public Procurement Tribunal</td>
<td>10 business days</td>
<td>One year</td>
</tr>
<tr>
<td>Denouncement of malpractices</td>
<td>Office of Public Procurement</td>
<td>No deadline</td>
<td>Six months</td>
</tr>
<tr>
<td>Constitutional action to protect constitutional rights</td>
<td>Court of Appeal</td>
<td>30 calendar days</td>
<td>Three to five months</td>
</tr>
<tr>
<td>Common actions</td>
<td>Ordinary tribunals</td>
<td>Although there is no deadline to file common actions, there is a limit to the general procedure (statute of limitation)</td>
<td>Five years or more</td>
</tr>
</tbody>
</table>

Finally, it should be mentioned that there are several special arbitration proceedings with respect to some administrative contracts, such as in the case of public works concessions, contracts for shared urban financing and concession contracts for public land.

ii Grounds for challenge

To substantiate a challenge, it suffices that the procuring entity that has called for a tender process, or with whom a contract has been concluded, has committed an action or omission of an arbitrary or illegal nature; and that the competitor or contractor has been affected as a result of that action or omission.

iii Remedies

During the execution of a contract, the procuring entity is entitled to impose on the contractor fines for breaches of its contractual obligations or to enforce the guarantees established in its favour in the contract. Similarly, the public entity is allowed to terminate the contract early in cases of a serious breach of the contractor’s obligations or if the contractor becomes insolvent.

The contractor may challenge at an administrative or judicial level the decisions of the procuring entity that called a tender process or with whom the contractor concluded a contract. At the administrative level, the procuring entity usually will not grant a preliminary injunction preventing the conclusion or execution of the awarded contract. Therefore, in practice, a preliminary injunction will always have to be requested from the Public Procurement Tribunal or from the ordinary tribunals. In this regard, it should be mentioned that the tribunals are not very propitious in granting such measures at a preliminary stage of a challenge. Notwithstanding the foregoing, to settle the dispute, the tribunals will have broad freedom to grant the injunction requested by the petitioner’s request, even if this means annulling the tender process or the previously concluded contract.
X OUTLOOK

An amendment to the Law on Administrative Contracts of Supply and Services is to be announced in 2017, and its main purpose will be the extension of the jurisdiction of the Public Procurement Tribunal and more detailed regulation on how to deal with conflicts of interest during the offer evaluation stage of a tender process.

The Office of Public Procurement has been focused on increasing the participation of small and medium-sized enterprises (SMEs) in the public procurement market, which has led the sales at the Office of Public Procurement with more than 45 per cent of the national amount, and 55 per cent of the international amount. The latter, in addition to developing the transparency and efficiency policies, are the main focus of the Office for the coming year.
EUROPEAN UNION

Clare Dwyer, Michael Rainey and Kina Sinclair

I INTRODUCTION


Member States were given until 18 April 2016 to transpose the 2014 Procurement Directives into national law.

Overriding principles of EU law, referred to as the ‘Treaty principles’, have been developed by the Court of Justice of the European Union (CJEU) on the basis of freedoms in the EU Treaties. These principles include free movement of goods and services within the EU, freedom of establishment, non-discrimination on grounds of nationality, equal treatment, transparency, proportionality (i.e., fairness) and mutual recognition.

In cases before the CJEU, the Court may decide that an official opinion from the Advocate General (AG) is necessary before the judges deliberate and give their verdict. The AG’s opinion is published and provides guidance on the law.

As with all EU directives, the Directives require Member States to adopt national legislation transposing them into national law. Nevertheless, the national courts must interpret the relevant national legislation insofar as it is possible in accordance with the Directives. If national rules do not properly implement the Directives, then certain provisions of the Directives may be relied upon directly against the state.

1 Clare Dwyer is a legal director, Michael Rainey is a managing associate and Kina Sinclair is an associate at Addleshaw Goddard LLP.
4 C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion SA.
5 C-8/81 Becker v. Finanzamt Münster-Immenstadt.
The EU is a signatory to the Agreement on Government Procurement (GPA) adopted under the auspices of the World Trade Organization. As such, economic operators from GPA states benefit from most of the provisions set out in the Directives (and, therefore, national laws derived from them).

Additionally, the EU has entered into various free trade agreements, so economic operators from certain other countries also benefit from the Directives.

The European Commission is the ‘guardian of the Treaties’. As such, it adopts guidance on procurement law (often by way of non-binding communications or notices). It initiates changes to the Directives. It can also take enforcement action against Member States that are in breach of the Directives or Treaty principles.

Rules similar to the Directives apply to purchasing by the institutions of the EU such as the Commission, the Council and the CJEU. This chapter does not further consider those special rules.

II YEAR IN REVIEW

The past year has seen a gradual development of procurement case law with no major changes.

The CJEU confirmed that where bids are evaluated on the basis of the most economically advantageous tender, the method of evaluation used by an authority to evaluate bids does not need to be brought to the attention of all bidders, provided that the method of evaluation does not affect the award criteria or the respective weightings as set out in the contact notice.

Case law has considered the application of the Directives to a transfer of competences concerning the performance of public tasks by authorities to a new public entity formed for that purpose. The arrangement in question did not constitute a public contract to which the Directives applied, provided that the transfer concerned both the responsibilities and the powers associated with the transferred competence, so that the newly competent public entity has decision-making and financial autonomy.

The Teckal exemption for ‘in-house’ contracts has also been further considered by EU case law. The CJEU ruled that when assessing whether a controlled person carries out the essential part of its activities with the shareholder authorities that control it (which is a precondition of the exemption), activities carried out for other authorities that are not shareholders and do not exercise any control over the contractor are to be regarded as carried out for the benefit of third parties. However, in establishing the essential part, account may be taken of activities carried out for its shareholding authorities before their joint control took effect.

The CJEU has confirmed that authorities can exclude bidders by applying selection stage criteria where the bidder fails to meet minimum requirements concerned with compliance with national legislation at the time the bid is submitted, even where the bidder has complied

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6 With the exception of the Defence and Security Procurement Directive.
7 Articles 258 and 260 of the Treaty on the Functioning of the European Union and the Remedies Directives (e.g., Public Sector Remedies Directive, Article 3).
8 Case C-6/15 TNS Dimarso NV v. Vlaams Gewest.
9 Case C-51/15 Remondis GmbH & Co. KG Region Nord v. Region Hannover.
10 See footnote 40.
11 Case C-553/15 Undis Servizi Srl v. Comune di Sulmona.
by the time the authority carries out its verification. In the context of challenging procedures, the CJEU has clarified that a bidder who has been definitively excluded from a procedure by an authority (for failure to provide original documentation pertaining to financial standing) can be refused access to a review of the award decision in that procedure.

Case law has reiterated the importance of complying with national procurement laws when awarding contracts that are funded by EU structural funds. Member States can require recipients of funding to repay a portion of the funding received for failing to comply with national procurement laws.

In December 2016, the Commission issued a reasoned opinion to 15 Member States who failed to fully transpose one or more of the 2014 Procurement Directives into their respective national laws by 18 April 2016. Of the 15 Member States, 11 had failed to fully transpose all three 2014 Directives. At the time of writing, the two-month period for the Member States to provide the Commission with an explanation of the measures taken to transpose the 2014 Procurement Directives has passed.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The Directives regulate most public sector entities as well as a significant number of privately owned utility companies. For convenience, we refer to all such entities as ‘authorities’.

The 2014 Public Contracts Directive applies to most public law bodies, including ‘bodies governed by public law’ that have a separate legal personality; are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and are more than 50 per cent funded, managed or controlled by other public sector authorities.

Private operators may, in limited circumstances, have to procure in accordance with the 2014 Public Contracts Directive: for example, where they award certain works contracts that are more than 50 per cent subsidised by authorities, in which case the authorities are obliged to secure compliance.

The 2014 Utilities Contracts Directive applies to contracts for utility activities awarded by entities regulated by the 2014 Public Contracts Directive plus entities operating on the basis of special or exclusive rights.

Where a utilities market is directly exposed to competition and access to the market is not restricted, Member States may apply to the Commission for a derogation from the
2014 Utilities Contracts Directive for contracts in pursuit of activities in that market. A derogation has been granted to a number of Member States in respect of, for example, postal services, electricity, and oil and gas.

The 2014 Concession Contracts Directive applies to the award of works and services concessions by authorities that are caught by the 2014 Utilities Contracts Directive (when pursuing a utility activity) and the 2014 Public Contracts Directive. A contract becomes a concession where the consideration includes the right to exploit works or services, and the operating risk (demand, supply or both) in such exploitation is transferred to the concessionaire.


### ii Regulated contracts

Generally, contracts for construction of works, supply of goods and provision of services, and services and works concessions, awarded by authorities are subject to the Directives if they meet the specified minimum financial thresholds:

<table>
<thead>
<tr>
<th>Type of Contract</th>
<th>Directive</th>
<th>Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goods and services contracts, design contests</td>
<td>2014 Public Contracts Directive</td>
<td>€135,000 (central government authorities listed in Annex I) or €209,000 (all other authorities)</td>
</tr>
<tr>
<td>Goods and services contracts, design contests</td>
<td>2014 Utilities Contracts Directive</td>
<td>€418,000</td>
</tr>
<tr>
<td>Goods and services contracts</td>
<td>Defence and Security Procurement Directive</td>
<td>€418,000</td>
</tr>
<tr>
<td>Social and other specific services contracts</td>
<td>2014 Public Contracts Directive</td>
<td>€750,000</td>
</tr>
<tr>
<td>Social and other specific services contracts</td>
<td>2014 Utilities Contracts Directive</td>
<td>€1 million</td>
</tr>
<tr>
<td>Services and works concession contracts</td>
<td>2014 Concession Contracts Directive</td>
<td>€5.225 million</td>
</tr>
</tbody>
</table>

Anti-avoidance rules prevent artificial splitting of contracts to bypass the Directives.

Contracts for certain social and other specific services are regulated to a limited, ‘light touch’ extent and, in particular, the obligation to follow one of the specified procedures does not apply, although one of the principal changes from the predecessor directives is that, above

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19 Article 34.
20 Article 1(2).
21 Article 5(1).
23 For example, 2014 Public Contracts Directive, Article 5.
24 2014 Public Contracts Directive, Article 74 and Annex XIV, 2014 Utilities Contracts Directive, Article 91 and Annex XVII. Some (but not all) of these services are also subject to lighter regulation under the Defence and Security Procurement Directive, Article 16 and Annex II.
the thresholds, advertising and competition is required. These services include health, social, educational, social security and community services. Any service that is not expressly listed as being subject to the ‘light touch’ regime is fully regulated.

Some types of contract are not regulated by the Directives, such as contracts for:

- the acquisition or rental of land;\(^{25}\)
- employment;\(^{26}\)
- certain research and development services;\(^{27}\) and
- certain financial services.\(^{28}\)

There have been a number of CJEU cases deciding whether a transaction was properly classified as an (unregulated) land agreement or a (regulated) works contract.\(^{29}\) Often, the distinction turns on whether the economic operator is obliged to undertake the works\(^{30}\) or whether, while the parties envisage certain works being carried out, the economic operator is at liberty to construct something different or to leave the land undeveloped.

In some exceptional cases, authorities may negotiate contracts with economic operators without prior advertisement,\(^{31}\) for example, in the case of extreme urgency following a failed procurement process or where, for technical reasons, the contract may be awarded only to a particular economic operator. These exceptions are narrowly construed.

Where a public contract is substantially modified, this may amount to a completely new contract, which the authority must competitively tender under the Directives.\(^{32}\)

Where the Directives do not apply, some form of advertisement is generally required if there may be certain cross-border interest in the resulting contract.\(^{33}\)

The 2014 Utilities Contracts Directive applies to the regulated activities listed in Articles 8 to 14 in the fields of gas, heat and electricity, water, transport, post, exploration for or extraction of coal and other solid fuels, and extraction of (but not exploration for) oil and gas. A utility’s other activities are unregulated unless the utility is also a contracting authority for the purposes of the 2014 Public Contracts Directive, in which case those other activities are subject to the procedures in that Directive.\(^{34}\)

The Defence and Security Procurement Directive applies to contracts for the supply of military equipment, for works and services for military purposes and for the supply of equipment, works and services involving, requiring or containing classified information. Works and services concession contracts in these fields are covered by the 2014 Concession Contracts Directive (which also has provisions determining which rules govern the award of contracts).

\(^{25}\) For example, 2014 Public Contracts Directive, Article 10(a).

\(^{26}\) For example, 2014 Public Contracts Directive, Article 10(g).

\(^{27}\) For example, 2014 Public Contracts Directive, Article 14.

\(^{28}\) For example, 2014 Public Contracts Directive, Article 10(e).

\(^{29}\) For example, C-220/05 Jean Auroux and others v. Commune de Roanne.

\(^{30}\) C-451/08 Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben.

\(^{31}\) For example, 2014 Public Contracts Directive, Article 32.

\(^{32}\) C-454/06 pressetext Nachrichtenagentur GmbH v. Republic of Austria and others. The 2014 Procurement Directives codify and amplify the case law (e.g., the 2014 Public Contracts Directive, Article 72).

\(^{33}\) See C-324/98 Teleautria Verlags GmbH and another v. Telekom Austria AG, Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJEU 2006/C 179/02 (1 August 2006), and T-258/06 Germany v. Commission.

\(^{34}\) C-393/06 Ing Aigner, Wasser-Wärme-Umwelt GmbH v. Fernwärme Wien GmbH.
mixed contracts (involving elements covered by each of these Directives)). Where the Defence and Security Procurement Directive applies, neither the 2014 Utilities Contracts Directive nor the 2014 Public Contracts Directive apply. The most sensitive defence contracts may still be awarded outside the scope of the Defence and Security Procurement Directive.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The Directives permit (but do not require) Member States to adopt certain rules aimed at reducing the burden on entities when awarding contracts. These include permitting:


b purchasing through or from central purchasing bodies (the 2014 Public Contracts Directive, the Utilities Contracts Directive and the Defence and Security Procurement Directive36);

c dynamic purchasing systems (DPS) (the 2014 Utilities Contracts Directive and the 2014 Public Contracts Directive 37); and

d qualification systems (the 2014 Utilities Contracts Directive38).

These concepts are generally not relevant to the award of works and services concessions, and are not dealt with explicitly in the 2014 Concession Contracts Directive.

Authorities must not use framework agreements or DPS improperly to prevent, restrict or distort competition. Framework agreements may not last longer than four years (public sector), seven years (defence) or eight years (utilities).

Framework agreements may be concluded with a single supplier or with multiple suppliers. When calling off from a multi-supplier framework, the authority either runs a ‘mini-competition’ to award each call-off contract or awards a call-off contract directly based on the terms of the framework agreement.

Central purchasing bodies must be contracting authorities as defined by the 2014 Public Contracts Directive.

In practice, DPS do not seem to be widely used.

ii Joint ventures

In principle, the Directives do not apply to the setting up of a joint venture (whether public-public or public-private), but they are relevant to any subsequent supply of goods, works or services by the joint venture to the authority or to other authorities.

A Commission Interpretative Communication39 on institutionalised public-private partnerships recommends that authorities should simultaneously advertise the selection of the joint venture partner and the award of a contract to the joint venture.

35 Respectively, Articles 33, 51 and 29.
36 Respectively, Articles 37, 55 and 10.
37 Respectively, Articles 52 and 34.
38 Article 77.
39 Commission interpretative communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), C (2007) 6661 (5 February 2008).
Contracts between authorities are in principle subject to the Directives. There are certain exceptions, although these all prohibit private participation or shareholdings. The 2014 Utilities Contracts Directive has separate rules on joint ventures between utilities and on intra-group supplies.

V THE BIDDING PROCESS

i Notice

Most procurement processes are formally commenced by publication of a contract notice. All official notices under the Directives, such as prior information notices, contract notices and contract award notices, must be sent for publication in the Official Journal of the European Union (OJEU), which is accessible free of charge at Tenders Electronic Daily.

ii Procedures

The Directives envisage various contract award procedures:

- open procedure: a one-stage process where bidders must show their good standing and their tender proposals in a single bidding round;
- restricted procedure: a two-stage process where, based on financial standing, qualification and past experience, at least five bidders are shortlisted to tender;
- competitive dialogue procedure: a process generally used for complex procurements where the authority knows only the output that it requires and has not yet identified a solution;
- competitive procedure with negotiation or negotiated procedure with advertisement: a process generally used for procurements where the authority knows both the output and the likely solution, but wishes to negotiate the terms with bidders;
- innovation partnership for the development of innovative products; and
- exceptionally, negotiated procedure without advertisement.

For the procurement of social and other specific services under the ‘light touch’ regime, and where the 2014 Concession Contracts Directive applies, no procedure is specified.

There are minimum timescales for key stages in most procedures, particularly as regards the minimum period between the contract notice and bidders’ initial expressions of interest. These time periods may be shortened in some specified cases, and vary depending on the procedure adopted and which Directive applies.

References:

40 C-107/98 Teckal Srl v. Comune di Viano and another; C-324/07 Coditel Brabant SA v. Commune d’Uccle and another; Hamburg Waste (C-480/06 Commission v. Germany). This case law is codified and amplified under the 2014 Procurement Directives, e.g., 2014 Public Contracts Directive, Article 12.
41 Articles 29 and 30.
43 For example, 2014 Public Contracts Directive, Article 27.
44 For example, 2014 Public Contracts Directive, Article 28.
45 For example, 2014 Public Contracts Directive, Article 30.
47 For example, 2014 Utilities Contracts Directive, Article 47.
49 For example, 2014 Public Contracts Directive, Article 32.
50 For example, 2014 Public Contracts Directive, Articles 27 to 31 and 47.
iii Amending bids

Once bids have been submitted, equal treatment and fairness significantly limit the scope for bid amendments.

Under the restricted procedure (and probably the open procedure), authorities may in certain cases seek clarification or allow bidders to correct obvious errors. However, this does not allow negotiation or the submission of what should be viewed as a new tender. The same rule applies to final tenders in the competitive procedure with negotiation or negotiated procedure with advertisement.

The competitive dialogue procedure is slightly more flexible: the authority may, before tender evaluation, request that bids be clarified, specified and optimised. However, this must not involve changes to the essential aspects of the tender or the procedure that are likely to distort competition or have a discriminatory effect. After selection of the winning bid, negotiations are permitted to confirm aspects of the tender and finalise the contract terms, provided the essential aspects are not materially modified and, again, there is no risk of distortion or discrimination.

VI ELIGIBILITY

i Qualification to bid

Authorities may reject bidders at the selection stage where they do not meet certain objectively evaluated minimum standards. They may also restrict the number of bidders invited to the next stage of competition under restricted, competitive dialogue and negotiated procedures. These standards may relate to the bidder’s:

a personal standing (e.g., whether the bidder has been declared insolvent or convicted of money laundering or corruption offences);

b enrolment on a professional or trade register as required in the bidder's state of establishment;

c financial standing; and
d technical and professional ability.

As noted earlier, a bidder may rely upon the technical and professional ability or financial standing of other entities, which could include other members of a bidding consortium or nominated subcontractors.

ii Conflicts of interest

The 2014 Procurement Directives contain express provisions on conflicts of interest. Authorities must investigate possible conflicts of interest where a member of the authority’s award panel is connected with a bidder, although they have some discretion as to how to
deal with such conflicts. Although the Defence and Security Directive does not contain an express provision, the obligation of non-discrimination imposes the same requirements in respect of procurements conducted under it.

Where an economic operator was involved in design work before the start of the award process and then wishes to bid for the contract, it could have a knowledge advantage from having prepared the designs and it could, even without intending to, have influenced the design of the specification or procurement process in such a way as to favour itself. Authorities must consider these issues on a case-by-case basis and permit the economic operator the opportunity to explain why there is no conflict of interest in a given case; a blanket ban on involvement of those with prior knowledge has been held to be disproportionate and in breach of the equal treatment principle.

iii Foreign suppliers

The Directives do not prohibit non-EU suppliers from bidding for public contracts. The GPA requires providers from GPA states to be given the same treatment as is afforded to national providers. Certain types of contracts are outside the GPA, including contracts for health services and defence contracts. Except for central government procurement, which is open to all GPA businesses, other procurements are only open to the extent that the bidder’s home state allows EU undertakings access to government procurement. In addition to the 28 EU Member States, the other GPA states are Armenia, Canada, Hong Kong, Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, the Republic of Moldova, Montenegro, the Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States. A revised and expanded GPA, modernising certain aspects of its rules, entered into force on 6 April 2014.

Special rules apply to utilities for the supply of goods (but not works or services). Where more than half the products (including software in telecommunications network equipment) in a bid are from third countries with which the EU does not have reciprocal agreements and the bid is equivalent in price and quality to an EU bid, then the utility must favour the bid comprising EU products.

EU rules do not currently prevent non-EU access to public procurement, but restrictions may occur at Member State level. In practice, third-country businesses may be able to overcome any protectionist national rules if they bid through a subsidiary established within the EU.

59 For example, the 2014 Public Contracts Directive, Article 24.
60 See T-160/03 AFCon Management Consultants and others v. Commission, which was decided under internal Commission rules but the principles in the case are likely to apply to the Defence and Security Procurement Directive.
61 For example, the 2014 Public Contracts Directive, Articles 41 and 57(4)(f).
62 See joined cases C-21/03 and C-34/03 Fabricom SA v. Belgium, Paragraphs 25 to 36.
VII AWARD

i Evaluating tenders

Authorities may assess bids on the basis of price or cost alone, taking a cost-effectiveness approach, or the best price-quality ratio to determine which is the most economically advantageous tender.

Authorities must disclose, before receiving bids, the criteria that they will use for bid evaluation and the weightings of the criteria chosen. In general, the criteria and weightings should not be changed during the process.

The authority must, if a tender appears to be abnormally low, request explanations from the bidder, and may then reject the abnormally low tender.

ii National interest and public policy considerations

Authorities must act in a non-discriminatory manner; any ‘buy local’ policy is, therefore, unlawful.

Indirect means of discrimination are also prohibited. For example, if the specification is written in a particular way to favour national suppliers, this infringes the requirement of non-discrimination. Therefore, an authority should normally use a national technical specification transposing European standards; it can only use other national standards if there is no European standard.

The procurement may take account of social or environmental considerations, but this must be non-discriminatory and proportionate to the objectives being pursued. Any requirements must be relevant to the contract.

There are limited ‘national interest’ exceptions in the Directives. For example, the Defence and Security Procurement Directive does not apply to contracts for the purpose of intelligence activities or that would oblige the Member State to supply information contrary to the essential interests of its security. These exceptions are narrowly construed.

VIII INFORMATION FLOW

As a result of the principle of transparency, during the procurement process authorities must ensure that they give sufficient information to bidders to enable them properly to understand the authority’s requirements and to ensure a level playing field. They must also disclose the award criteria that they will use to mark bids.

Under the Directives, authorities are required to notify bidders of decisions and supply certain information. When they make an award decision, they must then ‘stand still’ for a

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64 For example, 2014 Public Contracts Directive, Article 67; C-532/06 Emm G Lianakis AE and others v. Dimos Alexandroupolis and others, Paragraphs 36 to 38.
65 For example, 2014 Public Contracts Directive, Article 69.
66 For example, 2014 Public Contracts Directive, Article 42(3), (4) and (5).
67 This is codified in, for example, the 2014 Public Contracts Directive, Articles 18(2) and 56(1), which permit authorities to exclude bidders that do not comply with their obligations in the fields of environmental, social and labour law.
68 See C-448/01 EVN AG and Wienstrom GmbH v. Austria, where the bidder was required to show it supplied volumes of ‘green’ electricity that went far beyond the authority’s actual requirement. The CJEU held this was unlawful.
69 Article 13(a) and (b). See also 2014 Public Contracts Directive, Article 15.
minimum of 10 calendar days before signing the contract.\textsuperscript{70} This period allows unsuccessful bidders time to bring a legal challenge to prevent contract signing if they consider that the award decision is unlawful. Notices of award decisions to bidders must include scores, and a narrative summary of the characteristics and relative advantages of the winning bid.

IX \textbf{CHALLENGING AWARDS}

Challenges to procurement decisions may be brought in the national courts. The cost, complexity and duration of these processes vary considerably from Member State to Member State.

\textbf{i \hspace{1em} Procedures}

Rules governing challenges under the 2014 Procurement Directives are dealt with in the Public Sector Remedies Directive and the Utilities Remedies Directive, with those governing defence in the Defence and Security Procurement Directive itself. The Commission has reviewed the operation of these directives and has concluded that they are generally working well, so they will be maintained in their present form without further change at this stage.\textsuperscript{71}

In this section, the general provisions common to all are considered and referred to as the ‘Remedies Provisions’, but references to article numbers are to articles of the Public Sector Remedies Directive.

Member States must ensure that decisions taken by authorities ‘may be reviewed effectively’,\textsuperscript{72} and ‘as rapidly as possible’, in accordance with the Remedies Provisions.\textsuperscript{73} Member States may decide who is to carry out such reviews (‘review body’). The nature of review bodies varies considerably between Member States, and no bidder should assume that the relevant review body will be the national court. Member States may require that a bidder first seek review with the authority, or that a bidder be required to notify the authority of its intention to seek review.

The review body must be independent of the authority, and the Member State must provide that its decisions can be effectively enforced. If the review body is not the national court, then written reasons for the decision of the review body must be given, and there must be a further right of review by a court that is independent of both the review body and the contracting authority.

The review procedures must be available as a minimum to any person ‘having or having had an interest in obtaining a particular contract’ (i.e., to bidders themselves) who can show that he or she has been or risks being harmed by an alleged infringement. This leaves scope for interpretation of what a risk of being harmed might mean; for example, must the bidder show that, but for the breach, it would have good prospects of being awarded the contract, or merely that it would have had a more than minimal prospect of being awarded the contract?

\textsuperscript{70} For example, Public Sector Remedies Directive, Article 2a.


\textsuperscript{72} See C-440/13 – \textit{Croce Amica One Italia Srl v. Azienda Regionale Emergenza Uscita (AREU)}. The purpose of the review is to ensure that the EU public procurement rules are complied with, so that a simple examination of whether the decision is arbitrary will not suffice.

\textsuperscript{73} Article 1(1).
However, the CJEU has clarified that a bidder who has been definitively excluded from a procedure by an authority (for failure to provide original documentation pertaining to financial standing) can be refused access to a review of the award decision in that procedure.\(^{74}\)

It is for the Member State to decide on the relevant limitation period within which any application for review must be made. However, the right to bring a challenge must remain open after the deadline, where a reasonably well-informed and diligent bidder would only have understood the tender conditions after the authority had explained its decision.\(^{75}\) Member States may set a limitation period for claiming the remedy of ineffectiveness of at least 30 days from publication of a contract award notice and at least six months from the contract being concluded.

Review procedures adopted by individual Member States have been challenged on occasion. This has led the CJEU to consider areas such as court fees, limitation periods and the availability of remedies.

If the Commission considers that a serious infringement of Community law has been committed during a contract award procedure, it will notify the Member State, giving reasons, prior to a contract being concluded.\(^{76}\) The Member State must then either correct the infringement, give a reasoned submission as to why no correction has been made, or suspend the contract award procedure pending a decision as to whether to correct.

### ii Grounds for challenge

The Remedies Provisions say little about the grounds for challenge by bidders, providing simply that infringements of ‘Community law in the field of public procurement or national rules transposing that law’\(^{77}\) can be challenged. This covers breaches of both national rules implementing the Directives and Treaty principles, such as equality, non-discrimination and transparency.

The number of challenges and prospects of success vary considerably from state to state.\(^{78}\)

As noted above, the Commission may invoke a corrective mechanism when it ‘considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure’.\(^{79}\)

### iii Remedies

There are four main types of remedies that must be available to the review body under the review procedures. The first three are;\(^{80}\)

a. interim suspension of the award of the contract pending review by the first instance review body, which must continue at least for the standstill period; the review body’s decision as to whether to uphold this interim suspension can take into account the consequences of the continued suspension for all interests likely to be affected, as well as any public interest;

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\(^{74}\) C-355/15, see footnote 13.

\(^{75}\) C-583/13 eVigilo Ltd v. Priegaisrines apsaugos ir gelbejimo departamentas prie Vidaus reikalu ministerijos.

\(^{76}\) Article 3.

\(^{77}\) Article 1(1).

\(^{78}\) See national chapters for details of numbers and prospects for challenge.

\(^{79}\) Article 3(1).

\(^{80}\) Article 2(1).
The fourth and arguably most powerful remedy is that of ineffectiveness. Ineffectiveness must be available in three situations:81

a. if an authority has illegally awarded a contract without prior publication of a contract notice;

b. if an authority has awarded a contract in breach of the standstill period or suspension of contract award, and a bidder has thereby been deprived of the possibility to complain about some other infringement that has affected the bidder’s chance of obtaining the contract; and

c. where a Member State has permitted award of contracts without a standstill period under a framework or DPS.

Where the ineffectiveness remedy is not available, Member States may provide that once the contract has been concluded the only remedy available is damages.

Member States can provide that the consequence of ineffectiveness is retroactive cancellation of all contractual obligations, or may limit cancellation to future obligations only. If the latter option is chosen, the Member State must provide for the application of alternative penalties. If the general interest is in upholding the contract, so that the review body decides not to declare a contract ineffective, it must provide for alternative penalties.

Alternative penalties have to be effective, proportionate and dissuasive, and must be either the imposition of a fine on the authority, or shortening of the duration of the contract.

X    OUTLOOK

In 2017 we will continue to see national activity across the EU as Member States take steps to facilitate the mandatory transition to electronic procurement in their respective territories for all contracting authorities and all procurement procedures by October 2018. This will include the implementation of electronic communication, electronic submission, electronic auctions and electronic catalogues.

We may see the Commission make a referral to the CJEU of one or more of the 15 Member States that have not transposed one or more of the 2014 Directives and have failed to provide an explanation of the measures taken to transpose the 2014 Directives into their national law.

81 Article 2d.
I INTRODUCTION

In Finland, public procurement is regulated by the Act on Public Contracts and Concessions (the Act on Public Contracts), the Act on Public Contracts by Contracting Authorities in the Water, Energy, Transport and Postal Services Sectors (the Act on Public Contracts in the Utilities Sector) and the Act on Public Contracts in the Fields of Defence and Security. The key national legislation is based on the EU directives on public procurement, specifically the 2014 Public Contracts Directive, the 2014 Utilities Contracts Directive, the 2014 Concession Contracts Directive, the Defence and Security Procurement Directive and the Remedies Directive. The Agreement on Government Procurement (GPA) also applies to public procurement in Finland.

The Ministry of Employment and the Economy is responsible for the preparation of legislation concerning public procurement, while the Market Court is a special court that handles public procurement cases. The Market Court’s rulings in public procurement cases can be appealed to the Supreme Administrative Court. Appeal requires leave to appeal in most cases.

The Finnish public procurement legislation emphasises fundamental principles, which include equality and non-discriminatory treatment of participants. More specifically, the contracting authorities shall make use of the existing competitive conditions, ensure equality and non-discriminatory treatment among all participants in the procurement procedure, and act in a transparent way while meeting the requirements of proportionality.

II YEAR IN REVIEW

The main theme as regards public procurement during 2016 was the legislative reform under which the 2014 Procurement Directives were implemented into Finnish legislation. This large legislative reform came to an end in December 2016 as Parliament accepted the new legislation on public procurement. The new legislation came into force at the beginning of 2017.

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2 1397/2016.

3 1398/2016.

III SCOSE OF PROCUREMENT REGULATION

i Regulated authorities

The concepts of contracting authorities and contracting entities are defined in the Act on Public Contracts. In general, purchases of goods and services or public works contracts with public funds made by the state, municipal authorities, church and public enterprises have to be tendered in accordance with the procurement legislation.

Procurement legislation also applies to bodies governed by public law. A body governed by public law means an entity that has a legal personality and is established for the specific purpose of meeting needs in the general interest, and not having an industrial or commercial character. It must be financed for the most part by another contracting authority, be subject to management supervision by another contracting authority, or have an administrative, managerial or supervisory board with most of its members appointed by another contracting authority.

The Ministry of Employment and the Economy maintains a guiding list on which bodies are considered to be central government authorities. The list can be found on the public online portal, HILMA, on which contract notices are published.

In addition, the procurement legislation applies to any purchaser if it has received more than half of the value of the contract in aid from a contracting authority.

ii Regulated contracts

Public procurement legislation concerns the service, supply or public works contracts the contracting authorities enter into with external suppliers. According to the Act on Public Contracts, public contracts are contracts of financial interest concluded in writing between one or more contracting authorities and one or more suppliers. Service concessions had already been governed by national procurement legislation prior to the 2014 Procurement Directives. Finland’s public procurement legislation also includes specific provisions for healthcare and social services contracts.

There are general exclusions from the scope of public contracts. The Act on Public Contracts does not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the law or when the protection of the basic security interests of the state so require. Further, the Act does not apply to public contracts when their objective is mainly applicable to military use. The Act also does not apply to contracts that are governed by different procedural rules and awarded, inter alia, pursuant to the particular procedure of an international organisation.

In addition, the Act on Public Contracts does not apply to contracts listed in Article 10 of the 2014 Public Contracts Directive.

In Finland, contracts under the applicable national threshold value are excluded from the scope of procurement legislation. The threshold value refers to the estimated value of the contract. National procurements (i.e., procurements the value of which exceeds the national threshold but is below the EU threshold) must be made by competitive tendering procedures, but the process of deciding who shall be awarded a contract is not as strict as in procurements exceeding EU thresholds. Previously, the difference between the procedures was in practice not significant from a bidder’s point of view. However, the new Act on Public Contracts may change this as it provides contracting authorities with even more flexibility and discretion.

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5 www.hankintailmoitukset.fi.
Finland has also adopted national thresholds for social and other specific services listed in Annex XIV of the 2014 Public Contracts Directive as well as for concessions. The national thresholds are €400,000 for social services, €300,000 for other specific services and €500,000 for concessions. If the value of the contract exceeds these national thresholds, the contracts must be made using the EU provisions set out in the Directive for social and other specific services and concessions. Thus, in Finland the threshold for using EU rules in relation to these services and concessions is lower than in the Directive.

The applicable national thresholds from 1 January 2017 are as follows:

<table>
<thead>
<tr>
<th>Contract type</th>
<th>Threshold (€)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goods and services contracts</td>
<td>60,000</td>
</tr>
<tr>
<td>Concessions</td>
<td>500,000</td>
</tr>
<tr>
<td>Contracts for social services listed in Annex XIV of the Public Sector Directive 2014/24/EU</td>
<td>400,000</td>
</tr>
<tr>
<td>Contracts for other specific services listed in Annex XIV of the Public Sector Directive 2014/24/EU</td>
<td>300,000</td>
</tr>
<tr>
<td>Works contracts</td>
<td>150,000</td>
</tr>
<tr>
<td>Design contests</td>
<td>60,000</td>
</tr>
</tbody>
</table>

In the sector for defence and security, the national threshold for goods and services contracts is €100,000 and for works contracts it is €500,000. In the utilities sector, only the EU thresholds apply.

Where the contracting authority wishes to change a contract or transfer a contract to a different supplier, a new bidding procedure may be required. It is established in national law whether a change is to be regarded as material.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Contracting authorities may employ framework agreements and joint procurements or make use of other partnership opportunities available in awarding public contracts in order to reduce the administrative work involved in procurement.

Suppliers for the framework agreement shall be chosen by open or restricted procedures. Contracting authorities may also choose the suppliers for the framework agreement through a negotiated procedure or by awarding the contract directly in exceptional cases. Where a framework agreement is concluded with several suppliers, the contacting authority shall notify in the procurement documents the number of suppliers that shall be selected to the framework agreement. The contracting authority shall select the number of suppliers notified in the procurement documents, unless there are fewer suitable suppliers and admissible bids that meet the award criteria.

Contracts based on framework agreements shall be concluded with the original parties in accordance with the contract decision. The framework agreement may not be used in such a way as to distort, restrict or prevent competition. During the contract term, the parties may not make substantial amendments to the terms laid down in the framework agreement.

Pursuant to the Act on Public Contracts, the term of the framework agreement may not exceed four years, save in exceptional cases duly justified by the subject of the framework agreement.

Central purchasing bodies may be used for acquiring supplies or services intended for the contracting authorities owning them either directly or indirectly, or for awarding public
contracts or concluding framework agreements for supplies, services or works intended for the contracting authorities. The central purchasing body shall operate to perform the aforementioned activities, having been established expressly to perform these activities or been prescribed the performance of these activities as part of its remit.

The largest central purchasing bodies are Hansel Ltd, which is the government’s central purchasing body, and KL-Kuntahankinnat, which is a central purchasing body for the municipalities. The establishment of central purchasing bodies has increased during recent years, especially among the hospital districts and municipalities. In 2015, the value of Hansel’s procurements was approximately €697 million, whereas the equivalent for KL-Kuntahankinnat was approximately €340 million.

ii Joint ventures

There is a specific provision concerning in-house procurements (such as from public-public joint venture companies) in the Act on Public Contracts, which is based on EU case law and the 2014 Public Contracts Directive. According to the Act, parent contracting authorities can make purchases from an in-house entity without a prior procurement process if two requirements are met: (1) the parent contracting authorities exercise sufficient control over the in-house entity; and (2) at most 5 per cent and €500,000 per year of the activities of the in-house entity come from other activities than those carried out in the performance of tasks entrusted to the in-house entity by the controlling contracting authorities. By following a regulated procedure this amount may in certain situations be raised to 10 per cent.

These amounts show that the limit for sales to entities other than the controlling contracting authorities is much tighter than was required in the 2014 Public Sector Directive. Finland has adopted tighter limits for reasons of competitive neutrality.

The same limits as stated above also apply to horizontal cooperation. Horizontal cooperation is regulated in the Act on Public Contracts and the provisions are based on the 2014 Public Contracts Directive. A public authority can supply another public authority without a tendering procedure if the contracting authorities are cooperating and jointly fulfilling their common obligations relating to the public interest. In order for the horizontal cooperation to be acceptable, at the most 5 per cent and €500,000 per year of the services provided within the cooperation can be supplied to entities other than those involved in the cooperation. By following a regulated procedure this amount may in certain situations be raised to 10 per cent.

In the utilities sector the limit for in-house entity sales to entities other than the controlling contracting authorities is higher and corresponds to the limit set out in the 2014 Utilities Contracts Directive. Thus, in the utilities sector this limit is 20 per cent. This also applies to horizontal cooperation in the utilities sector.

As regards public-private partnerships involving the procurement of goods, services (including concessions) or works, the private sector partner has to be competitively tendered when deciding on the partnership. Typically, the negotiated procedure or competitive dialogue is used for this purpose.

V THE BIDDING PROCESS

i Notice

Contracting authorities have to publish a contract notice of all contracts falling into the scope of application of the public procurement acts if no grounds for direct award can be
applied. Contract notices are published on the HILMA website. This obligation covers contracts above national or EU thresholds. Notices are published on HILMA free of charge. Contracting authorities may also publish information in other media or contact potential suppliers directly after the notice has been published on HILMA.

Notices are published by filling in an electronic standard form found on the HILMA portal. In addition to national forms, the portal includes the key standard forms needed for advertising the EU procurements both in the classical and utilities sector. HILMA forwards notices to the TED database. Certain EU notices need to be completed and published via the Simap website. All notices (including old ones) can also be found via the CREDITA website6 (old notices are filed on this website).

ii Procedures

According to the Act on Public Contracts, contracting authorities in contracts above the EU thresholds must follow one of the procedures prescribed in the 2014 Procurement Directives. The requirements for the use of these procedures are in line with the requirements set in the Directives.

In contracts that are above national thresholds but below EU thresholds, the procurement procedure is more flexible. The procedure is at the discretion of the contracting entity provided that the principles of openness, equality, non-discriminatory treatment and proportionality are observed.

In relation to contracts concerning social and other specific services and concessions, the contracts must be made using the EU provisions set out in the 2014 Procurement Directives for social and other specific services and concessions if the relevant national threshold is exceeded. In line with the 2014 Procurement Directives the procurement procedures for these contracts are more flexible than in other EU procurements.

In the utilities sector, qualification systems may also be used. The procedures in the utilities sector follow the 2014 Utilities Contracts Directive rules.

The use of direct award procedures is – in line with the 2014 Procurement Directives – restricted by allowing such procedures only in specified and exceptional circumstances. In addition to the conditions set in the 2014 Procurement Directives, the direct award procedure may be used in individual cases in contracts for social services if the arrangement of a competitive bidding or the change of the service provider would be manifestly unreasonable or particularly inappropriate from the point of view of the client in order to safeguard a significant care or client relationship.

iii Amending bids

The contracting authorities must ensure equal and non-discriminatory treatment of all participants in the procurement procedure. Thus, after submitting the final tender, the bidders cannot make amendments to their tenders. This also means that if the tender includes errors or inconsistencies (for instance, regarding the price), the bidder cannot amend these errors on its own initiative.

The contracting authority may ask a bidder to clarify a tender, provided that this does not endanger the equal and non-discriminatory treatment of the participants. Therefore, clarifications that result in the bidder improving its tender are not allowed. It is at the discretion

6 www.credita.fi.
of the contracting authorities whether they request a bidder to clarify a tender. Case law further clarifies the grounds on which the contracting authorities may ask for clarifications. Only obvious faults may be corrected, and all bidders must be allowed to clarify their tenders in an equal manner. In addition, contracting authorities can make the tenders comparable if one of the tenders includes an obvious and reparable error, such as the quotation of prices in the wrong currency.

The new Act on Public Contracts includes a new provision concerning clarification of tenders. The aim of the new provision is to make the clarifying of tenders possible more often. However, according to the new provision, contracting authorities must always ensure equal and non-discriminatory treatment of tenderers, which sets boundaries for clarifications. Thus it is foreseeable that the new provision will not change the principles stated above.

In Finland, the concept of preferred bidder in negotiations is not referred to in the Act on Public Contracts; thus, no specific rules govern the preferred bidder stage. In practice, a similar procedure can be used in the competitive dialogue and negotiated procedure, where the negotiations can be organised in several phases if this has been clearly described in the contract notice. After the first negotiation round, the candidates can submit their initial tender based on which the contracting authority can choose a ‘preferred tender’. The contracting authority can continue negotiations regarding a potential solution and specifications of the contract with one of the bidders. If the proposed solution does not appear to be viable, the contracting authority may continue negotiations with the rest of the candidates. In practice, use of the described procedure has been rare.

During the negotiation phase, changes to the contract cannot exceed what has been notified in the contract notice. For example, the initial scope of the object of the contract cannot be broadened during the negotiations.

VI ELIGIBILITY

i Qualification to bid

Contracting authorities must exclude a party from a procurement procedure due to criminal offences that correspond to the mandatory exclusion grounds set out in the 2014 Procurement Directives. In addition to the mandatory exclusion grounds set out in the 2014 Procurement Directives, contracting authorities must also exclude a party with a member of an administrative, management or supervisory body or a person who has powers of representation, decision or control therein who has been subject of a conviction by a final judgment related to certain criminal offences within labour law.

The contracting authority may also, at its discretion, exclude a party from a procurement procedure for the following reasons:

a the party is bankrupt or under proceedings for a declaration of bankruptcy, is being wound-up, is undergoing restructuring proceedings or is in any analogous situation;

b the party is guilty of grave professional misconduct, which renders its integrity questionable, and which the contracting authority can demonstrate;

c the party has not fulfilled obligations relating to the payment of taxes or social security contributions in Finland or in the country of its establishment;

d the party has violated environmental, social or employment obligations set in Finnish or EU legislation, collective agreements or international agreements;

e the party has entered into agreements with other economic operators aimed at distorting competition and which the contracting authority can demonstrate;
the party has a conflict of interests that cannot be effectively eliminated by other means;
g the party has participated in the preparations of the procurement in a way that it
distorts competition and the distortion cannot be remedied by other, less intrusive
means;
h the party has shown significant or persistent deficiencies in the performance of a
substantive requirement under a prior public contract, which led to early termination
of that prior contract, damages or other comparable sanctions;
i the party has supplied essentially misleading information or no information regarding
exclusion grounds to the contracting authorities; or
j the party has undertaken to unduly influence the decision-making process of the
contracting authority, to obtain confidential information that may confer upon it
undue advantages in the procurement procedure or to negligently provide misleading
information that may have a material influence on decisions concerning exclusion,
selection or award.

The contracting authorities may set requirements relating to the party’s financial and economic
standing, technical capacity as well as professional ability and quality. All requirements must
be proportional to the subject matter, purpose and scope of the contract. The required
turnover cannot be more than two times the value of the awarded contract. In the defence
sector, the contracting authorities can also set stringent requirements for bidders regarding
information security. The contracting authority may exclude a party if it does not fulfil the
requirements set for the bidder.

According to national case law,7 a bidder can also be excluded if the identity of the
bidder or group of bidders is not distinctly clear. In the case in question, the Supreme
Administrative Court stated that, as the application to bid and the final bid included
contradicting information on several companies, it was not unambiguous who the bidder
company was and whose resources were to be used.

ii Conflicts of interest

The Act on Public Contracts regulates conflicts of interest in several manners. First, the Act
requires that if a candidate or tenderer takes part in the preparation of the procurement
procedure, contracting authorities must ensure that this does not distort competition.
Secondly, the Act gives contracting authorities the possibility to exclude from the procurement
procedure: (1) a party that has a conflict of interest that cannot be effectively eliminated by
other means; and (2) a party that has participated in the preparation of the procurement
procedure in a way that it distorts competition and the distortion of competition cannot be
remedied by other, less intrusive means.

Thirdly, the Act governs conflicts of interest via the principle of equal treatment. Based
on national case law, conflicts of interest arise when the representative of the contracting
authority has commitments, a seat on a committee or a monetary interest in one of the bidder
companies or its closely related subsidiaries. In such a case, the representative should recuse
him or herself from participating in the procurement procedure.8

7 KHO:2015:64.
8 See, for example, MAO:540/13 and MAO:11/11.
iii Foreign suppliers

The principles of equal treatment and non-discrimination set out in the GPA as well as in the Public Procurement Directives must be adhered to. Bidders from the GPA countries are not required to set up a local branch or subsidiary, or to have local tax residence in Finland. If the contracting authorities require the bidder to submit extracts of their trade register or other certificates, the bidder’s local corresponding documentation must be allowed.

VII AWARD

i Evaluating tenders

All tenders are opened simultaneously. In the open procedure, the suitability of bidders and the fulfilment of the obligatory minimum criteria are assessed first. In other procedures, the suitability of the bidders has already been assessed when selecting bidders to participate in the procedure.

Only the compliant tenders are compared and evaluated based on the pre-set criteria. The contract is awarded based on the most economically advantageous tender from the point of view of the contracting authority. The most advantageous tender can be identified on the basis of the lowest price, cost-effectiveness or the best price-quality ratio. It must be clearly stated in the procurement documents which comparison criteria will be used to award the contract as well as each criteria and their relative weighting. If the relative weighting of the comparison criteria is justifiably not possible, the comparison criteria shall be specified in order of importance.

The comparison criteria can relate to qualitative, environmental and/or social aspects and they can include, for example:

a quality;
b price;
c technical, aesthetic, functional and environmental characteristics;
d running costs;
e cost-effectiveness;
f after-sales services and technical assistance;
g the delivery date and delivery period;
h organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract;
i accessibility; or
j life cycle costs.

If the contracting authority uses price as the sole award criterion in contracts other than supply contracts, it must state the reasons for this in the procurement documents or the written report on the procurement. Such reasons cannot be appealed, but stating these reasons is mandatory.

Award criteria shall be linked to the subject matter of the contract in question. This shall be considered to be satisfied when the award criteria relate to the works, supplies or services to be provided under the contract in question in any respect and at any stage of their life cycle.
National interest and public policy considerations

Comparison criteria may relate to environmental and/or social aspects and they may include factors such as environmental characteristics and accessibility. In addition, the contracting authorities may reserve the right to participate in public procurement procedures in favour of sheltered employment programmes where most of the employees concerned cannot engage in occupations under normal conditions. The contract notice must clearly indicate that the contract is reserved for sheltered workshops or programmes.

All bidders must be treated in an equal and non-discriminatory manner, which means that domestic bidders cannot be favoured. If the object of the contract is required to have quality marks or technical specifications, the contracting authorities must accept the bid if the proposed products, services or works comply with a national standard transposing a European standard, a European technical approval, an official technical specification, an international standard or a technical reference, and these specifications address the performance or functional requirements set in the contract notice.

VIII INFORMATION FLOW

In accordance with the principle of equal and non-discriminatory treatment, all bidders must be provided with the same information throughout the procurement process.

Decisions concerning the positions of candidates and bidders and the results of the procurement procedure, including the grounds for the award decision, must be provided in writing by the contracting authority. A decision shall include information about factors that have substantially affected the decision, at minimum the reasons for exclusion of a bidder or tender and the grounds on which accepted tenders have been compared. The decision must include written instructions on how to initiate a correction procedure with the contracting authority itself and on appeal to the Market Court (‘petition instructions’). The award decision and the grounds thereof, as well as the petition instructions, shall be submitted in writing to the parties concerned (i.e., the bidders).

Disclosure obligations and access to information is governed by the Act on the Openness of Government Activities (the Openness Act). Pursuant to the Openness Act, participation requests, tenders and other documents related to the procurement process become public after the procurement agreement has been concluded. However, documents shall be given to other bidders before they are in the public domain, if said documents may influence their rights, interests or obligations in the matter.

Information compiled in public procurement processes relating to a business or professional secret of another bidder is exempted from the publicity principle and shall not be disclosed. However, the total price used in comparison must be provided to other bidders upon request.

The award decision does not in itself constitute a procurement contract, which must be concluded separately in writing. As regards procurements that exceed the EU thresholds, the procurement contract may be concluded no earlier than 14 days after all candidates or bidders have been informed or are deemed to have been informed of the decision and the petition instructions (‘standstill period’).

9 627/1999, as amended.
IX  CHALLENGING AWARDS

i  Procedures

Concerned parties can initiate a correction procedure with the contracting authority and refer a procurement matter to the Market Court. Generally, only bidders that have participated in the tender procedure have been regarded as concerned parties. However, as regards direct awards, parties operating on the same market also have the right to initiate proceedings. Further, in cases where the contracting authority uses discriminatory criteria in the contract notice, parties that have failed to submit a tender due to, for example, a flaw in the contract notice may also be allowed to challenge decisions.

There are two parallel remedies for the bidders: they may initiate a correction procedure with the contracting authority itself and appeal the contracting authority's decision to the Market Court. A party that has submitted an appeal to the Market Court must inform the contracting authority thereof by the date on which the appeal is submitted. In practice, unsuccessful bidders tend to initiate a correction procedure and appeal the award decision to the Market Court simultaneously, as the deadline for both is 14 days after the party has received information about the decision in writing. However, if the award decision or the petition instructions have been substantially deficient, the deadline for filing the petition is six months from the date of the decision. This is also the case concerning direct awards that have been awarded unlawfully.

The contracting authority may also initiate the correction procedure on its own initiative within 90 days from its decision and re-award the contract. The contracting authority must immediately inform parties if a correction procedure has been initiated.

There was an increase in the fees for court proceedings on 1 January 2016. The processing fee is €2,000 for disputes concerning procurements of a value less than €1 million, €4,000 for disputes in which the value of the procurement is at least €1 million and €6,000 if the value of the procurement is at least €10 million. Since 1 January 2016, appeals lodged with the Market Court have decreased rather significantly. This has probably at least partly resulted from the sharp rise in the processing fees. In addition to the processing fees, appellants can expect to pay for their own legal fees and, in cases where an appeal is unsuccessful, part of the counterparty's legal fees. The legal fees are, of course, dependent on the complexity of the case.

Litigation in the Market Court takes six months on average in public procurement appeals. In 2016, the Market Court resolved approximately 400 public procurement matters. Appeals against the rulings issued by the Market Court can be lodged with the Supreme Administrative Court provided that the Supreme Administrative Court grants leave to appeal. A ruling issued by the Market Court can be appealed without leave to appeal if the ruling includes imposing a fine on the contracting entity. Proceedings in the Supreme Administrative Court generally take at least 15 months, and in some cases up to 24 months.

ii  Grounds for challenge

The contracting authority's decision can be challenged on a number of different grounds. The most common grounds for challenge are the following:

a  a bidder's exclusion or lack thereof;

b  the successful bidder was not the one who submitted the most advantageous tender;

c  a procedural fault in the authority's procedure;
the comparison of tenders was inadequate because of the vagueness of or deviation from the selection criteria;

- a public contract has not been subject to public procurement; and

- the procurement procedure has not fulfilled the principle of equal and non-discriminatory treatment.

### Remedies

For procurements not exceeding the EU thresholds, the Market Court may overturn the contracting authority’s decision completely or in part, forbid the contracting authority from pursuing its incorrect procedure and oblige the contracting authority to correct its incorrect procedure. These three remedies are primary, and are used in situations where the procurement contract has not been concluded. The contracting authority’s obligation to correct its incorrect procedure can involve, *inter alia*, re-evaluating the bidders’ suitability, correcting the comparison of tenders or organising a new procurement procedure.

If the procurement contract has already been concluded, the Market Court may order the contracting authority to compensate a bidder that could have been successful had the procurement procedure been handled in accordance with the applicable law. The compensation may not, without special grounds, exceed 10 per cent of the total value of the procurement contract. In practice, the compensation is often considerably lower.

As regards procurements exceeding the EU thresholds and procurements of social and other specific services and concessions exceeding the relevant national thresholds, the Market Court may also set aside or shorten an already concluded procurement contract and order the contracting authority to pay an administrative fine to the state. Contracts exceeding the EU thresholds and contracts concerning social and other specific services and concessions exceeding the relevant national thresholds are also subject to a standstill obligation, which means that the contract may not be concluded if the matter has been referred to the Market Court (‘automatic suspension’).

Despite an appeal to the Supreme Administrative Court, a ruling issued by the Market Court concerning primary remedies shall be complied with unless otherwise instructed by the Supreme Administrative Court. Rulings concerning other remedies shall be complied with when the ruling has become final.

Damages can be sought through separate legal proceedings in civil courts. Such proceedings are, however, very rare in Finland.

### OUTLOOK

In 2017, case law based on the new procurement legislation will start to evolve. Case law will hopefully answer open questions regarding the new legislation and give tenderers and contracting entities reassurance on proper procedures under the new legislative regime.

Strict new in-house provisions will also have an effect on the market. Many in-house entities must reassess their position under the new legislation. Within certain fields, the new in-house legislation will have considerable effects on current structures. This applies especially to the waste sector, in which the need for possible legislative changes is being assessed.

In order to make the transition smoother, a transition period has been adopted regarding the new in-house rules. Within most sectors the strict thresholds for in-house entities’ sales
to other entities than the controlling entities will not have to be applied as a whole until the beginning of 2019. Within social services and other specific services this transition period will continue until January 2022.

The new provisions on horizontal cooperation will also probably have similar effects on the market. Also these provisions include a transitional period until 2019 and 2022.

There is also a comprehensive reform going on in Finland concerning healthcare and social services as well as regional government. This is one of the biggest ever administrative and operational overhauls in Finland. This major reform will also have a significant effect on public procurement practices in the healthcare and social care sector. The aim is to complete the reform by January 2019.
I INTRODUCTION

The new Public Procurement Ordinance\(^2\) and the Concession Ordinance\(^3\) came into force on 1 April 2016. These ordinances transposing the European Directives reshaped the legislation applicable to public procurement contracts and concession contracts. These new regulations take into account the case law of the Court of Justice of the European Union and of the Council of State (the administrative supreme court in France).

Articles 39 and 40 of Law No. 2016-1691 of 9 December 2016 relating to transparency, the fight against corruption and the modernisation of economic life (the Sapin II law) ratify the Public Procurement Ordinance with slight modifications and the Concession Ordinance. This law also empowers the government to codify both of the above ordinances in a new Public Procurement Code.


France retains certain specificities, especially in terms of litigation, as the division of the legal system between the civil courts and administrative courts is not common to all other countries. However, the fundamental principles governing public procurement rules – transparency of procedures, non-discrimination of bidders, equal treatment of offers and the saving of public resources – are in line with the European Directives.

II YEAR IN REVIEW

The key legislation governing government procurement is as follows:

\[a\] Decree No. 2016-247 of 3 March 2016 creating the national department in charge of public procurement contracts of the State and relating to the governance of State purchases, and its implementing administrative order of 10 May 2016;

\[b\] Decree No. 2016-412 of 7 April 2016 relating to the inclusion of energy performance standards in specific public contracts and public procurement contracts;

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1 Vincent Brenot and Emmanuelle Mignon are partners at August Debouzy. The authors would like to express their gratitude to Hélène Billery, counsel at August Debouzy, and Raphael Weiss student at the Paris Bar School, for their valuable contribution to the drafting of this chapter.

2 Ordinance No. 2015-899 of 23 July 2015 relating to public procurement contracts.

3 Ordinance No. 2016-65 of 29 January 2016 relating to concession contracts.
c Decree No. 2016-522 of 27 April 2016 relating to the creation of the administrative department in charge of the funding of public infrastructures and projects;
d Law No. 2016-925 of 7 July 2016 relating to creative freedom, architecture and the protection of heritage;
e the Sapin II law;
f Decree No. 2017-516 of 10 April 2017 containing various provisions relating to public procurement; and
g Ordinance No. 2017-562 of 19 April 2017 relating to public properties.

Among the key case law concerning the French procurement rules in 2016 and early 2017, it is worth mentioning the following:
a a Council of State decision of 30 March 2016 stated that the detailed data of a tender submitted by a selected candidate to the contracting authority should not be disclosed to the other candidates of the public procurement bidding process, as these documents are covered by the obligation of business confidentiality; and
b a Council of State decision of 9 November 2016 determined the conditions under which an international arbitral award rendered in France may be set aside by the internal judge in a dispute relating to a public procurement contract.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The bodies subject to government procurement regulation are the same whether they enter into a procurement contract or a concession contract. There are two kinds of bodies:
a contracting authorities, which include:

- bodies governed by public law (the state, local authorities, national and local bodies governed by public law);
- bodies governed by private law that have been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character and under certain conditions (they are financed, for the most part, by the state, regional or local authorities, or by other bodies governed by public law; or they are subject to management supervision by those authorities or bodies; or they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law); and
- bodies governed by private law created by public contracting authorities to fulfil certain needs they have in common; and

b contracting entities, which include:

- contracting authorities that pursue a network operator activity;
- public undertakings that pursue a network operator activity. Public undertaking means any undertaking over which one or several contracting authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein or the rules that govern it; and

4 Council of State, 30 March 2016, Centre hospitalier de Perpignan, No. 375529.
5 Council of State, 9 November 2016, Société Fosmax LNG, No. 388806.
6 Article 11 of the Public Procurement Ordinance and Article 10 of the Concession Ordinance.
• when they are not contracting authorities or public undertakings, entities governed by private law that operate in network operator activities on the basis of special or exclusive rights granted by a public decision.

ii Regulated contracts

Procurement contracts

Public procurement contracts are contracts for pecuniary interest concluded between one or more contracting authorities or entities and one or more economic operators, and having as their object the performance of works, the supply of products or the provision of services.\(^7\) Public-private partnership contracts are also subject to these rules, and are now considered to be procurement contracts.\(^8\) Public procurement contracts must be clearly distinguished from contracts between two local authorities involving a transfer of legal competences.\(^9\)

Concession contracts

Concession contracts are contracts concluded in writing by means of which one or more contracting authorities or contracting entities entrust the performance of works or the provision and the management of services to one or more economic operators, the consideration for which consists either solely in the right to operate the works or the services that are the subject of the contract, or that right together with payment. The concessionaire shall be deemed to assume the operating risks\(^10\) (i.e., it is not guaranteed, under normal operating conditions, that the investments made or the costs incurred in operating the works or the services that are the subject matter of the concession will be recouped). The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

Temporary occupation permits in the public domain used to be not submitted to any publication or competition rules.\(^11\) However, the Court of Justice of the European Union condemned the automatic renewal of a temporary occupation permit for the operation of tourist or leisure-orientated business activities on state-owned maritime property. According to the Court of Justice of the European Union, this type of permit should be awarded by means of an impartial and transparent selection procedure for potential candidates.\(^12\) Further, the Sapin II law authorised the government to set advertising and competition rules for certain public domain occupancy contracts granted by the state, local governments and their public undertakings.\(^13\) The Ordinance creating these rules was enacted on 19 April 2017.\(^14\)

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7 Article 4 of the Public Procurement Ordinance.
8 Article 4 of the Public Procurement Ordinance.
10 Article 5 of the Concession Ordinance.
12 Court of Justice of the European Union, 14 July 2016, Promoimpresa SRL, No. C-77/16.
13 Article 34 of the Sapin II law.
14 Ordinance No. 2017-562 of 19 April 2017 relating to public properties.
**Defence contracts**

Defence and security contracts are subject to specific provisions in the new public procurement regulations.\(^{15}\)

However, certain defence and security contracts (for instance, contracts classified as being sensitive related to weapons, war materials and intelligence operations) are not caught by procurement rules.\(^{16}\)

**Financial thresholds**\(^{17}\)

Contracting authorities and entities may award a public procurement contract without prior publication or competition whenever the value is below €25,000.

The thresholds for the formalised procedures for public procurement contracts are as follows:\(^{18}\)

\(^a\) contracting authorities:

- supplies and services: (1) for central public authorities listed below (except for defence contracts mentioned in the last bullet point): €135,000; (2) for other contracting authorities: €209,000; and (3) for supplies for public authorities for defence contracts, except for goods mentioned in Annex 4 of Appendix I on European Union offers for the World Trade Organization Government Procurement Agreement: €209,000; and
- works: €5.225 million;

\(^b\) contracting entities:

- supplies and services: €418,000; and
- works: €5.225 million; and

\(^c\) public procurement contracts for defence and security:

- supplies and services: €418,000; and
- works: €5.225 million.

The central public authorities are:

\(^a\) the state;

\(^b\) public establishments of the state that do not have any commercial or industrial character, apart from the health establishments;

\(^c\) independent administrative authorities that have legal capacity;

\(^d\) Caisse des Dépôts et Consignations;\(^ {19}\)

\(^e\) the National Order of the Legion of Honour;

\(^f\) the Union of Public Purchasing Groups; and

\(^g\) the Fondation Singer-Polignac.

The threshold for concession contracts bound by Article 9 1° of the Concession Decree is €5.225 million.

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\(^{15}\) Article 6 of the Public Procurement Ordinance.

\(^{16}\) Article 16 of the Public Procurement Ordinance.

\(^{17}\) All thresholds are indicated excluding taxes.

\(^{18}\) Article 42 of the Public Procurement Ordinance, Notice of 27 March 2016, relating to thresholds.

\(^{19}\) A public group in the service of France's general interest and economic development.
Exceptions
Both Ordinances set out a list of contracts that are excluded from their scope.\textsuperscript{20} Some exceptions concern contracting authorities and contracting entities (real estate, rail transport, financial services, etc.). Others specifically concern contracting authorities (exploitation of electronic communications, postal services, etc.) or contracting entities (contracts concluded by contracting entities in an EU Member State, or in a geographic area identified by a Member State, when the European Commission has acknowledged that, in such state or area, the activity is pursued in a competitive marketplace where access is not restricted).

Specific exclusions deal with public-public partnerships (in-house contracts, cooperation between state entities, and contracts between contracting entities and affiliated enterprises).

Contract variation and contract transfer
Variations are allowed under the conditions set forth by the Decrees.

Both Decrees\textsuperscript{21} set out a list of allowed variations.

An original contract can provide that variations will be allowed. A contract can also be modified if variations become necessary, but only when a contractor substitution is impossible and would cause a major drawback. A contract can also be modified in the event of unforeseen circumstances. Unsubstantial variations are also possible, so long as they do not change the global shape of the contract or its main financial balance. Considered to be unsubstantial variations are costs increases that do not exceed 10 per cent of the original contract amount for supplies and services, 15 per cent for works and 10 per cent for concession contracts.

Both Decrees allow transfers under certain conditions:\textsuperscript{22} in accordance with a sunset clause or an option set out in the initial contract, or following a restructuring operation if such transfer does not cause any substantial modification of the initial contract. Apart from these two options, transfers are not allowed by the Decrees.

IV SPECIAL CONTRACTUAL FORMS
i Framework agreements and central purchasing
Central purchasing allows contracting authorities and entities to call on a buyer who works as a centralised purchaser and can purchase supplies or services, or conclude a procurement contract for works, supplies or services to the benefit of such contracting authorities or entities.

Central purchasing is caught by the procurement rules.

Contracting authorities and entities who call on central purchasing agencies are deemed to have satisfied the procurement rules for publication and competition. However, they remain liable for the award of contracts and their performance when they undertake them.

Contracting authorities and entities can also call on a central purchasing agency for procurement contracts related to defence and security.\textsuperscript{23}

\textsuperscript{20} Articles 14 to 20 of the Public Procurement Ordinance and Articles 13 to 19 of the Concession Ordinance.
\textsuperscript{21} Articles 139 and 140 of the Public Procurement Decree and 36 and 37 of the Concession Decree.
\textsuperscript{22} Articles 139 of the Public Procurement Decree and 36 of the Concession Decree.
\textsuperscript{23} Article 27 of the Public Procurement Ordinance.
Contracting authorities and entities can create a consortium to conclude joint procurement contracts. The constituting act of the consortium defines the appropriate rules. It can allow one or several of its members to lead the procurement procedure or the contract performance on behalf of all members.

ii Joint ventures

A public contract awarded by a contracting authority to a legal entity governed by private or public law shall fall outside the scope of both Ordinances where all of the following conditions are fulfilled (in-house contracts):

a the contracting authority exercises over the legal entity control that is similar to the control that it exercises over its own departments; and

b more than 80 per cent of the activities of the controlled legal entity are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal entities controlled by that contracting authority; and

c there is no direct private capital participation in the controlled legal entity, with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert a decisive influence on the controlled legal person.

A contract concluded exclusively between contracting authorities shall fall outside the scope of the procurement regulations if the contract establishes or implements cooperation between the contracting authorities to ensure that the public services they have to perform are provided with a view to achieving objectives they have in common. The implementation of that cooperation should be governed solely by considerations relating to the public interest, and the contracting authorities perform on the open market less than 20 per cent of the activities concerned by the cooperation.

In all other cases, a contracting authority can supply another contracting authority if the contract is submitted to a prior tendering procedure. However, if, aside from its public service mission, a contracting authority wishes to take over an economic activity, it must act within the limits of its competence and also demonstrate a public interest than can be justified by the lack of private initiative. The contracting authority or entity must not take advantage of its specific status.

Public-private partnerships must comply with the rules set out for procurement contracts, and are also bound by specific rules under the Public Procurement Ordinance.

Before resorting to a public-private partnership contract, the contracting authority or entity must conduct a prior evaluation that justifies the need for such contract. In case of termination or cancellation of the public-private partnership pronounced by the judge, the contractor can be compensated of the expenses incurred for the performance of the contract provided such expenses have been ‘useful’ to the contracting authority, including financing costs.

24 Article 28 of the Public Procurement Ordinance.
25 Article 17 of the Public Procurement Ordinance and Article 16 of the Concession Ordinance.
26 Article 18 of the Public Procurement Ordinance.
29 Article 39 of the Sapin II law amending Article 89 of the Public Procurement Ordinance.
Where the private partner handles in whole or in part the project design, the project manager in charge of the design and monitoring of the works must be mentioned in the public-private partnership contract.30

A private co-contractor should not be caught by the procurement rules when buying. However, its subcontractors must first be approved by the contracting authority or entity.31

V THE BIDDING PROCESS

i Notice

With regard to public procurement contracts awarded following a formalised procedure, a call for tender is published by the contracting authority or entity in the Official Journal of the European Union or the Official Gazette for public procurement contracts, or both, as well as, optionally, in another publication, depending on the nature of the contracting authority or entity. Below the thresholds of the formalised procedure, publication in the Official Gazette for public procurement contracts or in a legal newspaper when the amount of the contract is superior or equal to €90,000 is mandatory for certain contracting authorities or entities. When the amount of the contract is below €90,000 for certain contracting authorities or entities, and below the thresholds of the formalised procedure for the other contracting authorities or entities, publication is made according to the characteristics of the contract.

With regard to concessions, the contracting authority or entity must release a concession notification. For concessions exceeding €5.225 million (excluding tax), the contracting authority advertises in the Official Journal of the European Union, the Official Gazette for public procurement contracts or in a legal newspaper and in a specialised newspaper in accordance with the economic area of the contract. Below this threshold, the contracting authority only advertises in the Official Gazette for public procurement contracts or in a legal newspaper.

ii Procedures

The Public Procurement Ordinance sets out various tendering procedures when the contract value exceeds the thresholds:32

a an open or restricted procedure when the contracting authority or entity chooses the economic operator that scores the highest, without any prior negotiation and based on objective criteria;

b a competitive procedure with negotiation when the contracting authority negotiates the contract terms with economic operators;

c a negotiated procedure with prior competition when the contracting entity negotiates the contract terms with economic operators; and

d a competitive dialogue when the contracting authority or entity enters into a dialogue with candidates admitted to the procedure to find an appropriate solution to its needs and the tender specifications.

30 Article 39 of the Sapin II law amending Article 69 of the Public Procurement Ordinance.
31 Article 62 of the Public Procurement Ordinance.
32 Article 42 of the Public Procurement Ordinance.
The buyer can award the contract following an adapted procedure if the contract value is below the thresholds.

The buyer can award the contract with no prior publication or competition if the amount of the contract is below €25,000.

The tendering procedures also apply to public-private partnerships. However, as mentioned above, before concluding a public-private partnership contract, the contracting authority or entity must conduct a prior assessment showing that such contract allows a better balance sheet regarding the projects’ characteristics, the public service requirements, the general interest that will be achieved or the challenges encountered in similar projects.

The new administrative department in charge of funding public infrastructures and projects also advises the public project holders. This department controls every prior assessment for projects implemented by the state or local authorities. The elected members of a local authority that has signed a public-private partnership contract with an economic operator must be properly informed of the exact costs incurred for the performance of works.

Regarding concession contracts, the contracting authority or entity can choose its tendering procedure as long as it guarantees open access to that procedure, equality between the candidates and the transparency of the procedure.

The contracting authority or entity can limit the number of candidates admitted to the tendering procedure by using non-discriminatory criteria related to the purpose of the contract and the aptitude of the candidates.

The contracting authority or entity can award the contract following a negotiated procedure with one or more bidders.

Public procurement contracts, and in strictly construed cases, concession contracts, can be awarded with no prior publication or competition when they can only be awarded to one specific economic operator, when there were no bidders or when all bids were inappropriate.

In any case, communications between the contracting authority or entity and economic contractors are encouraged to use the electronic route, but this goal has not yet been fully achieved. Defence and security procurement contracts are not bound by this obligation.

### Amending bids

The contracting authority or entity is allowed to amend the rules governing a procedure as long as competition is not affected, and the changes are necessary for the procedure or for the future performance of the contract. Equality between all candidates must be ensured, and candidates must be allowed an additional period of time to amend their bid if necessary.

Once the bids are filed, it is difficult to amend the rules governing the tendering procedure, and only minor adaptations are allowed.

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33 Article 66 of the Public Procurement Ordinance.
34 Decree No. 2016-522 of 27 April 2016 relating to the creation of the administrative department in charge of the funding of public infrastructures and projects.
35 Council of State, 11 May 2016, Rouveyr, No. 383768.
36 Article 43 of the Public Procurement Ordinance and Article 37 of the Concession Ordinance.
38 Administrative Court of Appeal of Paris, 4 March 2004, Garde des Sceaux, Ministre de la Justice, No. 02PA03885.
VI ELIGIBILITY

i Qualification to bid

Parties will be disqualified from bidding on the following grounds applicable to procurement and concession contracts:39

a they are economic operators that are under final condemnation for certain offences mentioned by the Ordinances;
b they are economic operators that have not filed their tax or social report, or that have not paid their taxes or social contributions;
c they are economic operators that are under judicial liquidation, that are subject to personal bankruptcy or a prohibition to administer, or that are admitted to a legal redress procedure;
d they are economic operators that have been convicted for certain employment law breaches; or
e they are economic operators that are under administrative or judicial contract exclusion.

Some grounds for disqualification are only applicable to defence and security contracts against the following parties:40

a economic operators that are under final condemnation for certain offences mentioned in the French Criminal Code, the French Defence Code or the French Homeland Security Code;
b economic operators whose civil liability has been committed within the past five years by a final court order condemning their ignorance of their commitments in terms of security; or
c economic operators that are found to be not reliable enough to avoid security breaches for the state.

Parties may also be disqualified from bidding on the following grounds:41

a they are economic operators that have had to pay damages for severe violation of their contractual obligations within the past three years;
b they are economic operators that had an undue influence on the decision-making procedure of the contracting authority or entity;
c they are economic operators whose participation in the procurement procedure elaboration led them to have access to certain information that may have affected competition; or
d they are economic operators under suspicion of participation in a cartel.

Economic operators must supply, along with their application, a sworn statement that they do not fall into the scope of some of these disqualifications. This sworn statement is a sufficient proof of the eligibility of the candidates. The contracting authority or entity no longer needs to ask the judicial authority to provide an extract of the judicial record of the candidate.42

39 Article 45 of the Public Procurement Ordinance and Article 39 of the Concession Ordinance.
40 Article 46 of the Public Procurement Ordinance and Article 40 of the Concession Ordinance.
41 Article 48 of the Public Procurement Ordinance and Article 42 of the Concession Ordinance.
42 Article 39 of the Sapin II law amending Article 45 of the Public Procurement Ordinance.
However, the contracting authority or entity can exceptionally allow an economic operator in one of the above situations to participate in the procurement procedure for overriding reasons relating to a major general interest.\(^{43}\)

In some of the above situations, economic operators may also demonstrate that they are once again trustworthy.

### ii Conflicts of interest

Economic operators that can cause a conflict of interest can be excluded from the tendering procedure when there is no other possible way to address such conflict.

A conflict of interest is defined by the Ordinances as:

\[
\text{[...] a situation where an economic operator that participates in the tendering procedure or can influence the procedure has a financial or economic interest or any other personal interest that could jeopardise its impartiality or independence in the tendering procedure.}^{44}\]

### iii Foreign suppliers

Foreign suppliers outside the EU can bid as long as they comply with the French procurement rules.

Regarding public procurement contracts, the contracting authority or entity may exclude an operator registered in a country whose public procurement contracts are not open to foreign operators.

Regarding concession contracts, in the field of defence and security, these contracts are earmarked for EU operators if they are not part of an international trade agreement. However, the contracting authority or entity may decide to open the procedure to foreign operators. In such a case, it indicates in the contract notice if the procedure is open to foreign operators and the accessibility criteria that the foreign economic operators should fulfil.\(^{45}\)

### VII AWARD

#### i Evaluating tenders

The Public Procurement Decree indicates that the contracting authority or entity can rely on the price for supplies and services contracts alone; or take into account various non-discriminatory criteria concerning the contract purpose, its qualitative aspects, and environmental and social criteria. These criteria are presented in the notice, the invitation to bid or the procurement documents. The purchasers must deploy all means to identify and reject the abnormally low tenders.\(^{46}\)

The Concession Decree indicates that, when evaluating a bid, the contracting authority or entity must take various non-discriminatory criteria into account, such as the price, environmental and social criteria, and innovation.

Whenever the concession contract value exceeds €5.225 million (excluding tax), the contracting authority or entity must fix the criteria in decreasing order, and this order is

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\(^{43}\) Article 47 of the Public Procurement Ordinance and Article 41 of the Concession Ordinance.

\(^{44}\) Article 48 of the Public Procurement Ordinance and Article 42 of the Concession Ordinance.

\(^{45}\) Article 20 of the Concession Decree.

\(^{46}\) Article 39 of the Sapin II law amending Article 53 of the Public Procurement Ordinance.
disclosed to bidders in the procurement documents.\textsuperscript{47} Exceptionally, the order can be modified by the contracting authority to take an innovating bid into account. However, such criteria must be non-discriminatory.\textsuperscript{48}

In all cases, the contract is awarded to the bid offering the best value for money.\textsuperscript{49}

The Public Procurement Ordinance requires contracting authorities and entities to disclose the awarded bid and the data regarding the contracts.\textsuperscript{50} The Concession Ordinance requires contracting authorities and entities to disclose the awarded bid.\textsuperscript{51}

\subsection*{ii National interest and public policy considerations}

European legislation forbids discrimination based on candidates' nationality inside the EU.

Contracting authorities and entities can use criteria based on environmental or social considerations.

Both Ordinances allow contracting authorities and entities to reject a bid regarding a defence and security contract when the tooling, supplies, IT equipment, staff, knowledge and supply sources are located outside of the EU, and when the candidate does not provide sufficient assurances to ensure the satisfactory performance of the contract.\textsuperscript{52}

\section*{VIII INFORMATION FLOW}

During the tendering procedure, the information provided to candidates must comply with certain fundamental principles:

\begin{itemize}
  \item[a] the communication of the content of a draft contract must be accurate;\textsuperscript{53}
  \item[b] the information must be delivered in a straightforward manner without any ambiguity;\textsuperscript{54}
  \item[c] the information must be comprehensive: legal documents provide that the criteria must be ranked, but case law has added the requirement that sub-criteria shall also be ranked if they influence selection of candidates and bids;\textsuperscript{55} and
  \item[d] the criteria must be understandable.\textsuperscript{56}
\end{itemize}

Candidates must be treated equally by a contracting authority or entity regarding information disclosure.

Confidentiality prevents a contracting authority or entity from communicating confidential information, such as secret information regarding industrial and commercial matters, or information that could harm fair competition between candidates.

However, the contracting authority or entity can ask candidates to disclose certain confidential information that has been specifically named.\textsuperscript{57}

\begin{thebibliography}{99}
\bibitem{47} Article 27 of the Concession Decree.\textsuperscript{47}
\bibitem{48} Article 27 of the Concession Decree.\textsuperscript{48}
\bibitem{49} Article 52 of the Public Procurement Ordinance and Article 47 of the Concession Ordinance.\textsuperscript{49}
\bibitem{50} Article 56 of the Public Procurement Ordinance.\textsuperscript{50}
\bibitem{51} Article 48 of the Concession Ordinance.\textsuperscript{51}
\bibitem{52} Article 51 of the Public Procurement Ordinance and Article 45 of the Concession Ordinance.\textsuperscript{52}
\bibitem{53} Council of State, 29 July 1998, \textit{Commune de Léognan}, No. 190452.\textsuperscript{53}
\bibitem{54} Council of State, 19 October 2001, \textit{Région Réunion}, No. 234298.\textsuperscript{54}
\bibitem{55} Council of State, 18 June 2010, \textit{Commune de Saint-Pal-de-Mons}, No. 337377.\textsuperscript{55}
\bibitem{56} Court of Justice of the European Union, 29 July 2001, \textit{SIAC Construction}, No. C-19/00.\textsuperscript{56}
\bibitem{57} Article 44 of the Public Procurement Ordinance and Article 38 of the Concession Ordinance.\textsuperscript{57}
\end{thebibliography}
Unsuccessful bidders must be notified by the contracting authority or entity.\textsuperscript{58}

When concession contracts exceed €5,225 million (excluding tax), the Decree on concession contracts provides that the contracting authority must notify unsuccessful bidders and justify the rejection. A standstill period of 16 days (11 in the case of an electronic notification) is mandatory before the contracting authority is allowed to sign the contract.\textsuperscript{59}

When a procurement contract exceeds the thresholds (formalised procedure), the Decree related to procurement contracts sets a similar standstill period.

\section*{IX CHALLENGING AWARDS}

\subsection*{i Procedures}

Pre-contractual emergency proceedings are under the jurisdiction of the president of the administrative tribunal or the president of the civil court, depending on the nature of the contract (i.e., administrative or civil). In any case, pre-contractual emergency proceedings involve only economic operators that have an interest in concluding the contract. This means that economic operators whose social purpose is linked to the contract’s object are deemed admissible to conclude such contract and therefore lodge a complaint, irrespective of whether they took part in the tendering procedure.\textsuperscript{60}

Such emergency proceedings must be brought before the court prior to the contract being signed, and based on an infringement of the procurement rules related to publication and competition. Judgments are issued within 20 days.

Contract emergency proceedings are also under the jurisdiction of the president of the administrative tribunal or the president of the civil court. The economic operators that can be involved are the same as the ones targeted in the pre-contractual emergency proceedings. However, an economic operator can only bring such action if it has unlawfully been deprived of the possibility to file pre-contractual emergency proceedings. In this case, the following situations are targeted: the claimant was not able to bring pre-contractual emergency proceedings, or it did bring such proceedings but the contracting authority or entity nevertheless signed the contract. Judgments are issued within one month.

In 2014, the Council of State created an appeal process to challenge the validity of contracts that allows interested third parties and unsuccessful candidates to challenge the contract’s validity.\textsuperscript{61} ‘Favoured third parties’, such as prefects and members of the deliberating bodies of local collectives, do not have to prove an interest to act: their grade is sufficient to give them interest to act.

On the contrary, other third parties and unsuccessful candidates need to show that their interests are prejudiced by the contract or the procurement procedure in a direct and clear way.

Such appeals have to be brought before the administrative court within a two-month period after the signature or publication of the award notice of the contract. Judgments are generally issued within 24 months.

\begin{footnotes}
\item[58] Article 51 of the Public Procurement Ordinance and Article 48 of the Concession Ordinance.
\item[59] Article 29 of the Concession Decree.
\item[60] Council of State, 8 August 2008, \textit{Région Bourgogne}, No. 307143.
\item[61] Council of State, 4 April 2014, \textit{Département du Tarn-et-Garonne}, No. 358994.
\end{footnotes}
ii Grounds for challenge
Regarding pre-contractual emergency proceedings, only grounds relating to the publication and the competition of the procurement procedure are allowed. The grounds must have prejudiced the claimant. The judge needs to verify whether the grounds invoked by the claimant have prejudiced him or her and favoured a competitor, depending on the stage of the procurement procedure they are related to.

   Regarding contract emergency proceedings, only grounds stated in Article L 551-18 of the French administrative procedures code can be applied:

a breach of the publication principles;

b breach of the competition rules;

c breach of the standstill obligations; and

d breach of the introduction of pre-contractual emergency proceedings.

Concerning an appeal challenging the contract’s validity, a distinction has to be made depending on the claimant: ‘favoured third parties’ can rely on any ground, but other third parties and unsuccessful candidates can only rely on grounds that have a direct impact on their prejudice.

iii Remedies
Pre-contractual emergency proceedings judges can grant injunctions for the contracting authority or entity to start over all or part of the procurement procedure, or let the claimant know on what specific ground they have rejected its bid; the judge can also postpone a contract signature until the claimant has been informed on the rejection ground, and he or she can finally cancel the procurement procedure and revoke illegal provisions in the tender documents.

   The contract emergency proceedings judge can cancel the contract, terminate it, reduce its duration, or impose a financial penalty upon the contracting authority or entity.

   In an appeal challenging the contract’s validity, the judge is not bound by the concluding remarks of the claimant. The judge can only terminate or cancel the contract if there is a particularly serious breach in the contract that cannot be legalised. Otherwise, he or she can modify some provisions, rule in favour of the continuation of the contract or award damages.

X OUTLOOK
As mentioned above, the Sapin II law empowers the government to codify the Public Procurement and Concessions Ordinances within 24 months in a new Public Procurement Code. This Code should ease the understanding and the application of the rules. However, contracting authorities and entities, economic operators and judges are barely getting used to the new rules of the Ordinances. Still, they will have to adapt to the future Public Procurement Code in a rather short term.

63 Council of State, 3 October 2008, Syndicat mixte intercontinental de réalisation et de gestion pour l’élimination des ordures ménagères du secteur est de la Sarthe (SMIRGEOMES), No. 305420.
64 Council of State, 19 January 2011, Grand port maritime du Havre, No. 343435.
66 Article L 551-20 of the French Code of Administrative Procedure.
Chapter 11

GERMANY

Olaf Otting, Udo H Olgemöller and Christoph Zinger

I INTRODUCTION

German procurement law is based on both European and national law. It is characterised by a complex set of regulations, which have changed due to the implementation of the New EU Directives. The modified procurement rules came into force on 18 April 2016.

The award of contracts with an estimated value equal to or exceeding the thresholds established by European law is subject to the rules stipulated by the European directives. These directives were enacted into the German legal system in 1999 in the Act Against Restraints of Competition (GWB). The GWB reaffirms the procurement principles deriving from the EU directives such as competition, equal treatment and transparency. In addition, the new GWB emphasises the principle of proportionality. In accordance with the European directives, the contracting entity is defined as well as the public contract. The GWB also lists the exemptions from the applicability of procurement rules, including the exemption applicable to cooperation within the public sector. Following amendments in 2016, the GWB now contains basic stipulations with regard to specifications for tenders, qualification of bidders and the award of contracts. Finally, the GWB governs the review procedures.

Based on the GWB, a number of acts of delegated legislation came into effect that were significantly amended during the modernisation of procurement law last year. German procurement law consists of a complex set of regulations composed of not only statutes, but also ordinances and even rules established by non-governmental bodies. Furthermore, German law limits the applicability of these rules strictly to contracts exceeding the thresholds; for contracts below the European thresholds, procurement rules are based on budgetary law and differ between the various federal states.

Besides the GWB, the most relevant regulation is the Ordinance on the Award of Public Contracts (VgV), which has been modified significantly to implement the New Directives into German law. The former version of the VgV contained only a few details on the award procedures, but basically declared applicable the procurement rules established by non-governmental committees. With regard to the award of public works contracts with an estimated value equal to or exceeding the European threshold, this is still the case. The award of those contracts is subject to the second section of the Regulation on Contract Awards for Public Works Contracts – Part A (VOB/A). With respect to contracts that are not public works contracts, the second section of the Regulation on Contract Awards for Public Supplies and Services Contracts – Part A (VOL/A) used to apply. Due to the modernisation process,

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the procurement rules for the award of those public contracts are now set out in the VgV. The second section of the VOL/A as well as the specific regulations for the award of service contracts that are performed by architects and other providers of independent professional services (VOF) no longer exist.

The award of contracts in the water, energy and transport sectors is regulated by the Ordinance on the Award of Public Contracts by Entities operating in the Water, Energy and Transport Sectors (SektVO). At the same level, the Ordinance on the Award of Public Contracts by Contracting Authorities or Entities in the Field of Defence and Security (VSVgV) stipulates specific rules transforming the Defence Directive. However, for public works contracts, the VSVgV refers to the third section of VOB/A.

The award of contracts with an estimated value below the European thresholds is governed by national budget law. Generally, this requires the competitive award of contracts and procedures in accordance with rules that are specified in the first section of VOB/A and VOL/A. Since the budget law applies to public authorities only, companies and utilities are not regulated. A contract notice in the Official Journal of the European Union (OJEU) is not mandatory. The effective review procedures governed by the GWB do not apply.

During the past few years, an increasing number of federal states have enacted additional procurement laws seeking to ensure compliance with social and environmental standards (and a minimum wage in particular), and in some cases the federal states have also established additional rules on procedures that apply to the award of contracts both below and above the thresholds.

In accordance with the New Directives, public service concessions are subject to German procurement law. They must be awarded in compliance with the regulations in the Ordinance on the award of Public Concessions. Where exemptions apply (e.g., in the field of water supply), the fundamental rules of the Treaty on the Functioning of the European Union (TFEU) have to be observed. Public service concessions in the field of public transport are to be awarded pursuant to Regulation (EC) No. 1370/2007. The German Public Transport Code (PBeG) establishes rules with respect to the award of public service contracts as well as public service concessions on public passenger transport services.

II YEAR IN REVIEW

The past year was dominated by the efforts to apply and to construe the new German procurement laws and regulations that have been enacted with effect from 18 April 2016. In practice, it turned out that things have changed rather from a formal than from a material perspective. Some instruments that have been introduced recently in Germany attracted specific attention such as the ex ante notification on the direct award of contracts which obliges interested companies to initiate formal proceedings within 10 days after the notification in the OJEU. Another topic of recent discussions is the opportunity to oblige a new service provider to take over the employees of the previous service provider in the field of public passenger transport services by rail. However, there has been interesting case law on the ‘classic’ issues of the procurement laws on the design of award criteria. The German procurement review bodies and courts took a more restrictive approach than the CJEU and demanded a precise description on the assessment process which restricts any discretion and flexibility of the assessment of the final bids.

As regards market sectors, the public passenger transport sector again showed a number of judicial review procedures filed against the award decisions on high-volume and
long-lasting contracts on regional railways services; railway undertakings, in particular those with a foreign mother company, are continuously entering the German market. The energy sector still provides for a number of concessions on the operation of municipal and regional distribution networks. Increasing competition in the field of ground handling services at airports triggered a number of judicial review procedures with a view to the award of relevant service concessions. However, these procedures are subject to the German Regulation for Ground Handling Services at Airports (BADV), which transposes Council Directive 96/67/EC into German law. These provisions provide for a sector-specific tender regime insofar that neither the EU procurement directives nor the German public procurement laws apply.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

In accordance with the New Directives, central, regional and local authorities or their associations must comply with the procurement rules. These rules also apply to bodies ‘governed by public law’ in terms of the New Directives. However, according to the definition of such bodies in the New Directives, these bodies may also be separate legal entities set up under German company law, like a company with limited liability (GmbH), if these companies are directly or indirectly controlled by a public authority, financed by public funds and established for special purposes of general interest that they pursue in a non-commercial manner. Public procurement rules also apply where the contracting authority is (indirectly) financed by public authorities.

Municipal housing companies may qualify as contracting authorities3 but a Chamber of Industry and Commerce has not been considered to be a contracting authority even though it has been established by the state.4 The Utilities Directive does not apply to postal services in Germany. Natural or legal persons under private law may be contracting authorities if they receive public funds, for example for civil engineering projects or for building hospitals. Religious bodies and entities controlled by the church do not qualify as contracting authorities.

As a consequence of the New Directives, a private company that is granted a public works concession is no longer subject to the procurement rules.

Below the European thresholds, procurement rules pertain to entities that must comply with the public budget law.

ii Regulated contracts

The award of public works contracts is subject to the procurement law, as is the award of public supply and service contracts. The same applies to public works concessions and public service concessions, with special rules laid down in Regulation (EC) No. 1370/2007 regarding concessions in the field of public transport. The award of public service concessions and contracts with an estimated value below the European thresholds may be subject to the procurement principles deriving directly from the TFEU. Utilities do not have to award contracts serving purposes other than sectoral activities.

4 VK Sachsen, 12 November 2015, case 1/SVK/033-15.
The specific regulations in the field of defence and security cover the award of contracts that have been excluded from these rules before on the basis of an excessive interpretation of Article 346 TFEU. In the healthcare sector, contracts between public health insurance funds and the pharmaceutical industry on discounts granted to the funds play an economically important role and have resulted in a number of complex procurement procedures. The Higher Regional Court of Düsseldorf referred a preliminary ruling to the Court of Justice of the European Union (CJEU) on the question of whether the open-house-model constitutes a public contract.5 The open-house-model is a contract concluded between a public health insurance company and a producer of pharmaceuticals, and this contract is open to every producer who is interested in delivering the same products on the basis of the same conditions.

Amendments to an existing contract may require the re-tendering of that contract. This is, typically but not only, given where the volume of the contract shall be increased. The German practice and review bodies are guided by the new Article 132 GWB, which transposes Article 72 of Directive 2014/24/EC and the CJEU’s case law.6

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Contracting authorities and entities may conclude framework agreements in terms of the European directives. According to German case law, bidders may challenge, in particular, a decision to put out to tender framework agreements with a duration exceeding the regular duration of four years. According to the new legislation, framework agreements may be concluded for all types of works and services. This had been doubted by some review bodies under the previous legislation: the GWB did not mention framework agreements.

Generally, contracting authorities and entities are entitled to accumulate their needs and to purchase the required works, services and supplies jointly.7 However, even in such cases of joint procurement, it is mandatory to consider the principle of dividing contracts into lots in order to enforce the interests of small and medium-sized companies. The new legislation now also provides for the possibility of joint procurement procedures by entities based in different Member States of the EU.

ii Joint ventures

Public-private partnerships must comply with procurement law. Where public contracts are to be awarded in such structures, contracting authorities must choose their partner by way of a regular procurement procedure. The joint venture itself must comply with the procurement law if it is to be qualified as a contracting authority or entity.

With regard to public-public partnerships, the CJEU’s in-house concept has been the prevailing point of interest for years.8 The rules on in-house contracts, first ruled on in the Teckal case,9 are set out in Article 108 GWB, which implements the provisions provided by the New Directives 1:1. Neither contracts awarded between subsidiaries (or sub-subsidiaries) controlled by the same authority nor ‘bottom-up contract awards’, where the controlled

5 CJEU case C-410/14.
6 CJEU case C-454/06.
7 VK Bund, 27 July 2016, case VK 2-63/16.
8 Higher Regional Court of Düsseldorf, 2 November 2016, case Verg 23/16, or CJEU case C-553/15.
9 CJEU case C-107/98.
entity awards a contract to the parent company, are subject to German procurement law. In addition, cooperation among public authorities falls outside the scope of the procurement law under specific preconditions. However, this may not be interpreted as a general exemption from the procurement rules in the public sector. In any case, an entity that is awarded a contract may perform only up to 20 per cent of similar activities on the open market, and any cooperation must be governed by a public common interest.

V THE BIDDING PROCESS

i Notice

Notices on contracts having an estimated value equal to or above the European thresholds are to be published in the OJEU. Additionally, pursuant to national or state regulation, the award of contracts may have to be notified on further websites (e.g., www.bund.de). The award of contracts below the thresholds is to be notified in the local or specialised press, on the above-mentioned websites, or both. Generally, contracting authorities must ensure that contracts with a cross-border interest are published in a way that attracts cross-border attention.

ii Procedures

The course of procurement procedures to be followed by contracting authorities is regulated precisely in the procurement regulations VgV and VOB/A. They define open procedures, restricted procedures, negotiated procedures and competitive dialogue. Electronic purchasing systems, particularly electronic auctions and electronic catalogues, are introduced by Articles 25 and 27 VgV but are not yet very common. The very strict priority of open procedures has been removed from the GWB, and German procurement law now stipulates the freedom to choose between open and restricted procedures in accordance with the New Directives. The requirements for the negotiated procedure are the same as for the competitive dialogue. The general exemption for specific services has been replaced by a new flexible regime for social and similar services. The new regime applies to the procurement of social and other specific services listed in Annex XIV of Directive 2014/24/EU where the contract value is above a higher threshold of €750,000. The Directive leaves the procedural provisions up to the Member States. German law refrains from inventing a new procedure, but Article 130 GWB offers the freedom to choose between the common procedure, the open, restricted and negotiated procedures and the competitive dialogue. Procurement procedures carried out by utilities are regulated by the SektVO, which follows a more flexible approach and allows, in particular, the utility free discretion to choose between open, restricted and negotiated procedures and, newly, competitive dialogue. Specific rules for contracts in the field of defence and security are laid down in the VSVgV and the third section of VOB/A; contracts may be awarded in restricted and negotiated procedures and competitive dialogues, but not in open procedures. Article 5(3) of Regulation (EC) No. 1370/2007 stipulates flexible guidelines with regard to contracts falling under the

10 CJEU case C-51/15, Piepenbrock.
11 CJEU case C-318/15.
scope of that provision, specified by the rules laid down in the PBefG and the European Commission’s Communication on interpretative guidelines concerning Regulation (EC) No. 1370/2007 on public passenger transport services by rail and by road.12

iii  Amending bids

In open and restricted procedures, bidders are not entitled to amend their bids when the time limit for receipt of tenders has expired. Queries of contracting authorities seeking to clarify the tenders are allowed but may not lead to amendments of the bids. Negotiated procedures are more flexible. The entire content of the contract is subject to negotiations as long as its identity is not changed, which means that the essential characteristics of the contract cannot be amended without a new notice of the newly defined contract. However, after reception of the final and binding offer, renegotiations with only one of the bidders are not allowed. If the contracting authority intends to do so, the negotiations must be reopened with all bidders due to the principle of fair and equal treatment. Where, in a negotiated procedure, subsequent stages take place to reduce the number of tenders, each decision on an amendment of the content of the contract must avoid the discrimination of bidders that have been excluded from the procedure previously. This may require either a limitation of the scope of negotiations to amendments that have no potential influence on the bidder’s ranking, or the readmittance of rejected bidders.

VI ELIGIBILITY

i  Qualification to bid

The criteria to qualify to bid are equivalent to European directive standards. Bidders must first demonstrate that exclusion grounds do not apply. German law differentiates between mandatory grounds (Article 123 GWB) and grounds that may justify an exclusion depending on the discretion of the authority (Article 124 GWB). In accordance with Article 122 GWB, bidders must prove their suitability to pursue the professional activity, their economic and financial standing as well as their technical and professional ability. Under a recently introduced regulation, the minimum yearly turnover that tenderers are required to have shall not exceed two times the estimated contract value. Bidders may rely on the qualification of third parties, regardless of the legal nature of the link the bidder has with them. However, recent German case law emphasises that the bidder must disclose the fact that he or she wants to rely on the capacities of other entities.13 Otherwise, the bidder should be excluded from participation in the procurement procedure. Aiming to promote small and medium-sized companies, German procurement law emphasises that groupings of candidates and tenderers must be treated equally to individual competitors. Nonetheless, in cases where companies join forces by establishing a grouping, they must respect the restrictions stipulated by the antitrust regulations. If a bid is incomplete, it does not have to be excluded from the procedures in each case. Since the amendment of the procurement rules in 2009, candidates and bidders may complete or explain minor defects, but in some cases it is at the contracting authorities’ discretion whether to let parties make use of this opportunity. They must make use of their discretion in a non-discriminatory way. Companies that compete regularly

12 OJEU 2014 C 92/1.

13 VK Westfalen, 25 February 2016, case 1 VK 1/15.
for public contracts may apply for a listing on pre-qualification registers. A reference to a pre-qualification register may replace the submission of evidence in each case. Furthermore, bidders can now prove their qualification by providing the European Single Procurement Document (ESPD) as preliminary evidence. The contracting authority may ask tenderers at any moment during the procedure to submit all or part of the supporting documents. According to German law, the ESPD is not mandatory in procurement procedures, but may be used by bidders in every case (and, if so, must be accepted as preliminary evidence). Alternatively, German law provides for the possibility to make use of self-declaration instead of producing evidence of eligibility.

Infringing bidders may demonstrate that they have taken measures to regain their reliability by means set out in Article 125 GWB. Companies that have infringed the law – in most cases, competition or antitrust rules – may clarify the facts and circumstances by actively collaborating with the investigating authorities and by taking concrete technical, organisational and personal measures that are appropriate to prevent further criminal offences or misconduct. Article 125(1) GWB stipulates the necessity to prove that the company has compensated any damage caused by the criminal offence or misconduct.

Recent case law has repeatedly confirmed that companies have large discretion on the decision to enter into an ad hoc cooperation aimed at submitting a common bid.¹⁴

ii  Conflicts of interest

German procurement law stipulates specific rules for persons excluded from acting on behalf of the contracting authority: Article 6 VgV lists cases where grounds exist to justify fears of prejudice due to a conflict of interest (such as acting for one of the bidders). Article 42 VSVgV provides the same rules in the field of defence and security, and Article 6 SektVO for utilities. Apart from that, in accordance with the CJEU’s Fabricom case,¹⁵ candidates and bidders who have advised or otherwise supported the contracting authority or entity before the commencement of the award procedure must be excluded if their advantages cannot be compensated otherwise.

iii  Foreign suppliers

Contracting authorities and entities can accept bids from foreign suppliers provided they comply with the qualification criteria. A local branch or subsidiary is not necessary except where markets have not yet been completely libered on the European level, such as the railway sector (see Article 14 of the German Railway Code). Where service contracts are put out to tender, contracting authorities and entities often prefer tenders offering availability on short notice. Thus, it may be advantageous to promise to establish an office or a branch onsite in the event of being awarded a contract. In any case, such award criterion must be notified transparently to the bidders.

¹⁴ Higher Regional Court of Düsseldorf, 1 July 2015, case Verg 17/15; Higher Regional Court of Saarbrücken, 27 June 2016, case 1 Verg 2/16.
¹⁵ CJEU case C-21/03, C-34/03.
VII AWARD

i Evaluating tenders

Basically, tenders are evaluated in a four-step procedure. First, tenders must comply with the formal requirements. Time limits must be observed as well as all further formal requirements. Tenderers are not allowed to deviate from any conditions established by the contracting authority or entity; these conditions can only be amended within negotiated procedures or as far as they are challenged by objections and review procedures. Second, the qualification of the bidder is to be verified. Third, tenders offering an abnormally low or high price may be excluded. Fourth, the remaining tenders are to be evaluated against the award criteria cited in the notice or in the tender documents in accordance with the notified weighting.

Article 127 GWB now explicitly states that a contract must be awarded to the bid with the most advantageous relationship between price and quality. However, the lowest price may still be the only criterion. Alternatively, various criteria of relevance to the subject matter of the contract (quality, price, etc.) may be defined, allowing the contract to be awarded to the most economically advantageous tender (best value for money). Recent German case law tends to very strict requirements on the transparent and sufficiently precise definition of award criteria.\textsuperscript{16} Contrary to previous German case law, the new Article 35(2) VgV allows for variations in the bids even if the price is the only criterion. Another current debate regards the compliance of German regulations on prices and fees (e.g., for architects) with European law.

Principally, criteria for the selection of candidates cannot be reused as award criteria; German case law even anticipated the Lianakis CJEU decision of 24 January 2008.\textsuperscript{17} In March 2015, the CJEU ruled in Ambisig that where a contract is intellectual in nature, it is the abilities and experience of the team proposed that is decisive for the evaluation of the professional quality of the team, and that a contracting authority is entitled to take quality into account as an award criterion.\textsuperscript{18} The CJEU distinguished Lianakis from the present case on the basis that the Lianakis case concerned the staff and experience of the tenderer in general, whereas this case concerned the staff and experience of the persons making up the particular team proposed to perform the contract. In line with Ambisig and the New Directives, the VgV now allows consideration of the organisation, and the qualifications and the experience of the team, where this seems to be appropriate for selecting the most economically advantageous tender. This applies to all types of contracts, not only to service contracts.

A bidder is entitled to present two or even more offers if its offers differ from each other in technical or qualitative terms and not only in terms of price. Affiliates of the same company may tender for the same public contract where Chinese walls ensure that such affiliates do not know of the content of the competing entity’s bid.

ii National interest and public policy considerations

The protection of national interests justified the refraining from competitive award procedures in the field of defence and security for a long time. This field has been cut back considerably as a result of the Defence Directive and its enactment into German procurement law. However, contracts that are declared secret in accordance with the German legal and administrative

\textsuperscript{16} Higher Regional Court of Düsseldorf, 2 November 2016, Verg 25/16; less strict CJEU case C-406/14.
\textsuperscript{17} CJEU case C-532/06, Lianakis; cf. BGH, 8 September 1998, case X ZR 109/06.
\textsuperscript{18} CJEU case C-601/13, Ambisig.
provisions are not subject to procurement law, and the same applies to contracts falling within the scope of Article 346 TFEU. Specific rules on the security of information set forth in the VSVG enact the equivalent provisions of the Defence Directive. First experiences have been gained in a complex negotiated procedure for the procurement of German navy vessels.

Compliance with measures that aim at ensuring data privacy (no-spy requirements) may be demanded by contracting entities if this is required by the matter of the contract in question.19

In consequence of the principles of non-discrimination and equal treatment, contracting authorities and entities are not entitled to favour local or domestic suppliers.20 In practice, cross-border tenders are rare. This may be due, inter alia, to language barriers, since most procurement procedures are carried out in German. Nevertheless, at least regarding contracts having an estimated value equal to or above the European thresholds, contracting authorities and entities are not allowed to require that products comply with national standards or quality marks; only compliance with European standards can be required.

Environmental considerations have become more important in recent years. Green procurement can be pursued, for example, by defining mandatory features of products or by setting award criteria favouring eco-sensitive products. For example, carbon dioxide emissions must be an award criterion if public supply contracts on cars are put out to tender. Moreover, in accordance with Article 31(2) VgV, contracting authorities may lay down special conditions relating to the performance of a contract such as eco-friendly specifications of breakdown vehicles where contracting authorities tender out relevant service contracts. The conditions governing the performance of a contract may, in particular, concern environmental considerations. Where contracting authorities award contracts with specific environmental, social or other characteristics, they may require compliance with the standards of specific labels as proof that the bidders meet the requirements.

Article 31(2) VgV covers social considerations as well. Based on this provision, the federal states have enacted an increasing number of procurement laws that require that tenderers guarantee to pay minimum wages defined in these procurement laws. An example is the procurement law of the federal state of North Rhine-Westphalia, which came into effect on 1 May 2012. This requires, inter alia, evidence of tenderers proving that they promote women or require a statement that products used in the bidder’s supply chain comply with international labour rules (ILO Standards). It was quite controversial whether these requirements are in compliance with European law. The CJEU’s case law sets limits to such regulations in a case where subcontractors from other EU Member States were concerned,21 whereas the CJEU ruling of 14 September 201522 generally confirmed that the provisions for minimum wages are in line with European law.

VIII INFORMATION FLOW

Since contracting authorities and entities are obliged to carry out a fair and transparent procedure, they must inform candidates and bidders on the intended course of the procedure. If a request for participation shall be rejected, the candidate is to be notified. Most notably, all

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19 Higher Regional Court of Düsseldorf, 21 October 2015, case 28/14.
20 Reconfirmed, e.g., by Higher Regional Court of Koblenz, 20 April 2016, case Verg 1/16.
21 CJEU case C-549/13.
22 CJEU case C-115/14.
bidders must be notified of the outcome of the procedure. It is a legal obligation to inform the unsuccessful bidders of the name of the successful competitor, the reasons for the rejection of their tenders and the earliest date of the conclusion of the contract (Article 134 GWB). A violation of that obligation and the following standstill period of at least 10 days may lead to the ineffectiveness of the award of a contract (Article 135 GWB). Specific obligations to ensure confidentiality of information apply in the field of defence and security.

IX CHALLENGING AWARDS

i Procedures
Candidates and bidders are able to challenge procurement procedures only if they can invoke the violation of regulations on the award of public contracts that are to protect their rights. The undertaking must demonstrate its interest in the contract, a non-compliance with the relevant rules and that the violation prejudices its expectations to be awarded the contract. Before initiating a review procedure, the bidder must have notified the alleged violation to the contracting authority or entity by way of an objection. Article 160(3) GWB stipulates on these objections, first of all severe time limits. Non-compliance with these requirements leads to the inadmissibility of a subsequent application to the review bodies. In particular, candidates and bidders are obliged to object to potential violations of the procurement rules within 10 days of their becoming aware of that violation. This deadline was newly introduced, as the former rule that bidders had to object ‘without undue delay’ was probably not in line with European law. A company that challenges an allegedly unlawful direct award of a contract has to evidence its ability to bid for that contract.

First instance review bodies are the procurement review chambers. They are part of the administration, and not of the judicial branch. Their decisions are subject to an immediate complaint. At the second instance, the higher regional courts of the federal states are competent. The German Federal High Court is not established as a regular third instance. This Court is involved solely if a higher regional court wishes to deviate from a decision of another higher regional court. If necessary, either the higher regional court or the Federal High Court is obliged to request the CJEU’s preliminary ruling pursuant to Article 267 TFEU.

Below the European thresholds as well as beyond the scope of European directives, said review procedure established by the GWB does not apply. The civil or administrative courts must be invoked where undertakings intend to avoid alleged violations of their rights. However, with increasing regularity the courts require that undertakings must notify alleged violations in compliance with the severe requirements set out by Article 160(3) GWB.

ii Grounds for challenge
Procurement procedures can be challenged by candidates and bidders who allege violations of the procurement law, given that the violated provisions seek to protect the applicant’s rights. Principally, all provisions of the German procurement law grant the right to undertakings to demand compliance with the law. For example, bidders can invoke violations of the provisions restricting the economic activities of municipalities set by the municipal codes of the federal states. Companies may also challenge a decision to award a contract directly in

23 CJEU case C-406/08.
violation of the duty to put that contract out to tender. The wide range of provisions allowing review procedures to be initiated led to about 750 review procedures in 2014, with a success rate of around 21 per cent.

iii Remedies
Where review bodies decide that the applicant’s rights were violated, they are entitled to take suitable measures to remedy the violation of rights and to prevent any impairment of the interest affected (Article 168 GWB). In most cases of successful proceedings, parts of procurement procedures must be repeated taking into account the review body’s legal opinion (e.g., correction of the evaluation of the tenders). Contracts that have been awarded cannot be set aside except in two cases: either the contract was awarded after the beginning of the review procedure, or the contract was awarded directly without any legal justification. According to current case law, undertakings can even prevent the award of contracts below the European thresholds or beyond the scope of the European directives, but details are still controversial. However, undertakings may claim damages either regarding the costs accrued by them during their participation in an unlawful procurement procedure or – in exceptional cases – regarding their losses due to an unlawful award to a competitor.

X OUTLOOK
A major topic on the agenda of the contracting authorities remains the upcoming obligation to organise the tender procedure entirely by electronic means. The electronic submission of tender notices and the obligation to make the tender documents available electronically – which have both been mandatory since 18 April 2016 – have neither required greater investments nor caused material hurdles in the daily operations. Now it is a much bigger challenge to carry out the entire procedure including the correspondence with the bidders via databases or electronic market spaces.

In March 2017, the German government published a draft bill on the introduction of a public register aimed at the protection of competition on public contracts and concessions. This register shall be established on the federal level and list companies that have violated certain commercial and social criminal laws or that have committed related administrative offences. The register will make it easier for contracting authorities to assess whether a bidder is eligible or not.

In February 2017 the federal government published a new Regulation on the award of public contracts below the European thresholds. It is expected to be formally enacted in the course of 2017 at least on the federal level and that most of the 16 federal states will adopt these rules as well.

The potential impact of the federal election in September 2017 on the public procurement legal framework is not yet predictable. The outcome of these elections may, however, have effects on large-scale procurement efforts that have been initiated by the current government in the field of defence and security where, for example, competitive and non-competitive procedures on the purchase of about 10 warships are pending and where a €500 million contract on the new standard rifle of the German army was announced.
Chapter 12

GHANA

Divine Kwaku Duwose Letsa and Elizabeth Ashun

I INTRODUCTION

All procurement in Ghana that is chargeable by government institutions to public funds\(^2\) is regulated by the Public Procurement Act 2003 (Act 663) (the Act).\(^3\) Ghana is not a party to the World Trade Organization Agreement on Government Procurement. However, some of the underlying principles have been incorporated into the Act. The Act applies to all government ministries, departments and agencies, and to contracts in the defence and utilities sectors.

The body responsible for government procurement policy and for enforcing compliance is the Public Procurement Authority (the Authority). The Authority is mandated under the Act to ‘regulate, assess and ensure full compliance’ by all entities. Additionally, the Authority is to harmonise the processes of public procurement in the public service to secure a judicious, economic and efficient use of state resources in public procurement. Its functions are premised on four key principles: fair competition, integrity, transparency and non-discrimination in public procurement.

The following guideline policies have been issued by the Public Procurement Board (the Board), which is the governing body of the Authority:

\(a\) Guidelines for Margins of Preference, PPB Policy 12/06/2006. The broad objective for applying margins of preference is to assist the local business community to become competitive and efficient suppliers to the public sector. The margin of preference is applicable to goods, services and works.

\(b\) Guidelines for Single Source Procurement Using Public Funds Already Approved by Parliament, PPB Policy 6/24/2006. The Act requires institutions to secure approval from the Board before they adopt single-source procurement. The Minister of Finance and Economic Planning (the Minister) issued guidelines on 17 September 2004 to explain the process for single-sourcing applications.

\(c\) Draft Guidelines For Framework Agreements, Public Procurement Authority 10/16/2008. A framework agreement, also known as a ‘blanket purchase agreement’, is one that establishes the general terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

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1 Divine Kwaku Duwose Letsa is a partner and Elizabeth Ashun is a senior associate at Bentsi-Enchill, Letsa & Ankomah.

2 ‘Public funds’ include the Consolidated Fund, the Contingency Fund and such other public funds as may be established by Parliament.

3 The Public Procurement Act 2003 (Act 663) was amended by the Public Procurement (Amendment) Act 2016 (Act 914).
Foreign Currency Use in Ghana: Bank of Ghana Announcement, PPA Public Affairs 10/22/2012, Pricing, Advertising and Receipt or Payment for Goods and Services in Foreign Currency in Ghana. This advises the public to desist from unauthorised dealings in foreign currency, and reminds the public that the cedi is the only legal tender in Ghana, and that the US dollar and any other foreign currency are not legal tender in Ghana.

II YEAR IN REVIEW

In March 2016, the Act was amended by the Public Procurement (Amendment) Act 2016 (Act 914) (the Amendment Act), which came into effect on 1 July 2016. The Authority indicated in a statement that ‘the Act had to be amended to propel public procurement into a second generation of reform and to streamline bottlenecks identified over a decade of implementation’. The amendments include:

a. the removal of the discretion given to the Minister to decide that it is in the national interest to use different procurement procedures from those provided under the Act;
b. a re-categorisation of government institutions to include some organisations that were initially not covered;
c. an increase in the thresholds across reconstituted board and procurement entities to ensure efficient administration of the increased thresholds;
d. decentralised procurement in line with the government’s decentralisation policy;
e. the dissolution of all tender review boards, with the exception of the Central Tender Review Board to reduce administrative costs and enhance efficiency; and
f. enabling provisions for policy initiatives such as sustainable public procurement, framework contracting and electronic procurement.

Ministries, departments and agencies will continue to seek concurrent approval from the Central Tender Review Committee, while the metropolitan, municipal and district assemblies will use the newly created Regional Tender Review Committee.

The conflict of interest provisions in the Act have been elaborated so that the procurement entity shall request for quotations from as many suppliers or contractors as practicable, but shall compare quotations from at least three different sources that should not be related in terms of ownership, shareholding or directorship and the principles of conflict of interest shall apply between the procurement entities and their members and the different price quotation sources. The Act now also specifically stipulates that a procurement entity in conducting procurement shall be guided by further procedures specified in manuals, regulatory notices and guidelines issued by the Authority.

The Act now empowers the Authority to charge specifically for processing fees for single source and restricted tendering applications.

Procurement issues have arisen in a number of breach of contract suits in which judgment was awarded against the state. The enforcement of the judgment against the state has thrown into the public domain the efficacy and integrity of the public procurement process, and in particular the roles played by public officials and suppliers. A lively public
debate has also been provoked concerning the circumstances under which single sourcing may be resorted to or abused, and the circumstances in which a procurement process may be terminated and with what consequences.\footnote{Attorney General v. Alfred Agbeshi Woyome (Suit No. OCC/43/1); Alfred Agbeshi Woyome v. Attorney General (Suit No. RPC/152/10); Isofoton SA v. The Attorney General [24/04/2012] Suit No. BC 24/09.}

It was noted in the press in March 2017 that the Authority is to pilot an electronic procurement system before the end of 2017 in its mission to help enhance transparency in the tendering and awarding of contracts by public institutions. As part of the pilot, six state institutions have been earmarked for the process, including the Volta River Authority, Social Security and National Insurance Trust and Ghana Cocoa Board. The e-procurement system is expected to be an end-to-end system, comprising e-notifications, e-catalogues, e-options, e-tendering, e-registration, e-attestation and contract/project management features. The Authority will also begin the implementation of an electronic monitoring process in the award of contracts and tenders. The Authority has also established a value for money audit team to undertake due diligence and a value for money audit on all procurement processes before final approval is given.

The Public Private Partnership Bill, 2016 (the PPP Bill 2016) seeks to establish a legal framework for the development, implementation and regulation of public-private partnership (PPP) arrangements and projects between public institutions and private entities for the provision of public infrastructure and services. The PPP Bill 2016 has gone through its second reading, granting it safe passage into the consideration stage for the discussion and approval of proposed amendments by Parliament. The PPP Bill 2016 when passed into law is likely to affect public procurement in Ghana.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The following bodies are affected by the government procurement rules:

a central management agencies;

b government ministries, departments and agencies;

c subvented agencies;

d governance institutions;

e state-owned enterprises to the extent that they utilise public funds;

f public universities, public schools, colleges and hospitals;

g the Bank of Ghana and financial institutions including public trusts, pension funds, insurance companies and building societies that are wholly owned by the Republic or in which the Republic has a majority interest;

h institutions established by government for the general welfare of the public or community;

i statutory funds, commissions and other bodies established by the government for a special purpose; and

j the phases of contract administration as specified in the contract administration manuals.
ii Regulated contracts

The following contracts are regulated by the Act:

\( a \) the procurement of goods, works and services, financed in whole or in part from public funds;

\( b \) functions that pertain to the procurement of goods, works and services, including the description of requirements and sources of supply, selection and award of contracts and the phases of contract administration;

\( c \) the disposal of public stores, vehicles and equipment; and

\( d \) procurement with public funds including loans procured by the government, grants, foreign aid funds and internal generated funds, except where the applicable grant or concessionary loan or external loan and commercial facility to the government provides the procedure for the use of the funds. However, such terms shall be subject to the prior review and ‘no objection’ of those procurement procedures by the Authority.

The Act does not regulate transfers of land.

There are no special rules for procurement in the utilities, defence and security sectors. However, the Act provides that, subject to approval of the Board, a procurement entity may undertake procurement in accordance with established commercial practices if the procurement entity is legally and financially autonomous and operates under commercial law, it is beyond contention that public sector procurement procedures are not suitable considering the strategic nature of the procurement, and the proposed procurement method will ensure value for money, provide competition and transparency to the extent possible.

This provision is said to be one of the most controversial in the Act and is more prone to abuse, in that it could be used to avoid going through a tender process, and a corrupt motive is often attributed to this.

Financial thresholds below and above which contracts are not regulated are set out under the Second, Third and Fifth Schedules of the Act. Thresholds are grouped under the method of procurement, thresholds for ministries, departments and agencies (approving authority) and thresholds for regional coordinating councils and metropolitan, municipal and district assemblies (approving authorities).

### Thresholds for procurement methods

<table>
<thead>
<tr>
<th>Procurement method/advertisement</th>
<th>Contract value threshold</th>
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<tbody>
<tr>
<td>Mandatory pre-qualification</td>
<td></td>
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<tr>
<td>(a) Goods</td>
<td>Above 10 million cedis</td>
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<tr>
<td>(b) Works</td>
<td>Above 15 million cedis</td>
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<tr>
<td>(c) Technical services</td>
<td>Above 5 million cedis</td>
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<tr>
<td>International competitive tender</td>
<td></td>
</tr>
<tr>
<td>(a) Goods</td>
<td>Above 10 million cedis</td>
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<tr>
<td>(b) Works</td>
<td>Above 15 million cedis</td>
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<tr>
<td>(c) Technical services</td>
<td>Above 5 million cedis</td>
</tr>
<tr>
<td>National competitive tender</td>
<td></td>
</tr>
<tr>
<td>(a) Goods</td>
<td>Above 100,000 and up to 10 million cedis</td>
</tr>
<tr>
<td>(b) Works</td>
<td>Above 200,000 and up to 15 million cedis</td>
</tr>
<tr>
<td>(c) Technical services</td>
<td>More than 50,000 and up to 5 million cedis</td>
</tr>
<tr>
<td>Restricted tendering</td>
<td>Subject to approval by the Board</td>
</tr>
<tr>
<td>Single source procurement and selection</td>
<td>Subject to approval by the Board</td>
</tr>
<tr>
<td>Procurement method/advertisement</td>
<td>Contract value threshold</td>
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<tr>
<td>Price quotation</td>
<td></td>
</tr>
<tr>
<td>(a) Goods</td>
<td>Up to 100,000 cedis</td>
</tr>
<tr>
<td>(b) Works</td>
<td>Up to 200,000 cedis</td>
</tr>
<tr>
<td>(c) Technical services</td>
<td>Up to 50,000 cedis</td>
</tr>
<tr>
<td>Consultancy services – no threshold limits</td>
<td>The Authority Manual should be referred to for the procedure for the procurement of all of the consultancy services (a) to (f). With respect to procurement by single source of a consultancy service, approval is required from the Authority</td>
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</tbody>
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<tbody>
<tr>
<td>(a) Quality-based selection</td>
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<tr>
<td>(b) Quality and cost-based selection</td>
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<tr>
<td>(c) Consultant's qualification</td>
</tr>
<tr>
<td>(d) Fixed based selection</td>
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<tr>
<td>(e) Least cost selection</td>
</tr>
<tr>
<td>(f) Individual consultant</td>
</tr>
<tr>
<td>(g) Single Source</td>
</tr>
</tbody>
</table>

### Thresholds for ministries, departments and agencies – approving authority

<table>
<thead>
<tr>
<th>Goods</th>
<th>Approving authority</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Central Tender Review Committee</td>
</tr>
<tr>
<td></td>
<td>Category A &amp; B</td>
</tr>
<tr>
<td>Goods</td>
<td>Above 1 million cedis</td>
</tr>
<tr>
<td>Works</td>
<td>Above 15 million cedis</td>
</tr>
<tr>
<td>Services</td>
<td>Above 1 million cedis</td>
</tr>
<tr>
<td>Goods</td>
<td>Above 800,000 cedis</td>
</tr>
<tr>
<td>Works</td>
<td>Above 1.5 million cedis</td>
</tr>
<tr>
<td>Services</td>
<td>Above 800,000 cedis</td>
</tr>
<tr>
<td>Goods</td>
<td>Above 400,000 cedis</td>
</tr>
<tr>
<td>Works</td>
<td>Above 800,000 cedis</td>
</tr>
<tr>
<td>Services</td>
<td>Above 400,000 cedis</td>
</tr>
<tr>
<td>Goods</td>
<td>Above 200,000 cedis</td>
</tr>
<tr>
<td>Works</td>
<td>Above 400,000 cedis</td>
</tr>
<tr>
<td>Services</td>
<td>Above 200,000 cedis</td>
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</tbody>
</table>

### Thresholds for regional coordinating councils and metropolitan, municipal and district assemblies approving authorities

<table>
<thead>
<tr>
<th>Goods</th>
<th>Approving authority</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Regional Tender Review Committee</td>
</tr>
<tr>
<td></td>
<td>Category F1: regional coordinating councils</td>
</tr>
<tr>
<td>Goods</td>
<td>Above 750,000 cedis</td>
</tr>
<tr>
<td>Works</td>
<td>Above 1 million cedis</td>
</tr>
<tr>
<td>Services</td>
<td>Above 750,000 cedis</td>
</tr>
<tr>
<td>Goods</td>
<td>Above 550,000 cedis</td>
</tr>
<tr>
<td>Works</td>
<td>Above 750,000 cedis</td>
</tr>
<tr>
<td>Services</td>
<td>Above 550,000 cedis</td>
</tr>
<tr>
<td>Goods</td>
<td>Above 400,000 cedis</td>
</tr>
<tr>
<td>Works</td>
<td>Above 550,000 cedis</td>
</tr>
<tr>
<td>Services</td>
<td>Above 400,000 cedis</td>
</tr>
</tbody>
</table>

The Act provides for procurement methods other than competitive tendering. These include:

a. where the requirement is of a specialised nature or has requirements of public safety or public security, the requirement is of an urgent nature or the number of potential...
suppliers is limited, or where an open competitive tender has failed to bring an award of contract, the restricted tendering method of procurement is used. Restricted tendering is a tendering process by direct invitation to a shortlist of pre-qualified, pre-registered or known suppliers and is subject to a specific approval by the Board;

\( \text{b} \) when it is not feasible for the procurement entity to formulate detailed specifications for the goods or works or, in the case of services, to identify their characteristics or where the character of the goods or services are subject to rapid technological advancements, two-stage tendering is used. Two-stage tendering is a method of procurement where a procurement entity invites tenderers in the initial stage to contribute to the detailed specification of goods. Following reviews and consultations, new detailed specifications are prepared and a restricted tender issued in the second stage to all participants who were not rejected in the first stage;

\( \text{c} \) where exceptional circumstances exist such as goods, works or services are only available from a particular supplier or contractor, or if a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and a reasonable alternative or substitute does not exist; where there is an urgent need for the goods, works or services and engaging in tender proceedings or any other method of procurement is impractical due to unforeseeable circumstances giving rise to the urgency which is not the result of dilatory conduct on the part of the procurement entity, or where national security considerations are paramount, single source procurement is used. It is a method of procurement from a supplier without competition and can only be used with the approval of the Board and additionally after public notice and time for comment where procurement from a particular supplier or contractor is necessary in order to promote a policy such as a socio-economic or local content policy and procurement from another supplier or contractor cannot promote that policy; and

\( \text{d} \) where there is an established market for goods or technical services that are not specially produced or provided to the particular specifications of the procurement entity and for goods where there is an established market if the estimated value of the procurement contract is less than the thresholds in the Act, a request for quotations method is made. This is based on comparing price quotations obtained from several suppliers, usually at least three, to ensure competitive prices.

Where there are significant variations to contracts, it is likely a competitive tender of the varied contract will be required.

A contract may allow the procurement entity to modify the contract’s value by a predetermined percentage when this is in the public interest and essential for the work of the procurement entity. All other amendments to costs, quantities, time periods and other terms and conditions of the contract must be approved by the relevant approving authority and confirmed in a formal contract amendment or addendum.

Except in cases of extreme urgency, where there will be an aggregate increase in the original amount of the contract by more than 10 per cent of the original price, a procurement entity must inform the appropriate tender review committee in the case of a contract subject to review by the tender review committee of the proposed extension, modification or variation order with reasons.
In the case of contracts that are not originally subject to review by a tender review committee, a proposed modification of a contract that will make the revised contract price exceed the procurement method threshold or the threshold of the procurement entity shall be cleared with the appropriate tender review committee.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements

In order for the Act to meet international standards and the UNCITRAL Model Law on public procurement, the Act now provides for framework contracting, where the Board, in consultation with the Minister, may introduce framework contracting agreements and other methods for any specific entity where the context permits until it is possible to do so nationally; and a procurement entity may engage in a framework agreement procedure in accordance with regulations or guidelines issued by the Board.

The Ministry of Health is leading ongoing supply chain reforms designed to improve efficiency in the entire health sector supply chain and has recently used framework contracting as part of the ongoing reforms for the procurement of essential medicines.

ii Joint ventures

PPPs

PPPs are bound by the procurement rules.

Joint ventures of public and private sector partnerships are currently regulated by the National Policy on Public Private Partnerships approved by the Cabinet in June 2011. However, some joint ventures are regulated by the Act. Private parties in PPPs have questioned why their procurements should be made under the Act. They argue that since the special purpose vehicle established by the PPP is not strictly a government entity they should not be bound merely because of the public entities' shareholding, especially if such a share is not significant.

It is the government’s policy to encourage the use of PPPs as a means of leveraging public resources with private sector resources and expertise to close the infrastructure gap and deliver efficient public infrastructure and services. The PPP Bill is expected to be passed by the end of 2017.

The PPP Bill 2016 indicates that it shall apply to:

a public sector projects undertaken in the form of partnership arrangements between a public authority and a public entity;

b all forms of partnership arrangements including models such as build–operate–transfer, build–own–operate–transfer and rehabilitate–operate–transfer;

c public authorities that intend to undertake partnership projects under the PPP Act;

d functions that relate to the identification, studies, document preparation, structuring, bidding, evaluation, award, implementation and monitoring of partnership arrangements; and

e commercial arrangements carried out through partnership arrangements in respect of state-owned enterprises.

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It shall not apply to:

a. the outsourcing of government services without transfer of significant financial and operational risks to a private entity for a sufficiently long period of time;
b. the procurement of goods, works and services primarily with the use of public funds by any public authority under the Act (except as otherwise provided for under the PPP Act);
c. privatisation or divestment of ownership or equity of a state-owned entity;
d. the grant of a mineral right under the Minerals and Mining Act, 2006 (Act 703) or any applicable mining law;
e. the grant of any right for exploration, development or production under the applicable law on petroleum; and
f. non-commercial activities that are the exclusive preserve of the military, police, defence and justice institutions.

Note the above is based on the PPP Bill 2016, which is subject to change and may go through several amendments during the parliamentary approval process.

V THE BIDDING PROCESS

i Notice

A procurement entity must invite tenders or, where applicable, cause an invitation to tender or an invitation to pre-qualify to be published in the Public Procurement Bulletin and at least two newspapers of wide national circulation.

The invitation may also be published in a newspaper of wide international circulation; in a relevant trade publication or technical or professional journal of wide international circulation; or on the website of the Authority.6

The following standard invitations for proposals are used by the procurement entities.

These include:

a. a standard request for proposals for selection of consultants;
b. a standard document for pre-qualification of suppliers, consultants and contractors;
c. a standard document for requests for expressions of interest; and

d. a sample format request for quotations.

ii Procedures

The procurement entities must adhere to the following procedure:

a. A procurement entity must prepare a procurement plan to support its approved programme.
b. A procurement entity must fix the place for and a specific date and time as the deadline for the submission of tenders, and allow tenderers at least six weeks to prepare their tenders for international competitive tendering.
c. The procurement entity must stipulate the method of procurement.
d. The procurement entity must specify the principal terms and conditions of the required tender security in the invitation documents.
e. The procurement entity may ask a supplier for clarification of its tender to assist in the examination, evaluation and comparison of tenders.

A procurement entity will regard a tender as responsive if it conforms to the requirements set out in the tender invitation documents; if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the invitation documents; or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender.

The procurement entity must allow enough time for the consultants to prepare their proposals.

A procurement entity must reject a tender, proposal, offer or quotation if the supplier, contractor or consultant that submitted it offers, gives or agrees to give, directly or indirectly, to a current or former officer or employee of the procurement entity or other governmental authority, a gratuity in any form, an offer of employment, or any other thing of service or value, as an inducement with respect to anything connected with a procurement entity and procurement proceedings.

The procurement entity must evaluate and compare the tenders that have been accepted to ascertain the successful tender in accordance with the procedures and criteria set out in the invitation documents.

A procurement entity may grant a margin of preference for the benefit of tenders for work by domestic suppliers, for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services.

The procurement entity may engage in pre-qualification proceedings to identify tenderers who are qualified prior to the submission of tenders.\(^7\)

The procurement entity may require the supplier that is the successful tenderer to demonstrate its qualifications again, regardless of whether it has engaged in pre-qualification proceedings in accordance with criteria and procedures that conform to pre-qualification proceedings in the Act.\(^8\)

A procurement entity must invite consulting services by publishing a notice seeking expressions of interest in submitting a proposal in the Public Procurement Bulletin for consultancy contracts above the threshold stated above.

The procurement entity is responsible for the preparation of a shortlist of consultants to be considered to participate in the selection process.\(^9\)

The procurement entity must use the standard invitation for proposals stipulated in the Fourth Schedule of the Act, and the requirements for a specific assignment must be introduced through information to consultants, data sheets or contract data sheets and not by introducing changes in the standard tender documents.

The procurement entity must establish criteria to evaluate the proposals and determine the relative weight to be accorded to each criterion and the manner in which they are to be applied in the evaluation of proposals.

A procurement entity must promptly publish notice of procurement contract awards.

Currently, very little e-procurement is done in Ghana. However, as advised above, the Authority is to pilot an electronic procurement system before the end of 2017. The procurement plan and bulletin are done electronically. Electronic auction is not used by awarding authorities.

\(^8\) Ibid.
\(^9\) Ibid.
iii Amending bids

_During the procurement process_

Bids cannot be amended to change their substance during the examination of tenders. Changes in price and changes aimed at making an unresponsive tender responsive must not be sought, offered or permitted. However, the procurement entity must correct purely arithmetical errors that are discovered during the examination of tenders and must give prompt notice of the correction to the supplier that submitted the tender.

A procurement entity may request suppliers to extend the period of validity of a tender for an additional specified period. A supplier may, however, refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate on the expiry of the unextended period of effectiveness.

In a situation where a supplier agrees to an extension of the period of effectiveness of its tenders, the supplier must extend orprocure an extension of the period of the tender securities provided by it or provide new tender securities to cover the extended period of effectiveness of the tender. Thus, a supplier whose security is not extended or that has not provided a new tender security is considered to have refused the request to extend the period of effectiveness of its tender.

A supplier may modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security unless otherwise stipulated in the tender documents. The modification or notice of withdrawal is effective if it is received by the procurement entity before the deadline for the submission of tenders.

In practice, however, when the amended copy is delivered to the procurement entity, it must state that it is the amended copy and supersedes the earlier copy.

VI ELIGIBILITY

i Qualification to bid

A party may be disqualified from bidding if he or she does not possess the necessary:

- **a** professional and technical qualifications and competence;
- **b** financial resources;
- **c** equipment and other physical facilities;
- **d** managerial capability, reliability, experience in the procurement object and reputation; and
- **e** the personnel to perform the procurement contract.

A party will also be disqualified from bidding if it:

- **a** does not have legal capacity to enter into a contract;10
- **b** is insolvent, in receivership, bankrupt or in the process of being wound up;
- **c** has its business activities suspended and is the subject of legal proceedings that would materially affect its capacity to enter into a contract;
- **d** has not fulfilled its obligations to pay taxes and social security contributions, and has not paid the compensation due for damage caused to property by pollution;
- **e** has directors or officers who have been convicted of a criminal offence relating to their professional conduct, or of making false statements or misrepresentations as to their

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10 Ibid.
qualifications, to enter into a procurement contract in any country, within a period of 10 years preceding the commencement of the procurement proceedings, or is disqualified pursuant to administrative suspension or disbarment proceedings in any country; or

f. does not meet any other criteria that the procurement entity considers appropriate.

ii Conflicts of interest

In resolving conflict of interest situations, the Appeals and Complaints Panel of the Public Procurement Authority (Panel) considers statutory and international best practice rules applicable to conflicts of interest. These include:

a. Section 93(1) and 92 of the Act;
b. Section 87 of the Civil Service Act, 1993 (PNDCL 327);
c. Article 284 of the 1992 Constitution;
d. Guidelines on Conflict of Interest prepared by the Commission on Human Rights and Administrative Justice (CHRAJ) to assist public officials with identifying, managing and resolving conflicts of interest (CHRAJ COI Guidelines);
e. the common law prohibition against self-dealing;\(^{11}\)
f. Sections 205 to 207 of the Companies Act, 1963 (Act 179); and
g. the Conflicts of Interest Laws and Guidelines prepared by the Conflicts of Interest Office, Civil Division, Government Law Section of California Attorney General’s Office.\(^{12}\)

In the case of *Cenpower Domini Ltd v. Central Tender Review Board*, the Panel found that although the CHRAJ COI Guidelines offered some guidance, the California Conflicts of Interest Laws and Guidelines were useful and of persuasive effect, particularly to the extent that they regulate both general financial and specific conflict of interest situations in government contracts by local, state and legislative officials.

In resolving conflict of interest situations, conflicting interests must be disclosed. Whenever a conflict of interest situation occurs or is likely to occur, the public official must disclose it to the procurement entity. Conflicts of interest may be resolved in the following ways:

a. divestment or liquidation of the interest by the public official;
b. detachment of the public official from involvement in an affected decision-making process;
c. restriction of access by the affected public official to particular information;
d. transfer of the public official to duties in a non-conflicting function;
e. rearrangement of the public official’s duties and responsibilities;
f. resignation of the public official from the conflicting private capacity function; and
g. resignation of the public official from the public office.\(^{13}\)

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\(^{11}\) Prohibits public officials from being financially interested in a public contract in both their official public and private capacities.


\(^{13}\) CHRAJ COI Guidelines.
iii Foreign suppliers
The Authority provides for tendering procedures, including international competitive tendering. This form of tendering cannot be achieved if foreign firms are not invited to tender.

There is no requirement under the Act for foreign suppliers to set up a local branch or subsidiary or have local tax residence to do business with public authorities. However, for regulatory purposes, the Authority may set that requirement.

VII AWARD
i Evaluating tenders
The invitation documents provide for all the information about evaluating methodologies. Once the methodology is provided for in the tender document, there cannot be an introduction of a new criterion later. The procurement entity may modify the invitation documents by issuing an addendum prior to the deadline for submission of tenders. The addendum must be communicated promptly to the relevant suppliers and must be binding on those suppliers. A tender document that conforms to the requirements set out in the tender invitation documents or that contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the invitation documents, or that contains errors or oversights that are capable of being corrected without touching on the substance of the tender, is regarded as ‘responsive’.

The lowest evaluated tender price and the lowest evaluated tender ascertained on the basis of the criteria specified in the invitation documents must be taken into account when evaluating a bid.

To determine the lowest evaluated tender, the procurement entity must consider:

a the tender price, subject to any margin of preference;
b the cost of operating, maintaining and repairing the goods or works, the time for delivery of the goods, completion of works or provisions of the services, the functional characteristics of the goods or works, and the terms of payment and of guarantees in respect of the goods, works or services;
c the effect the acceptance of the tender will have on:
• the balance of payments position and foreign exchange reserves of Ghana;
• the counter-trade arrangements offered by suppliers;
• the extent of local content, including manufacturers, labour and materials, in goods, works or services being offered by suppliers;
• the economic development potential offered by tenders, including domestic investment or other business activity;
• the encouragement of employment, and the reservation of certain production for domestic suppliers;
• the transfer of technology;
• the development of managerial, scientific and operational skills; and
d national security considerations.

The award stage involves:
a the acceptance and notification of acceptance of the tender within 30 days of the acceptance of the tender to the supplier accepting the tender;
b the signing of the procurement contract by the procurement entity and the supplier within 30 days after the notification above where the tender documents require the supplier whose tender has been accepted to sign a written procurement contract confirming the tender;
c the coming into force of the written procurement contract on the commencement date indicated on the contract; and

d the notification of the unsuccessful parties of the successful supplier who has entered into the contract and the contract price.

ii National interest and public policy considerations
The procurement of goods, works and services must be financed in whole or in part from public funds.

The Act provides for national competitive tendering, which is used when the procurement entity decides that only domestic suppliers may submit tenders. As such, unless the invitation specifically indicates that it is a national competitive tender, it is open to foreign bidders as well.

A procurement entity may also grant a margin of preference for the benefit of tenders for work by domestic suppliers, for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. This margin of preference has to be approved by the Board of the Authority.

Environmental considerations may also be taken into account, but this will be provided for in the invitation documents.

Sustainable public procurement has been introduced to the Act. This will incorporate environmental and social principles into the public procurement process.

VIII INFORMATION FLOW
Communication between procurement entities and tenderers must be in writing, and communications in any other form must be referred to and confirmed in writing.

A supplier may also request prompt clarification of the tender documents by the procurement entity. The procurement entity must respond to such a request by a supplier within a reasonable time before the deadline for the submission of tenders to enable the supplier to make a timely submission of its tender, and must, without disclosing the source of the request, communicate the clarification to the suppliers provided with the invitation documents.

Again, the procurement entity must promptly notify each supplier submitting an application to pre-qualify about whether it has been pre-qualified, and must make available to members of the general public, upon request, the names of the suppliers who have been pre-qualified.

Further, the procurement entity must, upon request, communicate to suppliers who have not been pre-qualified the grounds for disqualification, but the procurement entity is not required to specify the evidence or give the reasons for its finding on the grounds.

The procurement entity may also require a supplier who has been pre-qualified to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify the supplier.

Moreover, the procurement entity must promptly notify each supplier requested to demonstrate its qualifications again whether the supplier has done so to the satisfaction of the procurement entity.
A procurement entity must also maintain a record of the procurement proceedings. The entity is, however, not liable to tenderers for damages owing solely to a failure to maintain a record of the procurement proceedings. The record of procurement proceedings will be made available upon request by a person. This is, however, subject to certain conditions.

Again, suppliers have an obligation to disclose any conflict of interest situations to the procurement entity.

Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or to any other person not involved officially in the examination, evaluation or comparison of tenders, or in the decision on which tender should be accepted, except as provided in the record of procurement proceedings.

There is an obligation on procurement entities to notify unsuccessful bidders of the outcome before contract signing. Where a procurement entity rejects tenders, proposals and quotations, the grounds for rejection must be communicated to the tenderer within two days from the date the procurement entity decides to discontinue with tender proceedings. If the decision to reject tenders is taken before the closing date, tenders received must be returned unopened to the tenderers submitting them. Justification for the rejection is not required. The rejection of the tender, proposal, offer or quotation with reasons must be recorded in the procurement proceedings and promptly communicated to suppliers.

There is a confidential obligation on procurement entities to treat proposals and the negotiations on the selection procedure as confidential, and to avoid the disclosure of their contents to competing consultants. In addition, a party to the negotiations must not reveal to any other person the technical specifications, price or any other information relating to the negotiations without the consent of the other party.

IX CHALLENGING AWARDS

i Procedures

In practice, there is a three-tier system for making complaints. The first tier involves a complaint to the procurement entity. This must, in the first instance, be submitted in writing to the head of the procurement entity if the procurement contract has not already entered into force.

The head of the procurement entity must not entertain a complaint unless it is submitted within 20 days after the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or when that supplier, contractor or consultant should have become aware of those circumstances, whichever is earlier. The procurement entity may, however, entertain a complaint or continue to entertain a complaint after the procurement contract has entered into force.

A procurement entity must attempt to resolve a complaint by mutual agreement of the supplier and the procurement entity. The procurement entity must, within 21 days after the submission of the complaint, issue a written decision and state the reasons for the decision. If it fails to do so, the supplier, contractor or consultant submitting the complaint is entitled to institute proceedings for administrative review.

The second tier involves submitting a petition to the Board for administrative review. A supplier, contractor or consultant must submit a petition to the Board within 21 days after it becomes aware of the circumstances giving rise to the complaint or the time when the supplier, contractor or consultant ought to have become aware of those circumstances.
On receipt of a complaint, the Authority must give notice of the complaint promptly to the procurement entity. The Board may, among other matters:

- declare the legal rules or principles that govern the subject matter of the complaint and address any suspension in force;
- order that the provisions of the Act be complied with;
- prohibit the procurement entity from acting, taking a decision or following a procedure that is not in compliance with the Act;
- require the procurement entity that has acted or proceeded in a manner that is not compliance with the Act to take action, make a decision or proceed in a manner that is in compliance with the Act;
- overturn in whole or in part an act or decision of the procurement entity that is not in compliance with the provisions of the Act other than an act or a decision bringing the procurement contract or framework agreement into force;
- revise a decision by the procurement entity that is not in compliance with the Act other than an act or decision bringing the procurement contract or framework agreement into force;
- require the payment of compensation for reasonable costs incurred by the supplier or contractor who submitted the complaint in connection with the procurement proceedings as a result of act, decision or procedure followed by the procurement entity in the procurement proceedings that is not in compliance with the provisions of the Act and for any loss or damage suffered which shall be limited to the costs of the preparation of the tender or the costs related to the application, or both;
- order that the procurement proceedings be terminated; and
- dismiss the complaint and require the payment of compensation by the complainant for reasonable costs incurred by the procurement entity or the Board.

The last resort is the courts. The first two channels must be exhausted before one can go to the courts. Thus, in the case of *Intelligent Card Production System v. Electoral Commission*, the plaintiff only had recourse to the court when it went through review proceedings. It was only after the Authority could not take steps to suspend the demonstration that the Electoral Commission was going to organise that the plaintiff went for redress in the court.

ii Grounds for challenge

A supplier, contractor or consultant that claims to have suffered any loss or injury has a right of redress. Despite the above, the following are not subject to complaint or administrative review:

- the selection method of procurement;
- the choice of a selection procedure;
- the limitation of the procurement proceedings; and
- a decision by the procurement entity to reject tenders, proposals, offers or quotations if the grounds for the rejection are specified in the tender documents or in the request for proposals or quotations.

iii Remedies

The courts have the power to grant injunctions, set aside contracts, order new tenders and award damages for breaches of procurement law.
In the case of *The Republic v. Ministry of Education and Sports and 2 Ors*,14 where the applicant challenged the decision of the Ministry of Education and Sports to single source the procurement of supplementary readers, textbooks and dictionaries for basic senior secondary schools and teacher training colleges throughout Ghana, the Supreme Court granted an injunction restraining the first respondent from proceeding with the said single source procurement awarded to Macmillan Education Limited, and ordered it to comply strictly with any of the procurement procedures under the Act in the intended public procurement of the supplementary readers, textbooks and dictionaries for the basic senior secondary schools and training colleges in Ghana.

In addition, in the case of *CCW Limited v. Accra Metropolitan Assembly*,15 the defendant engaged the plaintiff to render waste disposal services, including landfill services, for a seven-year period within the city of Accra. The defendant terminated the agreement before the contracted time, and alleged in its counterclaim that the laid-down procedure for procurement was not followed before the contract was awarded to the plaintiff, and thus the contract was void. The court set aside the contract on the basis of illegality and ordered restitution of the benefit conferred on the defendant under the contract to the plaintiff.

Fines can also be imposed for breach of procurement procedures. A person who contravenes a provision of the Act commits an offence, and where a penalty is not provided for the offence, that person is liable on summary conviction to a fine not exceeding 2,500 penalty units or a term of imprisonment not exceeding five years, or both. One penalty unit is equal to 12 cedis.16

**X OUTLOOK**

Criticisms levelled against the Act and the Board include ineffective monitoring and transparency. The issues of sole sourcing to prevent competitive bidding and bulk breaking to avoid higher bodies reviewing the tender process are considered common practice. It has been suggested that awards should be published together with their prices so that the public can also monitor the delivery and performance of procurement. Although there are provisions in the Act to ensure transparency, business integrity and non-discrimination in the process, there is still a feeling that these key elements are not being strictly observed.

Others also suggest that some members of the public should be made part of the procurement process, especially at the point where the decision to procure is made.

Over 10 years after its enactment, the Act is being tested in all respects, and public, anti-corruption-focused civil society organisations and the media are becoming more involved in procurement issues. This is healthy for a law founded on the principles of fair competition, integrity, transparency and non-discrimination. The Amendment Act attempts to incorporate international best practice to enhance the efficacy and operation of the procurement system. It is essential that the regulations to the Act are enacted as quickly, so that the Act will be implemented effectively.

Time will tell whether the Amendment Act will improve public procurement governance, efficiency and public accountability.

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16 Section 27(1) of Interpretation Act, 2009 (Act 792).
I INTRODUCTION

India has always lacked an exhaustive national law on procurement, even though purchase through tenders has been the most preferred and feasible method of securing large procurements. In the absence of any nationalised law, the legislators nominated the General Financial Rules, 2005 (GFR) and the Delegation of Financial Powers Rules, 1978 as the two pieces of subordinate legislation that regulated procurements in the public sector. In addition, guidelines were issued by the Directorate General of Supplies and Disposals and the Central Vigilance Commission (CVC) together with instructions by the Ministry of Finance (MoF) that were responsible for bringing about integrity in public sector procurement. Although these were essentially rules and guidelines, they gradually evolved into conventional laws of procurement practice.

The state governments and central public sector units (CPSUs) have their own general financial rules based on the broad principles outlined in the GFR. Some states, like Tamil Nadu and Karnataka, have introduced legislation for procurement, for example the Tamil Nadu Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tender Rules, 2000; and the Karnataka Transparency in Public Procurement Act, 1999.

Sectoral procurement procedures have been developed within the general framework keeping in mind the specific requirements of the sectors. New defence procurement management structures and systems were set up in the Ministry of Defence that came into effect from 30 December 2002 and that are applicable to procurements resulting from the ‘buy’ decision of the Defence Acquisition Council. The Defence Procurement Manual 2005 and Defence Procurement Procedures, 2005 provide comprehensive guidelines in this regard. These were revised in 2008, and the Defence Procurement Procedures 2008 and 2009 enhanced the scope to include the ‘make’ procedure, and ‘buy and make’ (Indian) categories. These procedures were further revised in 2011, 2013 and 2016 to ensure expeditious procurement of the approved requirements of the armed forces in terms of the capabilities sought and time frame prescribed by optimally utilising the allocated budgetary resources.

Additionally, certain criminal penalties are also prescribed under the Indian Penal Code, 1860, and the Prevention of Corruption Act, 1988, for corrupt and fraudulent practices, which may be used in the case of bids where bidders undertake such practices to influence the bid process.

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1 Sunil Seth is a senior partner and Vasanth Rajasekaran is a partner at Seth Dua & Associates. This chapter is accurate as of May 2016.
However, the public procurement laws underwent a recent reform in India when the Union cabinet approved the Public Procurement Bill, 2012 (Bill) for the legislature’s approval. The Bill draws substantially on the UNCITRAL Model Law of July 2011. The laws and procurement practices in the United States and European Union countries have also been taken into consideration to some extent. They have not only been suitably adapted for Indian conditions, but a number of new provisions have been formulated to suit the legal and institutional environment in India. The Bill envisages, within its ambit, procurements for goods, works and services; procurements entered into with public-private partnerships, joint ventures (JVs) and special purpose vehicles; and such other procurements as have been specifically notified by the central government. It ensures accountability and probity in the procurement process, fair and equitable treatment of bidders, promotion of competition, and enhancement of efficiency and economy, thereby maintaining integrity and public confidence in the public procurement process.

Although the Bill does not explicitly overrule the previous rules and guidelines, it proposes to restrict their applicability to the extent that such rules or guidelines are not inconsistent with the provisions of the Bill.

II YEAR IN REVIEW

India has shown remarkable economic and industrial growth in recent times. While the legislative focus remained on such growth, matters such as public procurement procedures, administrative management of agreements and the purchase of services were governed by rules and instructions given by the concerned departments. Although these rules were extensive and elaborate, they lacked legislative authority and placed arbitrary powers in the hands of procurers. Thereafter, when the policy of improved industrialisation brought about a change in the scope of CPSUs and the amount of procurements, corrupt practices and misuse of power became the main features of procurement processes. Many such cases came to light, highlighting a need for an immediate law to address this.

A recent landmark judgment\(^2\) by the Supreme Court of India quashed the licences granted to telecoms companies. On 2 February 2012, the Supreme Court decided upon the allocation of licences to telecoms companies for the Second Generation spectrum. The government had adopted a ‘first come, first served’ policy at previous rates of 2001, so that the new licensees were on a level playing field with the old licensees, and so that the cost to the public remained reasonable. In other words, a deliberate decision was taken not to maximise the commercial return to the government. This first come, first served policy resulted in a windfall of billions of rupees to successful companies, and led to serious charges of fraud and corruption against the then Minister for Communications and Information Technology, A Raja, and other officials. The Supreme Court came to the conclusion that spectrum is a natural resource and observed that ‘there cannot be a universally acceptable definition of natural resource’. It was held that a natural resource’s value depends upon its availability and the demand for it, and the Supreme Court judged on these considerations that spectrum was a natural resource. The distribution of natural resources must promote public good against private gain. In a controversial move, the Court struck down all licences granted under the first come, first served policy. It held that an auction held fairly and impartially is the best method for the state to allocate public or natural resources. The government’s view

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\(^2\) Centre for Public Interest Litigation v. Union of India (2012) 3 SCC 1.
is that it cannot be bound by a defined and specific method only for the distribution of natural resources. Some telecoms companies have also initiated legal proceedings against the government with large damages claims under their bilateral investment treaties.

The Supreme Court, in its very recent ruling on 25 August 2014,3 had cancelled the allocation of coal blocks by the central government from 1993 to 2011 on the grounds that the dispensation routes adopted by the government (instead of competitive bidding) were invalid, unfair and arbitrary, and suffer from diverse infirmities and flaws.

These two landmark judgments have made procuring agencies follow the competitive bidding process for allocation of natural resources.

### III SCOPE OF PROCUREMENT REGULATION

In accordance with the theory of the separation of powers, India envisages a federal structure in the Constitution of India wherein the areas of operation are divided between the central and state governments. The seventh schedule of the Constitution contains three exhaustive lists of items: the union list, which lists items legislated on by the central government; the state list, which recounts items that fall under the purview of the state legislature; and the concurrent list. With regard to the allocation of items to the authority of the state and the central government, although some items such as public health, hospitals and sanitation fall under the state list, matters that have wider ramifications at the national level, such as family welfare and population control, medical education, prevention of food contamination and quality control in the manufacture of drugs, have been included in the concurrent list. ‘Procurement’ as a subject does not figure in these lists – union, state or concurrent – which govern legislative functions in India. Therefore, the Union parliament has the exclusive power to make any laws on the subject of procurement. The public procurement legislation in India has its foundation in the Constitution specifically in light of the right to equality and non-discrimination under Article 14. This fundamental right has incorporated an obligation on all state entities to undertake all contractual arrangements through reasonable and non-arbitrary procedures and practices.

The Bill proposes to regulate the award of government contracts of over 5 million rupees by all ‘procuring entities’. The ‘procuring entities’ falling within the scope of the Bill include public-private partnerships, central government departments and ministries, constitutional bodies or entities set up under any acts of parliament, and central government undertakings (i.e., entities or companies with 50 per cent or more direct or indirect government shareholding). As regards the monetarily defined limit, the procuring entities are not permitted to package or divide the procurement so as to limit competition or prevent obligations under this Bill. Public procurements in certain scenarios, such as emergency procurements for disaster management or procurements for national security, have been carved out of the purview of the Bill.

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3 Manohar Lal Sharma v. Principal Secretary & Others (2014) 9 SCC 516.
IV  SPECIAL CONTRACTUAL FORMS

i  Framework agreements and central purchasing

The procuring entity is permitted to enter into framework agreements with one or more bidders, for a specified period, which set out terms and conditions under which specific procurements can be made during the term of the agreement. A framework agreement will generally allow a purchaser more flexibility around the goods or services contracted for under the framework, both in terms of volume and also the details of the relevant goods and services. Usually, such agreements are preferred when the procuring entity needs services and is unsure of its specific requirements and reluctant to incur the costs of the complete procurement procedure. These may include agreement on prices by way of ‘rate contracts’, which may be either predetermined or determined at the stage of actual procurement through competition or a process allowing their revision without further competition. Such agreements may be entered into through open competitive bidding or through limited competitive bidding, wherein a defined number of participants are involved, but unfair and anticompetitive behaviour is condemned.

ii  JVs

Intending bidders may form JVs to bring together their technical, financial, personnel and equipment capabilities to meet the requirements of particular contract work. For large and complex works involving higher net worth, JVs are preferred, as they provide division of cost and expertise to the bidder and serve a better guarantee to the procuring entity. Consequently, when qualifying JVs, the memorandum of understanding forming the JV agreement is thoroughly scrutinised by the procuring entity.

However, in the case of JVs involving a foreign company, the bid document may require the foreign company to incorporate a special purpose vehicle (SPV) in India for the purpose of participating in and discharging the contractual obligations under the public procurement. The bid documents in most such cases also mandate that the successful bidder retains specified levels of ownership and control of the SPV so incorporated, which is typically in the form of shareholding lock-ins and change-of-control restrictions. A foreign bidder may participate on the guarantee of the Indian bidder; however, it shall be jointly and severally liable for the procurement so acquired or in any other manner as may be provided under the terms of the contract.

V  THE BIDDING PROCESS

i  Notice

The fundamental norms of the Indian procurement regulations stipulate transparency, and fair and equitable treatment of bidders. Thus, emphasis is placed on publishing the pre-qualification document, bidder registration document or bidding document, as the case may be, with a detailed description of the subject matter of the procurement. The Bill provides for standardisation of these documents even in terms of technical specifications. Ordinarily, procurement is conducted through advertised tender enquiries. The advertisement must be issued in the Indian Trade Journal (published by the government) and additionally in a national newspaper having wide circulation. In the past, these details were made available on the official website of the concerned departments; however, a central public procurement portal (CPPP) has been created by the government, which serves as a one-stop gateway
wherein all bid documents or registration documents and other information are to be published. A panel for registration of eligible and reliable bidders may also be formed by a procuring entity, for which notice as well as the list of successfully registered bidders will be available on the CPPP.

**ii Procedures**

Every procuring entity would clearly identify the subject matter of the procurement, the method of procurement that it seeks to follow along with any criteria of pre-qualification, as well as any restrictions on bidders that it intends to put in place, before executing a framework agreement or initiating the procurement process.

The various procurement methods that a procuring entity may opt for under the Bill are:

- open competitive bidding;
- restrictive bidding;
- two-stage bidding;
- single-source procurement;
- electronic procurement;
- spot purchase; or
- any other method notified by the government.

Under open competitive bidding, the sealed bids are opened in public so that the interested persons may view the selection of the successful bidder. For convenience, the procuring entity may form a panel of pre-qualified bidders through a screening process that further participates in restrictive bidding. This limits the number of participants. In cases where greater technical and professional expertise is required, the procuring entity may follow the two-stage bidding process wherein two separate bids – a technical bid and a financial bid – are invited from the bidders. The bidders are first selected on the basis of the technical bid, and only the financial bids of the successful technical bidders is taken into consideration for final selection. Single-source procurement and spot purchases are non-competitive procurement methods, and should be used only after the approval of the competent authority under exceptional circumstances. Such procurement may be made in cases of emergency, cost limitation, continuance of previous or additional work that cannot be acquired from another firm, or any other such circumstances that are justifiable to the satisfaction of the competent authority.

The government may also provide for electronic procurement, and may also make such electronic procurement mandatory with respect to certain categories. Procurement of goods and services by governments through electronic means has been high on the agenda in recent multilateral trade talks, and global financial institutions have also been advocating the introduction of public electronic marketplaces. Adequate research exists to show that the introduction of such mechanisms would bring greater transparency in government tenders and purchases, lead to greater savings and improved funds availability for re-appropriation, and also result in downstream computerisation and streamlining of contract and inventory management, thereby bringing in further efficiencies. It is notified that communication in electronic form will be deemed to be equal to written communication.

While procuring entities cannot set out a bidding criterion that discriminates or limits the participation of any bidder, the procuring entities are empowered to promote certain categories of bidders and impose certain offsets against foreign bidders to promote domestic
industry or further socioeconomic policies. Additionally, the government or procurers are authorised to impose norms to limit participation on grounds such as the protection of public health and policy, morality, safety, intellectual property or Indian strategic interests.

iii Amending bids

The overall technical and financial bid evaluation system is strong, with very few cases of allegations of bid modification or substitution of tender documents. Since e-tendering systems in India merely convert this traditional system into electronic format through the use of digitally signed bids submitted through the internet, the position of knowledge of bidding rules in the case of e-tendering remains equally strong in terms of the time available to study the evaluation system, the transparency of the evaluation system and consistency in the application of the bidding rules. In the event that any modification is made to the bidding document or any clarification is issued that materially affects the terms contained in the bidding document, the procuring entity is required to publish or communicate such modification or clarification in the same manner as the publication or communication of the initial bidding document was made. Under such circumstances, the last date of submission of bid may be postponed, and the bidder is permitted to modify or resubmit the bid within the extended time limit.

The public-private partnerships (PPP) bid documents usually contain a restriction on changing the consortium members. The same, however, may be permitted by the procurer during the bidding stage where the lead member continues as before and the substitution is at least equal in terms of technical or financial capacity to the member sought to be replaced. Approval for a change of composition is permitted under special circumstances and if the discretion of the authority is maintained.

VI ELIGIBILITY

i Qualification to bid

As a result of the mandate of the Constitution, the government and its agencies cannot treat citizens unequally, discriminatorily, arbitrarily or unreasonably. It must not waste public money and is accountable to judicial action if it attempts to do so. The tendering authority therefore must proceed in accordance with the limitations contained in the tender document or in the applicable manuals or rules. The bidder must possess the necessary professional, technical, financial and managerial resources and competence required under the bidding document, pre-qualification document or bidder registration document, as the case may be, issued by the procuring entity.

A procuring entity may engage in a pre-qualification process, prior to inviting bids, for the purpose of identifying eligible bidders and qualifying such bidders on the basis of technical, professional, financial or any such reasonable grounds. However, any involvement of the bidder in the bidding process would lead to disqualification.

ii Conflicts of interest

If a bidder is in a position to materially affect fair competition or the diligent performance of the procurement contract or framework agreement, or is prejudicial to the interests of the procuring entity, then such a bid is required to be excluded by the procuring entity. The general rule prescribed by courts, as part of the administrative law of India, is that any person having a conflict of interest will not be part of the bid evaluation or award process.
More specific provisions can be found in the documents created in relation to PPP projects under the model request for proposal (RFP) and model request for quotation (RFQ) as given by the MoF in 2009. The PPP bid document will require a declaration to the effect that the bidder intending to participate does not have any conflict of interest. A false declaration would give the procuring entity the right to forfeit the bid security. A conflict of interest may be understood to subsist when a bidder or its consortium members have a common controlling shareholding or other ownership interest, the same legal representation, access to each other’s information or ability to influence the bid of any bidder, or have participated in the preparation of any document, design or technical specification for the project.

Further, most government authorities are required to adopt the Integrity Pact recommended by Transparency International, also adopted and recommended by the CVC, which additionally requires the owner to be excluded from the bidding process on the involvement of any known prejudiced person. It is estimated that about 44 PSUs have duly adopted the Integrity Pact to date. A growing trend to adopt this Integrity Pact may be expected once the Bill is enacted.

iii Foreign suppliers

Foreign companies, as a general practice, may be required to set up branches, subsidiaries, or otherwise enter into JVs and other commercial arrangements, to participate in bid processes relating to public procurement processes in accordance with the terms and conditions of the bid document. To ensure greater accountability, the Bill proposes that the procuring entities financed under multilateral development banks, bilateral development agencies or foreign governments or pursuant to inter-governmental agreements may carry out a procurement process only after a prior approval from the central government. Under Indian law, there are no general reciprocity requirements in respect of public procurements. However, there may be bilateral or multilateral trade agreements that may extend beneficial regimes to certain nations, including direct tax avoidance regimes. Where the procuring entity has prior commercial arrangements with other international entities, the procuring entity may also be subject to requirements of such international entities. At present, India has not entered into any such free trade agreements so as to govern procurement by foreign bidders differently.

VII AWARD

i Evaluating tenders

The criteria for evaluation and comparison of bid proposals, subject to adherence to the paramount requirements of non-arbitrariness and reasonableness (as mandated by the Constitution), would be dependent on the specifications and criterion prescribed by the procuring entity in its bid documents. As such, the procuring entity is required to evaluate bids on the basis of price, quality, cost of operation, terms of payments and guarantee, and the professional and technical competence of the bidder.

The commonly adopted mechanism for the selection of the successful bidder in bid documents includes selection of the lowest bidder (L1 method), typically adopted for the selection of the successful bidder, inter se technically qualified bidders, in respect of lump sum and rate contracts. Selection of the highest bidder (H1 method) is made for technically qualified bidders in respect of revenue sharing-based contracts, and contracts that contemplate a premium paid up front by the successful bidder or provide for a return on equity investment by the procuring entity. The bidder requiring the lowest government grant, or the lowest
subsidy (as evaluated on a net present-value basis), is selected for projects that are financially
not viable (or have low viability). Further, the selection of the bidder may also be based on
the combined scores from the evaluation of their technical and financial bid, on the basis of a
predetermined weighting mechanism. Under this mechanism, the financial proposals would
continue to be evaluated on the basis of the methods identified above, as applicable given the
nature of the bid process.

It is pertinent to note that procuring entities are not bound to accept the bid of the
highest evaluated bidder and may select other bidders, subject to the procuring entity being
able to demonstrate that the selection process was undertaken on a reasonable, fair, transparent
and non-arbitrary basis. Certain procuring entities may also reject bids that are extremely low
or whose financial terms are extremely prejudicial to the bidder (this is typically evaluated on
the basis of the prevailing market rates).

ii National interest and public policy considerations

Rule 184 of the GFR permits a diversion from the prescribed procurement process in cases
where exceptional circumstances exist that necessitate the outsourcing of a job to a chosen
contractor. The competent authority under the government or the concerned department,
if satisfied by a detailed justification of the existence of exceptional circumstances, may
allow the contract to be awarded on a nomination basis or by private negotiations without
following the due bidding process. Further, the provisions listed in the Bill for ensuring
transparency and prohibiting anticompetitive behaviour are excluded from application if the
central government deems it necessary to promote domestic industry, the socioeconomic
policy of the government or for any other consideration in the public interest. The central
government may provide for mandatory procurement of any subject matter of procurement
from any category of bidders, or purchase preference in procurement from any category
of bidders. It may also limit participation on account of the need to protect public policy,
morality or safety, to protect intellectual property, or to protect the national security and
strategic interests of India. Furthermore, for poor performance, a bidder may be blacklisted
and prevented from all future procurement by the procuring entity.

Currently, handlooms are purchased exclusively from Khadi and Village Industries
Commission, notified handloom units through the Association of Corporations Apex
Societies of Handlooms and the Women’s Development Organisation, Dehradun, and
358 items are reserved for exclusive purchase from small-scale industries (SSI). Where offers
are received from large-scale units as well as SSI units, but some of the lowest offers were
from large-scale units, the offers of SSI units were given a price preference of up to 15 per
cent over the lowest acceptable offer from the large-scale private sector unit, provided that the
stores were technically acceptable and satisfied the basic consideration of delivery schedule
and capacity. However, the price preference admissible to SSI units will be accorded on a
tender-to-tender basis. This has now been replaced with a cap of 20 per cent of the total value
from the SSI.

VIII INFORMATION FLOW

The bid document will contain the requirements that a bidder must fulfil as well as the
information a bidder may have to provide when submitting the bid. In addition, the bidder
may also seek clarification with regard to the content of the bid document from the procuring
entity within the prescribed time.
If the procuring entity has to clarify doubts of potential bidders, a pre-bid conference may be held, and records of such conference will be communicated to all bidders and exhibited at the CPPP. A record of every document, notification, decision or other information generated in the course of procurement and communicated is required to be maintained by the procuring entity.

Greater responsibility and accountability has been imposed on procuring entities for ensuring due and diligent performance of the procurement process. A procuring entity is prohibited from disclosing any such information that may impede or affect the enforcement of any law, the security or strategic interests of India, intellectual property, legitimate commercial interests of bidders or that may violate any pre-existing contractual obligations or the confidentiality of the procuring entity. The procuring entity is obliged to preserve any such information about a bidder that may be of interest to competing bidders.

IX CHALLENGING AWARDS

Generally, a contract can be challenged before a high court under its writ jurisdiction if it violates the basic provisions of the Constitution, including the fundamental provisions listed under Article 14 of equality, fairness and non-discrimination. To ensure efficiency and economy, the Bill also provides that the secretary-level officers of the Department of Procurement Policy will act as the chairperson and members of the Procurement Regulatory Authority that would oversee compliance with the Bill, in addition to discharging the quasi-judicial functions of investigations and settling disputes. The Authority would also advise the government on various matters relating to public procurement.

i Procedures

A bidder unsatisfied by the conduct of the procuring entity may make an application for review before the procuring entity. The Bill also envisages setting up one or more independent procurement redressal committees chaired by retired high court judges of proven integrity and experience in public procurement to determine whether a procuring entity has complied with the requirements of the Bill and any rules framed under it. These redressal committees would give recommendations that the procuring entity may or may not take into consideration.

Further, the monitor appointed under the Integrity Pact can be approached seeking review of any decision. Save for this, the decision of a contracting authority is final unless challenged before a court of law. Judicial review would lie before the high court of the relevant state. This is in exercise of the writ-issuing powers conferred on the high courts by the Constitution. The Indian judiciary is independent and proactive. It can review administrative actions if the same is vitiated by any bias, arbitrariness, unfairness or illegality, or if the same is discriminatory, irrational or even grossly unreasonable. However, the courts would interfere only in cases where the procedure followed is arbitrary, irrational or grossly unreasonable, or if the procedure prescribed has not been followed.

ii Grounds for challenge

If the procuring entity discriminates or awards the contract in an irrational, illegal, arbitrary or unfair manner, or without making complete disclosures of material information, the interested parties may challenge such procurement process before the high court. To exclude the jurisdiction of the courts, the Bill provides that a review application may first be filed before a grievance redressal committee if any of the provisions of the Bill are violated. However,
a bidder is prohibited from challenging the determination of the need for procurement, provisions limiting participation of bidders, the decision to enter into negotiations, or the cancellation of the procurement process or the confidentiality provisions.

### iii Remedies

Pursuant to the provisions of the Bill, the redressal committee, if it deems it necessary, may recommend the procuring entity for suspension from a procurement process, pending disposal of the application, in the interests of justice. The time taken in settlement of disputes would vary from case to case. In cases of a violation of constitutional principles, the review procedure may take up to 60 days; in other cases, it may take up to two years. The courts may grant an injunction if necessary to prevent a miscarriage of justice or may cancel the entire procurement process *ab initio*, if necessary.

As a deterrent, penalties of up to 2 million rupees or 5 per cent of the procurement value, whichever is higher, may be imposed for any intentionally frivolous or malicious complaints before these redressal committees. In addition, an exhaustive list of offences and penalties has been provided under the Bill on account of corrupt practices, interference in procurement processes or for breach of the code of integrity in the Bill. A bidder found guilty of such offences may be debarred or blacklisted and prevented from participating in any procurement procedures for a period of two years.

### X OUTLOOK

The long-awaited Bill lays down principles that make the process of procurement transparent and competent for all organisations, including public sector enterprises. However, the legislature has yet to provide clarification to bridge the gap between the provisions of the RFP, RFQ and CVC guidelines.

India’s defence procurement procedures have not been altered, and e-procurement is not yet the standard method for procurement of routine and non-strategic goods and services by the government. Likewise, the implementation of the procurement of 20 per cent of such from small and medium-sized enterprises may result in lower standards, especially in the absence of any authority being responsible for such procurement. Although certain aspects remain unclear, government procurement may be seen as an emerging tool of global integration and good governance in India. The new central government, led by Prime Minister Narendra Modi, has promised to usher in greater transparency and speedy procurement processes for all government procurement, including defence procurement, and has committed to bring in public procurement legislation to ensure fairness, transparency, non-arbitrariness and equality.
Chapter 14

ITALY

Filippo Pacciani and Luca Morichetti Franchi

I INTRODUCTION

The main public procurement legislation applicable in Italy is laid down by the Public Contracts Code (PCC). The PCC came into force on 19 April 2016, implementing both the 2014 Public Contracts Directive and the 2014 Concession Contracts Directive, as well as the 2014 Utilities Contracts Directive, and replacing the previous Public Contracts Code. The relevant legal framework is completed by a number of secondary sources, which includes ministerial decrees and guidelines issued by the National Anti-Corruption Authority (ANAC), aimed at providing detailed rules on specific matters.

The European Union (on behalf of its Member States, including Italy) is party to the World Trade Organization’s Agreement on Government Procurement (GPA), which has been approved at the EU level by Council Decision 94/800/EC.

The national bodies responsible for setting up the public procurement policy are Parliament (legislative power), the government (executive power) and the ANAC, whose power has been consistently widened by the PCC.

The main principles underpinning public procurement policy in Italy are closely aligned to those that inspire the 2014 Procurement Directives: transparency and equal treatment of economic operators, effectiveness, impartiality, proportionality, environmental protection and energy efficiency.

II YEAR IN REVIEW

In the past year, pivotal developments in public procurement legislation have been made: the PCC came into force implementing the 2014 Procurement Directives and a number of ANAC guidelines have been adopted.

ANAC guidelines already in force provide specific regulations about:

- architectural and engineering services tenders;\(^4\)
- the ‘most economically advantageous’ tender criterion;\(^5\)
- the role of the tender procedure manager;\(^6\)

\(^1\) Filippo Pacciani is a partner and Luca Morichetti Franchi is an associate at Legance – Avvocati Associati.
\(^2\) Legislative Decree No. 50/2016.
\(^3\) Legislative Decree No. 163/2006.
below threshold contract tenders;\textsuperscript{7} selection criteria of members of the tender committee;\textsuperscript{8} exclusion of candidates due to material professional misconducts;\textsuperscript{9} and in-house providing.\textsuperscript{10}

Additional ANAC guidelines, as well as a number of ministerial decrees, have not yet been issued.

Case law developments have spanned a wide range of issues such as enforcement of the bid bond in favour of the contracting authority, should the bidder fail to sign the contract;\textsuperscript{11} contract award annulment;\textsuperscript{12} bidders’ ability to rectify documentation filed with the contracting authority;\textsuperscript{13} and qualification requirements based on social security contributions.\textsuperscript{14}

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

The PCC is applicable to public entities encompassing the central government, any regional or local authority, as well as any association formed by such entities.

Additionally, the PCC’s scope also includes the following entities:

- bodies governed by public law, that is, bodies in compliance with the following characteristics: (1) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (2) they have legal personality; and (3) they are financed, for the most part, by the central government, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board and at least half of the members are appointed by the central government, regional or local authorities, or by other bodies governed by public law;

- public undertakings over which a public entity exercises a dominant influence by virtue of its ownership thereof, its financial participation therein or the rules governing it;

- private entities acting on the basis of ‘special or exclusive’ rights, granted by a competent authority, in any of the utilities sectors provided for by Articles 115 to 121 of the PCC;

- works and services concessionaries; and

- private entities that hold building permits when such entities directly undertake the obligation to execute town planning works in lieu of payment of the relevant contribution.

\textsuperscript{7} ANAC Guidelines No. 4, adopted by Resolution No. 1097 of 26 October 2016.
\textsuperscript{8} ANAC Guidelines No. 5, adopted by Resolution No. 1190 of 16 November 2016.
\textsuperscript{9} ANAC Guidelines No. 6, adopted by Resolution No. 1293 of 16 November 2016.
\textsuperscript{11} Council of State, Section III, Decision No. 3765/2016.
\textsuperscript{12} Council of State, Section III, Decision No. 5026/2016.
\textsuperscript{13} Council of State, Section V, Decision No. 3667/2016.
\textsuperscript{14} Council of State, Plenary Meeting No. 5/2016 and No. 10/2016.
ii Regulated contracts

The PCC applies to public works, supplies and services contracts, in the ordinary sectors and in the utilities sectors. The utilities sectors include: (1) gas and heat; (2) electricity; (3) water; (4) transport services; (5) ports and airports; (6) postal services; and (7) extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels.

Public contracts in the defence and security sectors are awarded pursuant to the PCC and specific rules set forth by Legislative Decree No. 208/2011, implementing Directive No. 2009/81/EU.

The PCC also provides for an organic regulation of public-private partnership (PPP) contracts, including concession contracts.

PPPs are defined as contracts for pecuniary interest, concluded in writing, by means of which one or more contracting authorities entrust one or more economic operators with a set of activities including the execution, transformation, maintenance and operation of a work or service, the consideration for which consists in the availability or in the right to exploit the works or services or in the performance of a service connected to such works by undertaking the risk. Moreover, the definition of PPP expressly recalls the application of the Eurostat decisions. As a general rule, the private sector partner has to be competitively tendered.

Concession contracts are defined as agreements for pecuniary interest concluded in writing by means of which one or more contracting entities entrust one or more economic operators with the execution of works or the provision and the management of services the consideration for which consists either solely in the right to exploit the works or services that are the subject of the contract or in that right together with payment.

The award of a concession, as well as any other PPP contract, shall involve the allocation to the concessionaire of an operating risk in exploiting the works or services, encompassing demand or supply risk or both. The concessionaire or private partner in a PPP contract shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the contract. The part of the risk transferred to the concessionaire or private partner in a PPP contract shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire or private partner in a PPP contract shall not be merely nominal or negligible.

As far as PPP and concession contracts are concerned, the PCC also provides for a set of specific rules with regard to the bidding process, duration of the contract, and revision of the financial and economic plan.

Specific financial thresholds for determining individual contract coverage are set forth by the PCC. The PCC applies to both above-threshold and below-threshold contracts, although such contracts are treated differently in terms of the procurement procedures to be applied. Examples include: (1) works contracts whose amount is equal to or higher than €40,000 and lower than €150,000; and (2) supply and services contracts whose amount is equal to or higher than €40,000 and lower than the thresholds set forth by the PCC, which are awarded through negotiated procedures subject to prior consultation of at least five economic operators, where available, selected on the basis of a market survey or from special lists, and in compliance with a criterion of rotation.⁴⁵

⁴⁵ Article 36 of the PCC.
As far as the above threshold contracts are concerned, contracting authorities may award public contracts by a negotiated procedure without prior publication under specific conditions laid down by the PCC, such as: (1) failed procurement; (2) works, supplies or services that can be supplied only by a particular economic operator; (3) extreme urgency; (4) supply contracts where the products involved are manufactured purely for the purpose of research, study or development; (5) additional deliveries by the former supplier, intended as a partial replacement or extension of existing supplies where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in technical difficulties in operation and maintenance; (6) supplies quoted and purchased on a commodity market; (7) purchase of supplies or services on particularly advantageous terms, from either a supplier that is definitively winding up its business activities, or the liquidator in an insolvency procedure; and (8) new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract.16

As a general rule, variations to contracts are subject to authorisation of the contracting entity and must not alter the nature of the agreement. In particular, public contracts may be modified or transferred to a different supplier (as a consequence of a merger, demerger or transfer of a going concern) without competitively tendering the varied or transferred contract under specific conditions set forth by the PCC.

Certain contracts are excluded from the scope of the PCC due to their object. Examples include: concession contracts in water supply sector; certain financial or legal services; certain public transportation services, etc. Although the award of such contracts is not subject to the procedural rules laid down by the PCC, general principles governing public procurement (such as transparency, equal treatment, etc.) apply.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

A framework agreement means a contract that is awarded in accordance with the procedures laid down by the PCC and concluded between one or more contracting authorities and one or more economic operators, aimed at establishing the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.17

The term of a framework agreement shall not exceed four years in the ordinary sectors and eight years in the special sectors, apart from exceptional cases duly justified, in particular by the subject of the framework agreement.

Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement. For the award of those contracts, contracting authorities may consult the economic operator which is party to the framework agreement in writing, requesting it to supplement its tender if necessary.

Where a framework agreement is concluded with more than one economic operator, contracts based on that agreement shall be awarded either with or without reopening

16 Article 63 of the PCC.
17 Article 54 of the PCC.
competition among the economic operators parties to the framework agreement, depending on the conditions provided for by the PCC and on the basis of a reasoned decision of the contracting authority.

Contracting authorities may use a dynamic purchasing system for commonly used purchases.\textsuperscript{18} Such procedure entails a completely electronic process, which follows the rules of a restricted procedure and is open throughout the period of its validity to any economic operator that satisfies the selection criteria.

Contracting authorities can launch autonomous tender procedures only under the condition that they are qualified to do so by the ANAC, in accordance with specific rules set forth by a governmental decree, which have not been issued yet.\textsuperscript{19}

Non-qualified contracting authorities shall necessarily purchase works, supplies and/or services from or through a central purchasing body (which can be used by qualified contracting authorities as well).

The role of central purchasing bodies has been strongly enhanced by recent legislation in the context of a national spending review programme. The main operating functions of central purchasing bodies are: (1) to award supplies and services contracts as well as certain types of works contracts; (2) to enter into framework agreements that can be used by qualified awarding authorities to award public tenders; and (3) to manage dynamic purchasing systems and electronic markets.

The main central purchasing body is Consip SpA, a joint-stock company entirely held by the Ministry of Finance. Moreover, each region has its own central purchasing body, operating at a local level.

\textbf{ii Joint ventures}

As a general principle, contracting authorities should always award public contracts pursuant to public procurement procedures, regardless of whether the counterparty is a private or public entity.

However, the PCC has introduced specific rules for in-house providing, pursuant to which the award of a public contract shall fall outside the scope of public procurement rules where all of the following conditions are met: (1) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; (2) more than 80 per cent of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority; and (3) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert a decisive influence on the controlled legal person.

Pursuant to Article 192 of the PCC, a special register of the contracting authorities operating through in-house awards is held by the ANAC.

Furthermore, in the utilities sectors, the PCC does not apply to contracts awarded by: (1) a joint venture (JV) set up by public entities or public undertakings to an entity that is affiliated with a member of the JV; or (2) a JV’s member to the JV itself.

\textsuperscript{18} Article 55 of the PCC.
\textsuperscript{19} Article 38 of the PCC.
V THE BIDDING PROCESS

i Notice
As a general rule, contracting authorities shall comply with the general principle of transparency, according to which all their acts concerning public tenders must be formally published.\(^{20}\)

Specific rules are laid down by the PCC with regard to publication of: contract notices, both at the EU level and at the national level, as well as on the buyer profile; prior information notices; and contract award notices on the results of the procurement procedure.

ii Procedures
Contracting authorities may use the following tender procedures:

\(a\) open procedures, where any interested economic operator may submit a tender in response to a call for competition;\(^{21}\)

\(b\) restricted procedures, where any economic operator may submit a request to participate in response to a call for competition, and only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender;\(^{22}\)

\(c\) competitive procedures with negotiation, where any economic operator may submit a request to participate in response to a call for competition. However, only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender, which shall be the basis for the subsequent negotiations. Afterwards, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them. The contracting authority then assesses the final tenders on the basis of the award criteria and awards the contract;\(^{23}\)

\(d\) negotiated procedure without prior publication, which can be used by awarding authorities under specific circumstances set forth by the PCC;\(^{24}\)

\(e\) competitive dialogues. In accordance with such procedural scheme, contracting authorities shall set out their needs and requirements in the contract notice and may also define them in a descriptive document. Any economic operator may submit a request to participate in response to a contract notice, but only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the dialogue. Contracting authorities then open a dialogue with the selected participants aimed at identifying and defining the means best suited to satisfying their needs. Having declared that the dialogue is concluded and having so informed the remaining participants, contracting authorities ask each of them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue;\(^{25}\)

\(^{20}\) Article 29 of the PCC.

\(^{21}\) Article 60 of the PCC.

\(^{22}\) Article 61 of the PCC.

\(^{23}\) Article 62 of the PCC.

\(^{24}\) Article 63 of the PCC.

\(^{25}\) Article 64 of the PCC.
Awarding authorities may also use electronic procurement or electronic auctions.

### iii Amending bids

As a general principle, no material changes regarding either the conditions of the tendered contracts or the requirements for eligibility to bid are allowed.

Contracting authorities may authorise or require tenderers to submit variants, indicating such faculty in the contract notice. However, variants shall be linked to the subject matter of the contract, and only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration.

### VI ELIGIBILITY

#### i Qualification to bid

In order to participate in tender procedures, bidders must comply with the following three main sets of requirements pertaining to:

a. general moral requisites, aimed at excluding from tenders entities falling into the following categories: those who have received final judgment for certain types of crimes; those undergoing bankruptcy proceedings (or entry into a proceeding for the declaration of bankruptcy); those who have failed to pay social security contributions or taxes; those who have been found guilty of material professional misconduct; and those who have made misrepresentations, etc.;

b. economic and financial capacity; and

c. technical and professional capacity.

The requirements described under (b) and (c) must be related and proportionate to the subject matter of the contract.

Economic operators may be excluded from the tender only in the event the above-mentioned requirements are not met by the bidders, or should the bid not be compliant with mandatory requirements set forth by the procurement documents.

#### ii Conflicts of interest

The PCC provides for a wide concept of conflicts of interest, which covers any situation where staff members of the contracting authority who are involved in the conduct of the procurement procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.27

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26 Article 65 of the PCC.
27 Article 42 of the PCC.
Personnel of contracting authorities that have a conflict of interest must give specific notice thereof to the contracting authority and must abstain from the procurement procedure.

### Foreign suppliers

Pursuant to Article 45 of the PCC, Italian contracting entities shall allow economic operators established in EU Member States to participate in national procurement procedures.

Insofar as they are covered by the GPA and by the other international agreements by which the EU is bound, contracting authorities shall accord to the economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators established in Italy.\(^{28}\)

### VII AWARD

#### i Evaluating tender

As a general rule, contracting authorities award public contracts following the most economically advantageous tender criterion, which takes into account both the price and other quality criteria, using a cost-effectiveness approach. Quality criteria may include: organisation, qualification and experience of staff assigned to performing the contract; after-sales service and technical assistance; and environmental and/or social aspects.

The contracting authority shall specify, in the procurement documents, the relative weighting it gives to each of the criteria chosen to determine the most economically advantageous tender. Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

The lowest-price criterion can be used in the following cases only:\(^{29}\)

- for works up to €1 million awarded on the basis of executive designs; and
- for services and supplies with standard features or whose terms are defined by the market, including those with no relevant technological or innovative content.

#### ii National interest and public policy consideration

Specific regulations are laid down with regard to strategic infrastructures of national interest, aimed at: (1) ensuring correct planning and priority in their execution; (2) providing them with financial support through specific national funds; and (3) providing the awarded contract with greater stability.

As far as public policy considerations are concerned, public contracts must be awarded in accordance with the principles of environmental protection and energy efficiency,\(^{30}\) and may also consider social criteria.

Unless justified by the subject matter of the contract, technical specifications laying down the characteristics required for a work, service or supply shall not refer to a specific make or source, or a particular process that characterises the products or services provided by a

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28 Article 49 of the PCC.
29 Article 95, Paragraph 4 of the PCC.
30 Articles 4 and 30 of the PCC.
specific economic operator, or to trademarks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.\textsuperscript{31} Such reference shall be permitted only on an exceptional basis.

Where a contracting authority uses the option of referring to technical specifications, it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

**VIII INFORMATION FLOW**

On request from the tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

- any unsuccessful tenderer of the reasons for the rejection of its tender;
- any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement; and
- any tenderer that has made an admissible tender of the progress of negotiations and dialogue with tenderers.\textsuperscript{32}

Contracting authorities withhold information regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.\textsuperscript{33}

Furthermore, contracting authorities shall as quickly as possible, and in any event within five days from receipt of a written request, inform:

- the awardee and other recipients identified by the PCC of the contract award, as well as the signing date of the contract;
- excluded bidders of their disqualification; and
- any candidate of the decision not to award a contract or not to conclude a framework agreement.\textsuperscript{34}

Once the contract is awarded, each bidder having a qualified interest can ask to have access to the bidding documents of the awardee as well as other undisclosed procurement documents. However, contracting authorities shall not grant access to information with regard to:

- information concerning technical or trade secrets of the bidder, unless access to such information is necessary for filing a legal action;
- legal opinions obtained for the solution of potential or ongoing disputes concerning public contracts; and

\textsuperscript{31} Article 68 of the PCC.

\textsuperscript{32} Article 76, Paragraphs 1 and 2 of the PCC.

\textsuperscript{33} Article 76, Paragraph 4 of the PCC.

\textsuperscript{34} Article 76, Paragraph 5 of the PCC.
As far as the standstill period is concerned, the PCC provides that the contract cannot be signed before 35 days from the last notice of the contract award by the contracting authority. However, exceptions to the standstill rule are set forth by Article 32 of the PCC. Should the contract award be challenged and interim measures (such as suspension of the effects) be requested, the contract cannot be signed before the issuance of the precautionary decision by the administrative court.

**IX CHALLENGING AWARDS**

Litigation costs in the field of public procurement may depend on various circumstances. In particular, bringing a legal action before the administrative courts involves the payment of a tax, whose amount ranges from €2,000 to €9,000. Time frames may also vary depending on a number of factors, such as the complexity of the case and the workload of the court seized of the case. However, specific rules are set forth by the Administrative Trial Code (ATC) in order to accelerate the duration of judicial proceedings in the field of public procurement.

**Procedures**

In the Italian legal framework, enforcement of public procurement rules is granted not only through judicial review, but also by means of alternative dispute resolution, encompassing the following procedures:

- friendly settlement agreements, which can be used by contracting authorities in the event the amount of the exceptions raised and quantified by the contractor is equal to or higher than 5 per cent and up to 15 per cent of the contract value;
- the technical advisory board, which may be entrusted by the parties with the task of submitting a non-binding solution to disputes;
- civil settlements;
- the arbitration panel of the ANAC; and
- pre-litigation advice to be issued by the ANAC with regard to disputes arising during the tender procedures.

As far as judicial reviews are concerned, a distinction needs to be drawn between actions regarding the awarding procedure, which are subject to the jurisdiction of administrative courts, and actions concerning the performance of the contract once it has been awarded, which are subject to the jurisdiction of civil courts.

Judicial claims are regulated by the ATC. As a general principle, any interested party is entitled to challenge measures adopted by the contracting authority within 30 days from the communication (or acknowledgment) of the measure itself. Should the contract notice not...
be published, the 30-day period starts from the day following the publication of the contract
awarding notice. If no such notice is issued, challenge must be filed within six months from
the day following the contract signing.

The appeal may be filed with the competent regional court of first instance, whose
decisions may be challenged before the administrative court of second instance (the Council
of State).

In 2016, the PCC introduced a new regulation with regard to challenges against
measures issued by the contracting authority pertaining to admission to or exclusion of
candidates from procurement procedures. Such claims must be filed within 30 days from
their publication on the buyer profile, otherwise claimants are prevented from challenging
any subsequent deed issued in the procurement procedure.

ii Grounds for challenge

Appeals before administrative courts may be grounded on the breach of the procurement
rules set forth by the law and the procurement documents as well as on the infringement
of the general principles governing the exercise of administrative power (such as lack of
competence, lack of a preliminary investigation and failure to state sufficient reasons, illogical
and contradictory motivation).

iii Remedies

In general terms, claimants are entitled, *inter alia*, to challenge administrative measures issued
by contracting authorities (such as calls for tender, admission or exclusion of a candidate,
etc.), as well as to ask for interim measures aimed at suspending the effectiveness of the
challenged measure. Administrative courts may also award damages, including the loss of
chances.

Should the court set aside the contract award, the former is bound to declare the
contract ineffective, in whole or in part, only in cases of material violations set forth by the
ATC.39

However, in spite of such serious violations, the contract remains effective if overriding
reasons relating to a general interest require that its effects are maintained. On the other
hand, the administrative court identifies the following alternative sanctions to be applied
alternatively or cumulatively:

a a fine to be paid to the contracting authority, whose amount range from 0.5 to 5 per
cent of the value of the contract;40 and/or

b a shortening of the contract duration, where possible, ranging from 10 to 50 per cent
of the remaining duration at the date of the court decision.

Apart from the above-mentioned cases, the court that overturns the contract award determines
whether or not to declare the contract ineffective.

Further procedural provisions are set forth with regard to disputes concerning strategic
infrastructures. Apart from cases in which the court is bound to set aside the contract, the
suspension or annulment of the contract award does not imply the ineffectiveness of the
contract already signed, and the applicant is only entitled to claim for damages.

39 Article 121 of the ATC.
40 Pursuant to Article 123, Paragraph 1(a) of the ATC, the contract value is intended as the award price.
X OUTLOOK

Forthcoming developments in the field of public procurement will be brought by a special governmental decree aimed at amending the PCC, to be issued within one year after the entry into force of the latter and currently under discussion.

The next 12 months will also see further implementation of the PCC through ministerial decrees and ANAC guidelines. Moreover, cases applying the previous regime will continue to make their way through the courts, alongside cases based on the new legal framework.

All this considered, it remains to be seen how the policies related to public procurement will affect the business environment, from the standpoint of both contracting authorities and economic operators.
INTRODUCTION

The legal framework governing how the Mexican government and state-owned enterprises acquire goods, services, contract public works or otherwise partner with the private sector has undergone considerable amendments and additions in recent years to improve procurement practices and processes, combat corruption and bid rigging, and to introduce new mechanisms facilitating the implementation of projects in conjunction with the private sector. All of these factors have led to more streamlined, sophisticated and transparent procurement laws, implementing regulations and guidelines.

Mexico is a federation and is therefore subject to three levels of interaction and regulation: federal, state and municipal. Procurement laws are issued at all three governmental levels. Certain public services and utilities are mandated by the Mexican Constitution to be satisfied solely by municipal governments, such as waste collection, public lighting and the supply of potable water; however, municipalities can render such services and utilities through decentralised entities in association with state and federal governments or the private sector. Furthermore, depending upon the source of financing of a project, although it may be a state or municipal project, if federal funds are used, federal procurement laws (in addition to other applicable local laws) will apply to the project.

We shall focus on the federal procurement laws since most of the volume and large procurement processes are based upon federal law. Moreover, the main principles of the federal procurement laws can be seen throughout local legislation as federal laws generally act as a model for local statutes.

There are three main bodies of law that regulate procurement at a federal level: the Public Procurement Law, which regulates procurement of leases and acquisition of goods and services; the Public Works Law, regulating specific lump sum and unit price construction contracts; and the Public-Private Partnership (PPP) Law, regulating long-term service contracts and partnerships. All of these laws are complemented by regulations based upon the principles set out in such laws and guidelines for more specific matters (i.e., guidelines on cost-benefit analyses and those applicable to certain force majeure events).

Certain state-owned entities (such as the Federal Electricity Commission (CFE) or Petróleos Mexicanos (Pemex)) have their own specific procurement regime and the above-mentioned bodies of law may not directly apply; however, they are bound to follow the principles set out therein. In addition, the recently enacted laws comprising the National Anti-corruption System contain specific provisions applying to public procurement (regardless of the specific statute regulating the process) to impose fines and administrative
and criminal sanctions for corruption offences. As certain projects may require governmental concessions or permits to exploit public assets or render a public service, other laws will be applicable in such cases, and in specific cases a special procurement process may also apply (e.g., hydrocarbons industry, energy, roads and airports).

The main governmental bodies that interpret and regulate procurement laws are the Ministry of Finance and the Ministry of the Comptroller; both entities publish guidelines on matters related to procurement. All such guidelines, as well as any amendments to any procurement laws or regulations, must be published in the Federal Official Gazette for transparency and publicity purposes. Certain industries such as gas, oil, energy, roads and airports have their own governmental bodies that regulate their specific industry. Furthermore, most governmental bodies also have internal guidelines issued by their internal comptroller body and procurement committees that issue guidelines on how to procure for their specific needs. The Ministry of the Comptroller has tried to standardise these internal guidelines across different federal governmental bodies.

The fundamental principles of procurement in Mexico are clearly defined at a constitutional level: legality, loyalty, efficiency, equal treatment, fairness, transparency and honesty. The procurement legal framework mandates that public procurement procedures guarantee the best available terms and conditions for the public body; however, the current framework focuses more on transparency and anti-corruption issues and less on assuring an actual competitive and efficient results. In addition, Mexico is a party to various multilateral and bilateral treaties granting benefits in connection with public procurement, such as treating entities or individuals of such treaty countries as from a ‘most favoured’ or ‘preferred’ nation.

II YEAR IN REVIEW

During 2016, Congress approved the laws to implement the National Anti-corruption System created in 2015, including the General Law of Administrative Liabilities, the General Law of the National Anti-corruption System, the Organic Law of the Federal Court of Administrative Justice and the Federal Scrutiny and Accountability Law. The implementing laws of the National Anti-corruption System will mark the beginning of new practices in procurement at all levels of the Mexican government.

In particular, the General Law of Administrative Liabilities will abrogate the Federal Anti-corruption Law on Public Procurement later this year. This new law sets forth specific procedures to be followed by public officials in public procurement, as well as penalties and administrative sanctions to be imposed on public officials and private individuals or entities for administrative offences such as bribery and collusion in public procurement. Apart from economic penalties, individuals or entities committing such offences could be declared ineligible to participate in public contracting from a three-month to a 10-year term. Consequently, the Federal Criminal Code was amended to penalise certain corruption offences. All of these sanctions can be imposed by either the Federal Court of Administrative Justice, the Superior Auditing Office of the Federation or the Specialised Prosecutor’s Office to Combat Corruption. The National Anti-corruption System also mandates Congress to enact laws to implement the National Anti-corruption System at state and municipal levels, including the creation of a Specialised Prosecutor’s Office to Combat Corruption at the local level. The law even has an extraterritorial reach, as it applies to international commercial transactions, which cover acts between Mexican nationals and foreign public officials.

In addition to the anti-corruption related reforms, the PPP Law was amended in April 2016 to (1) make the law applicable to the energy regulatory entities (i.e., the National
Hydrocarbons Commission and the Energy Regulatory Commission); (2) impose an obligation on the Ministry of Finance to publish certain quarterly information of the PPPs to be paid by the Mexican government with federal funds; (3) streamline and clarify certain requirements for the registration of the project with the Ministry of Finance; (4) include a requirement for the projects to be pre-approved by a committee within the Chamber of Representatives, including outlining a revised process for budgeting and approval; (5) clarify the requirements for unsolicited proposals and the approval process; and (6) clarify provisions relating to step-in rights of the public entity in the event of default of the contractor.

One of the major reforms affecting public procurement was the enactment of the Financial Discipline Law. The main purpose of this law is to further regulate the indebtedness incurred by states and municipalities, setting forth specific requirements for them to (1) obtain financing, (2) budget for public procurement, and (3) grant payment guarantees for the benefit of private contractors or service providers.

Public procurement for major infrastructure projects was very active in 2016.

In the energy sector, the National Hydrocarbons Commission awarded more than 30 contracts for exploration and/or production tendered between 2015 and 2016. The auctions for deep-water oil contracts were particularly successful. CFE was also active, with six gas pipelines awarded and a combined cycle generation plant; other major transmission line projects are in the pipeline.

In the telecommunications sector, the Ministry of Communications and Transportation awarded a 20-year PPP contract to develop the shared public telecommunications network. This is one of the largest projects tendered in Mexico, the first procured under the PPP Law in this sector, and it is expected to bring 4G-LTE services to 92 per cent of the country in the next seven years. In addition, several major construction contracts for the New Mexico City International Airport were awarded during 2016.

In the water sector, a PPP contract was awarded by the state of Baja California to build and operate the largest desalination plant in Latin America. Finally, several hospitals for the public health sector and federal highways were awarded or are being tendered under PPP schemes.

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

The procurement rules described in this chapter apply to practically all Mexican federal governmental agencies, bodies and entities with a majority of equity held by one of these entities. Pemex and CFE would be exceptions to this rule. Also, certain types of projects may be subject to special laws as would be the case for concessions in the transportation industry.

#### ii Regulated contracts

All contracts entered into by government agencies, except as noted above, are regulated by the provisions of the Public Works Law, the Public Procurement Law, the PPP Law and the regulations thereunder. As a general rule, procurement contracts must be tendered in an open bid. Conducting a restricted invitation or directly awarding a contract is an option only afforded to the government under special circumstances, where a public tender would not be possible or recommended because of, \textit{inter alia}:

- the existence of licences, intellectual property and patents;
- national security matters or where a public tender may affect or compromise public health, the economy, public safety, the environment or may otherwise create social unrest;
in cases of urgency because of force majeure or otherwise;

where the goods or services to be contracted cannot be obtained through an open tender process or when the corresponding tender process was unsuccessful;

where the goods or services are offered to the government as payment in kind or the relevant contract derives from or is ancillary to a master agreement that has already been awarded; or

if the amount of the contract is less than the threshold amount included for such purposes in the annual federal spending budget.

Under laws applicable to oil and gas-related activities, there are also certain exceptions to a public bid such as in the case of retaining advisers, oil spills and engineering services.

Regardless of the form tendered, the terms of any procurement agreement will need to abide by applicable procurement laws and, when applicable, the special rules governing the requesting entity.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Mexico does not have standardised forms of agreements across the board, and sometimes not even within the same governmental body. It is easy to find, within the same agency, contracts of a very similar nature signed only a day apart but with substantially different provisions or structures. Some of the previously mentioned guidelines and specific efforts of government agencies have resulted in some framework agreements for commodity-type services or supplies of goods.

Central purchasing is not compulsory in Mexico, but it is a practice that is starting to be observed given the efficiencies that can be obtained; such is the case for the Mexican Social Security Institute. Some states have also started to centralise purchases, but again there are no regulations on the matter and certainly no obligation to procure in this way.

ii Joint ventures

Public companies and independent governmental bodies

The Mexican legal system provides for the existence of independent governmental bodies, public companies with major government interests, as well as the formation of public trusts. Such entities are considered to form part of the Mexican public administration and (unless expressly exempted) are therefore subject to all applicable procurement rules. All activities are regulated principally in the same fashion as any governmental agency. Joint ventures in which the government has a minority stake would not necessarily be subject to or regulated under general public procurement rules. Both Pemex and CFE, as state productive companies, have been expressly excluded from the Federal Law of Parastatal Entities and will have their own set of procurement rules as mentioned above.

PPPs

For many years, to encourage private capital participation in public infrastructure and utilities, the main forms of contracting have been through long-term services agreements with a construction component, financed public works contracts and concessions. Over the years these forms of contracting, having evolved and improved, led to the enactment of
the PPP Law in 2012 and to the enactment of PPP laws in the majority of the states in Mexico. These laws were especially created to provide the necessary flexibility in procurement to develop long-term joint ventures between governmental agencies and private parties.

V THE BIDDING PROCESS

The Mexican Constitution prescribes that all government acquisitions and leases of any kinds of goods, retained services or construction of public works be carried out and awarded – as a general rule – through a public bidding process, to guarantee the best available conditions for the government in terms of price, quality, financing and opportunity. Accordingly, all procurement laws dictate that all government procurement – as a general rule – should be conducted through an open tender procedure.

i Notice

The use of an electronic procurement system called CompraNet, managed by the Ministry of the Comptroller, is a mandatory mechanism to make public and freely available information on government procurement.

All federal government public invitations to tender must be made public through CompraNet and in the Federal Official Gazette, and may also be divulged by other means of publicity such as the official website of the contracting agency or governmental body, or newspapers with national distribution, as determined in each case. As a general rule, amendments, changes or clarifications to the bid documents (including those stemming from clarification meetings), award notices or any other relevant information for the tender process are made public through CompraNet to guarantee that all participants have access to the same information, and the transparency of the process.

In addition, any bidder in a tender process to be conducted under the Public Procurement Law may now participate through CompraNet without the need to physically attend the different events of the process, unless otherwise specifically requested in the tender documents.2

ii Procedures

As previously indicated, the government procurement process in Mexico is usually conducted through a public tender; however, procurement contracts, under certain circumstances described above, may also be awarded through a restricted invitation to tender, delivered to at least three participants or even directly awarded to a supplier or service provider.

Also, an important development under the PPP Law is the government’s ability3 to retain consulting or advisory services through a restricted invitation to tender process, or to directly award contracts to service providers to perform all necessary works and services to develop and implement a specific project to be tendered by the government, provided that the total costs of such services do not exceed a specified threshold.

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2 A tender process under the Public Procurement Law may require that the submitting of bids and other events of the tender process be conducted only in person, in person and through CompraNet, or only through CompraNet.

3 Notwithstanding that the government is afforded this flexibility under the PPP Law, the relevant advisory, consulting or service agreements will be awarded under the Public Procurement Law but specifically for the development and implementation of PPP projects to be tendered in accordance with the PPP Law.
The Public Procurement Law also provides that, in connection with the purchase or supply of certain goods, certain environmental or sustainability requirements be met, and in some circumstances a certification by the Ministry of the Environment and Natural Resources may be required.

Procurement contracts to be awarded under the Public Procurement Law or the Public Works Law can be tendered as:

a a national public tender, where only Mexican entities or individuals may participate in the bidding process and the goods to be provided or the materials to be used for the works or project being contracted should have a national content of at least 50 per cent;
b an international public tender, under the coverage of international treaties, where it would be mandatory under the relevant international treaty to limit the participation to Mexican and foreign bidders only from those countries with which Mexico has signed a free trade agreement with a chapter on government procurement; or
c an open international public tender, only when (1) an unsuccessful national tender process has been held; or (2) if required for the procurement to be financed with a foreign loan granted to, or guaranteed by, the federal government.

The PPP Law does not classify tender processes for PPP projects as national and international but rather specifically sets forth that any entity may participate in PPP projects provided that the industry-specific regulations allow for the participation of the private sector in the services to be provided (for such purposes a licence, permit or concession may be required).

iii Amending bids

As long as any changes or amendments would not have the purpose of restricting the participation of other bidders, the contracting governmental body or agency may change the bidding documents throughout the tender process, including as a result of a clarification meeting, provided that any such amendments would have to be made with sufficient anticipation for all participants to revise their proposals accordingly before the submission date.4 As previously indicated, any such amendments should be disclosed through CompraNet – among other means – to guarantee that all participants would have access to such information. Such amendments should not entail the substitution of the goods or services originally tendered, or add others significantly different in quality or nature to those originally tendered.

The tender documents, including the form of contracts and exhibits thereto, as may be amended in clarification meetings and the bid proposal, are binding among the parties. The actual contract to be executed should not modify or amend the terms and conditions contained therein.

Mexican public procurement laws do not promote or facilitate discussions on the tender documents on an individual basis but are rather limited to responses and information provided in the clarification meetings. The only exceptions to this rule are:

a those cases where a contract is directly awarded, as was the case with each PPP contract that was awarded in 2011 under the PPP Federal Prison Programme (in such awards the federal government had several individual meetings with each participant to negotiate and modify the relevant form of PPP contract);

4 The Public Procurement Law requires that in all tender processes at least one clarification meeting be held, although it is not mandatory for the participating bidders to attend.
After a procurement contract has been awarded the contracting governmental body or agency may amend the contract as long as the amount, quantity or volume of the goods or services originally contracted has not increased by more than 20 per cent and the prices of the relevant goods, leases or services are not changed. If, however, after a contract has been awarded, new general economic circumstances arise that result in new conditions outside the control of the parties, which imply an increase or reduction in the prices of services or goods, such an increase or reduction should be considered and adjusted in the contract in accordance with the guidelines that the Ministry of the Comptroller may issue for such purposes. Under the Public Works Law a similar limitation applies, as contracts may be amended provided that the price is not increased or the term of the agreement is not extended by more than 25 per cent.

In contrast, the PPP Law expressly recognises the need to review and amend long-term contracts to implement modifications to:

- improve the conditions or quality of the services or infrastructure being provided;
- protect the environment and natural resources;
- adjust the scope of the contract because of new circumstances; or
- enhance the financial feasibility of the project when new and unforeseen circumstances arise.

## VI ELIGIBILITY

Other than those specific cases where the private sector or foreign participation is limited or proscribed, as previously explained, the eligibility criteria for government procurement is relatively standardised throughout Mexican government procurement legislation.

### i Qualification to bid

In addition to those specific cases where proposals should not be admitted because of a conflict of interest or otherwise, as described in Section VI.ii, proposals may be dismissed or disqualified if a participant has used inside or privileged information; if participants have colluded to raise prices or to obtain any other advantage; or if a participant does not meet the requirements under the bid documents provided that any such breach would affect the financial or technical feasibility of the relevant tender.\(^5\)

As a particular feature of PPP projects, the PPP Law affords the tendering government agency the ability to pre-qualify proposals in accordance with the specific terms and conditions of the bid basis. Such pre-qualification should be limited to ascertaining which proposals comply with the minimum requirement to be considered as economically and technically feasible.

\(^5\) All procurement laws and – as a general rule – all bid documents clearly specify that lack of compliance with specific requirements under the bid documents should not constitute a cause to disqualify or reject a proposal unless lack of compliance adversely affects the technical or economic financial viability of the proposal. The foregoing has been consistently confirmed in court precedents.
Conflicts of interest

All government procurement regulations prohibit governmental bodies or agencies from receiving proposals or awarding contracts to participants that:

- have a family, business or labour relationship or where a government officer who participates in the bidding process could otherwise benefit from the relevant contract;
- have a conflict of interest with the contracting governmental agency or other participants in the same tender process;
- have been convicted by a final and non-appealable judgment in the previous three years in connection with government procurement contracts;
- have had a governmental agency rescind a contract for breach or wrongful misdoing;
- are insolvent or subject to an insolvency proceeding; or
- have been vetoed by the Ministry of the Comptroller.

The new General Law of Administrative Liabilities has a much more ample definition of ‘conflict of interest’, identifying as such ‘the possible influence of an impartial and objective performance from public officials due to personal, family or business interests’. Although this definition has not been transferred to procurement laws, verification and confirmation of the absence of conflict of interests in procurement processes should be further scrutinised. To that effect, the General Law of Administrative Liabilities now obliges public officials to submit declarations of (1) assets, (2) conflicts of interests, and (3) evidence of good standing with Mexican tax authorities.

Foreign suppliers

Unless otherwise specifically prohibited with respect to a particular industry, foreign suppliers may participate in government procurement tenders. However, as previously explained, certain tenders may be limited to national participants. Even in such cases, foreign suppliers may also participate through associations or joint ventures, provided that the Mexican company remains the majority and controlling holder, or as a subcontractor or supplier, only if the 50 per cent national content threshold is observed.

Foreign participants may or may not be required under the tender documents to incorporate a Mexican subsidiary in the event they are awarded a procurement contract, but in all cases they would be required to submit to Mexican law and Mexican courts. In those cases where the supplier or services provider is required to hold a certain permit, licence or concession, the specific regulations governing such permits, licences or concessions generally require that any such governmental authorisation be granted solely to a Mexican entity.

VII AWARD

Evaluating tenders

Bidders are commonly asked to submit their proposals in two separate packages (or envelopes): one containing the technical proposal and a separate one containing the pricing.

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6 For short-term contracts or those limited to the supply of goods, foreign participants are not always required to incorporate a Mexican special purpose vehicle to enter into the relevant procurement agreement.
Both packages could be opened at the same time or in successive events with the technical proposals being opened first then, in a subsequent evaluation, the pricing under each of the proposals that qualify for the second stage would be revealed.

Government procurement laws provide flexibility to the tendering authorities to establish in the tendering documents the specific rules to be considered for the evaluation of the proposal; these rules should be outlined in the tendering documents for the information and benefit of all participants. Depending on the type of procurement contract, the winning bid could be determined on the basis of price or on the overall qualification of each proposal.

Among the most common mechanisms for evaluating proposals, the pricing component is weighted as follows:

a lowest price wins (commonly used for supply of goods or services) provided that the goods or services offered are consistent with the tender documents;

b the technical proposals are evaluated separately and, among those that reach a certain minimum score, the contract is awarded to the proposal with the lowest price; or

c in a score-based tender, where many aspects of the proposals are individually evaluated (including pricing as one of the many criteria to be considered) and the bid with the highest score is awarded the project.

The award should spell out:

a the reasons for disqualifying certain bids;

b which bids were considered technically feasible;

c the reasons for not considering as valid the pricing under certain proposals;

d the reasons for awarding the contract to a specific bidder; and

e information in connection with the execution of the relevant procurement agreement.

ii National interest and public policy considerations

Generally procurement laws promote the participation of Mexican companies and the acquisition of Mexican goods in government procurement processes. As a practical matter, national companies and goods can be favoured in a procurement process as follows:

a with respect to industries where foreign participation is proscribed or limited;

b in a national tender process where only Mexican suppliers may participate or goods and services should comply with a certain Mexican component;

c with respect to certain goods that require certifications issued by Mexican authorities;

d in open international public tenders, the tendering authority should favour, in equal circumstances, those proposals that would generate employment in Mexico or that would use more products produced in Mexico (that comply with the national component threshold required in a national tender process). Such proposals should receive up to a 15 per cent advantage in their price with respect to other proposals with imported goods or services; and

e in those cases where the evaluation rules consider a score-based tender, additional scores could be granted to those proposals from small or medium-sized companies that use innovation technologies as evidenced by certification from the Mexican Institute of Industrial Property.

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7 A contract may not be awarded to the bidder with the lowest price if in the opinion of the tendering authority (based on an independent analysis) the prices offered by such a bidder are not market prices.
VIII INFORMATION FLOW

All relevant information regarding federal government procurement is made freely and publicly available by the federal government through CompraNet, and includes:

a. the annual spending programme of, and projects to be conducted by, the relevant governmental contracting agency or body;
b. authorised suppliers’ lists;
c. calls for public bids and closed invitations, as well as amendments thereto;
d. calls for clarification meetings and the outcome thereof; and
e. contract award notices, including those directly awarded outside a bidding process.

Government procurement regulations prescribe that the tender process and all relevant information in connection therewith should be disclosed and made equally available to all participants. However, certain information may be reserved and not disclosed if it is deemed to be restricted or confidential in accordance with the Federal Law of Transparency and Access to Public Government Information or any other applicable laws and regulations (e.g., the procurement of goods or services related to national security; documents or information used in or considered to be part of an ongoing tender process; and information submitted by participants as confidential).

IX CHALLENGING AWARDS

All challenges in connection with a government procurement tender process should be submitted to the Ministry of the Comptroller. Such challenges should only be made in connection with:

a. the invitation for the tender process and for the clarification meetings;
b. restricted invitations to at least three participants (only such participants may contest the invitation);
c. submission and opening of bid proposals;
d. the award;
e. the cancellation of the tender process; or
f. acts and omissions from the tendering government agency that hinder the execution of the relevant procurement agreement.

i Procedures

An award may only be challenged by a participant that actually submitted a proposal and should be filed in writing with the Ministry of the Comptroller or through CompraNet within the next six business days following the date on which the meeting making the award public was held or when the participant was actually notified of the award in the event that such a meeting was not held.

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8 Such programmes can be updated on a monthly basis, or as required.
9 Governmental authorities usually reserve the proposals submitted by bidders for several years after the relevant tender process has been concluded.
ii  Grounds for challenge
The challenging participant may request that the tender process be suspended and the execution of the procurement contract with the winning bidder be postponed. In the event that the Ministry of the Comptroller approves the requested suspension of the process, such a suspension would only be granted if the challenging participant actually guarantees the indemnification of any damages that the suspension may cause, as requested by the Ministry of the Comptroller. Such a guarantee would have to be of an amount greater than 10 per cent and less than 30 per cent of the amount of its bid; however, the winning bidder may offer a counter-guarantee of the same amount for the process not to be suspended.

iii  Remedies
The final resolution issued by the Ministry of the Comptroller may dismiss the challenge, declare the tender process null and void, or declare the nullity of the specific act being challenged (such as the award), in which case the challenged act would need to be restored. Such a resolution may be contested or appealed at the federal courts.

X  OUTLOOK
The Ministry of Finance recently announced a strategy to boost PPP projects, including 12 new projects to be tendered during 2017 for a total investment of 22,000 million Mexican pesos, including five new toll roads and seven new hospitals under the PPP Law. Therefore, 2017 will be quite active in the area of public procurement. These projects will put to the test recent amendments to the PPP Law and new statutes and regulations related to government procurement.

We should also be very observant of the implementation at the federal and local level of the new National Anti-corruption System and how will it affect procurement at all governmental levels. There is a great level of uncertainty as to how it will be implemented and whether this greater scrutiny and more rigorous sanctioning of public officials may initially delay the government procurement process in Mexico as these new statutes and regulations start to be applied.

Finally, the Superior Auditing Office of the Federation, exercising its strengthened authority deriving from the National Anti-corruption System, recently proposed the creation of an entity that manages and oversees PPPs, following examples of other jurisdictions in Latin America and the United Kingdom, but no specific steps towards that goal have been taken as of yet.
Chapter 16

NETHERLANDS

Bregje Korthals Altes and Mathieu Schimmel

I  INTRODUCTION

The key procurement legislation applicable in the Netherlands is all based on the European Union Procurement Directives and consists of the following:

\[ a \] the Public Procurement Act (PPA);
\[ b \] the Public Procurement Decree;
\[ c \] the Works Procurement Regulations 2016;
\[ d \] the Procurement Regulations for the Utilities Sectors 2013; and
\[ e \] the Proportionality Guide.

The PPA applies to all national procurement procedures (i.e., both those that are below the EU thresholds and those that meet or exceed the thresholds). The PPA distinguishes between different types of procedures and sectors; its internal structure consists of four parts that are applicable depending on the type and value of the procurement procedure:

\[ a \] Part 1 contains general provisions that are applicable to all (including below-threshold) procurement procedures that fall under the scope of the PPA;
\[ b \] Part 2 applies only to procurement procedures that meet the EU thresholds set by Directive 2014/24/EU;
\[ c \] Part 2a implements the provisions of Directive 2014/23/EU on the award of concessions;
\[ d \] Part 3 is only applicable to procurement by entities operating in the water, energy, transport and postal services sectors (i.e., ‘utilities procurement’); and
\[ d \] Part 4 contains some final provisions.

A number of measures are further regulated in the Public Procurement Decree. These concern, inter alia, the application of the principle of proportionality by means of a mandatory Proportionality Guide, the mandatory application of the Works Procurement Regulations 2016 for procurement of works below the EU thresholds, and procedural rules regarding the submission of documents by tenderers.

1 Bregje Korthals Altes is a partner and Mathieu Schimmel is a senior associate at De Brauw Blackstone Westbroek.
3 Article 10(1) Public Procurement Decree.
4 Article 11(1) Public Procurement Decree.
The Proportionality Guide aims to ensure that all requirements imposed by a contracting authority are proportionate to the object and scope of the public contract. Accordingly, the application of the Guide should strengthen the position of small and medium-sized enterprises during tender procedures. Contracting authorities may only deviate from the detailed provisions on proportionality contained in the Proportionality Guide if this is properly motivated in the tender documents (i.e., following a ‘comply or explain’ mechanism).

In addition to these general public procurement regulations, Dutch law provides for a number of sector-specific regulations. Procurement regulations are, for example, included in the Passenger Transport Act 2000.

Dutch public procurement law recognises the general principles of public procurement law (non-discrimination, transparency and proportionality) and the general principles of Dutch civil law (including pre-contractual good faith).

II YEAR IN REVIEW

The main development in 2016 has been the amendment of the PPA and the related procurement legislation to implement the new EU Procurement Directives. This amendment entered into force on 1 July 2016. Some of the most important amendments include:

a. the gradual introduction of a general obligation to tender electronically (which will fully apply as of 1 July 2017);

b. the increased flexibility of procedures, notably the expanded possibilities to tender a contract on the basis of a competitive dialogue and the procedure for innovation partnerships;

c. the codification of a framework for public-public partnerships;

d. the codification of the rules on substantial modifications of tendered contracts during their term;

e. the introduction of past performance as a possible ground for exclusion;

f. the introduction of a new award criterion – lowest costs based on cost-effectiveness, which allows contracting authorities and contracting entities to include costs related to sustainability, such as recycling and maintenance costs, in awarding contracts; and

g. the experience and abilities of the tenderer’s team can under certain circumstances be scrutinised as part an award criterion (and not merely a selection criterion).

In addition, the European Single Procurement Document has replaced the Dutch self-declaration model despite initial objections by the government. Also, due to a parliamentary amendment to the government’s legislative proposal, the obligation to apply the Proportionality Guide has now also been extended to utilities procurement.

Apart from that, another interesting development was the much-awaited Dutch Supreme Court ruling on the question whether the sanction of ineffectiveness can be applied to a tendered contract concluded after a claim brought against it is dismissed in summary proceedings (as is current practice in the Netherlands), but which dismissal is subsequently overturned on appeal or set aside in proceedings on the merits. The Dutch Supreme Court confirmed that under such circumstances, a tendered contract can in principle no longer be declared ineffective on the basis of a violation of public procurement law.5

III SCOPE OF PROCUREMENT REGULATION

i Applicability ratione personae

Most contracting authorities are governed by Part 2 of the PPA. Public sector entities qualifying as contracting authorities are for a large part specifically listed in the PPA (e.g., government departments, regional or local authorities). Other entities qualify as contracting authorities on the basis that they are regarded as ‘bodies governed by public law’ (i.e., entities established for the purpose of meeting needs in the general interest not having an industrial or commercial character, that are predominantly financed or controlled by other contracting authorities).

Part 3 of the PPA applies to contracting authorities and to other contracting entities, in as far they carry out the activities designated in Article 3.1–3.6 of the PPA in the water, energy, transport and postal services sectors (referred to collectively as ‘special sector companies’).

Part 2a of the PPA applies to both contracting authorities and special sector companies in as far as the award concerns a (works or services) concession.

ii Applicability ratione materiae

Generally, contracts for the construction of works, supply of goods and provision of services awarded by the contracting authorities and contracting entities referred to above are subject to the procurement regulations. The financial thresholds are set in the EU Procurement Directives.

Below-threshold contracts are not normally subject to the procurement regulations, unless there is a certain cross-border interest. The PPA, however, contains in Part 1 some limited provisions for below-threshold contracts that also apply to voluntary tender procedures initiated by contracting authorities (see also Section I, supra). In addition, works contracts – and contracts for services and goods related to works contracts – below the EU thresholds are subject to the Works Procurement Regulations 2016.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements are extensively used. Many are multi-supplier frameworks, typically involving a mini-competition among all framework panellists at the call-off stage. Single-supplier frameworks are also common. Framework agreements are often established by one authority on behalf of itself and a (frequently very large) number of other authorities. Dynamic purchasing systems are not widely used at present. Contracting entities operating in the water, energy, transport and postal services sectors widely use both framework agreements and qualification systems to reduce the burden of procurement processes, often establishing single-supplier framework agreements for a certain period (e.g., five years).

ii Joint ventures (JVs)

Public-public JVs are common. They have typically relied on the Teckal or the Stadtreinigung Hamburg exceptions developed in the case law of the European Court of Justice, which have now been codified in Article 2.24b of the PPA. An increasing number of large infrastructure projects are realised on the basis of public-private partnerships. The government has drafted a template contract for the design, building, financing, maintenance and (sometimes also) operation (DBFM(O)) of infrastructure projects. The government has also standardised
the tender guidelines in relation to such projects. The use of these standards has increased significantly, and DBFM(O) contracts have been negotiated for various road, tunnel and tram infrastructure projects in the Netherlands over the past few years.

V THE BIDDING PROCESS

i Notice
Above-threshold contracts must be published on the digital portal of the Dutch government (TenderNed).6 TenderNed subsequently forwards the contract notice to the European Commission for publication in the Official Journal of the European Union.7

To mitigate the risk of a contract being declared ineffective because it was not properly published, voluntary ex ante transparency notices are sometimes used when authorities directly award a contract without a call for tenders.8

ii Procedures
For above-threshold contracts, the procurement regulations generally require use of one of the prescribed procedures (i.e., open, restricted, competitive dialogue or negotiated procedure). The PPA has implemented the requirements introduced by the new EU Procurement Directives on running the new innovation partnership procedure and the procedure for competitive dialogue. The PPA also implements the new ‘light regime’ introduced by the new EU Procurement Directives for the award of contracts for social and other specific services.

Subject to compliance with certain mandatory requirements (e.g., principles of transparency and equal treatment), the PPA provides for contracting authorities and special sector companies to have significant flexibility in determining the procedures to be applied.

iii Amending bids
In a number of court cases, tenderers have sought to challenge the authority’s refusal to allow them to correct defects in, or omissions from, their bids. In our experience, authorities take different approaches to this issue. By contrast, it is fairly common for authorities to seek clarification of bids. Authorities should ensure that clarification does not result in amendments to bids and that tenderers are treated equally.

VI ELIGIBILITY

i Qualification to bid
The PPA replicates the grounds for exclusion and selection criteria for assessing tenderers’ suitability to contract set out in the relevant EU Procurement Directives.

ii Conflicts of interest
The PPA has implemented the requirements introduced by the EU Procurement Directives to require authorities to take appropriate effective measures to prevent, identify and

6 Articles 2.62, 2a.33(3), 3.56 4.13(1)(a) PPA.
7 Article 4.13 PPA.
8 Article 4.16(1) PPA.
remedy conflicts of interest. Economic operators may be excluded from participation in a procurement procedure where a conflict of interest cannot be effectively remedied by other, less intrusive, means.

iii Foreign suppliers

Foreign suppliers do not have to set up a local branch or subsidiary, or have local tax residence to do business with public authorities in the Netherlands.

VII AWARD

i Evaluating tenders

Most contracts are awarded using award criteria implementing a blend of quality and price. Approaches to setting award criteria vary. Many authorities use a very detailed marking scheme, with each small element of the project receiving a predefined mark (e.g., 0.5 per cent for proposals on staffing levels). Other authorities take a much broader approach, with no sub-criteria and a global figure for each criterion of, say, 20 or 25 per cent.

Under the PPA, contracting authorities can award contracts to the tenderer offering the lowest price, the best price-quality ratio (i.e., the form criterion of the ‘most economically advantageous offer’) or, as was introduced by the PPA in 2016, the bid with the lowest cost using a cost-effectiveness approach. When the best price-quality ratio is used, contracting authorities must, from the date of publication of the notice, disclose on what specific criteria they will award the contract. The contracting authority must also specify the weighing factor in the tender documents.

ii National interest and public policy considerations

In principle, domestic suppliers cannot be favoured for reasons of public interest. Social and environmental considerations can, however, be taken into account.

VIII INFORMATION FLOW

During the procurement process, contracting authorities must ensure that the tender procedure and (selection and award) criteria are clear and unequivocal. When tenderers have questions or are uncertain about the correct interpretation of a certain clause or criterion, it is generally recommended that they make formal requests to the contracting authority as soon as possible after they receive the invitation to tender. The Grossman jurisprudence of the European Court of Justice is strictly applied in the Netherlands. Contracting authorities may nevertheless withhold information from tenderers on a number of grounds such as the public interest, the legitimate commercial interest of any person or possible prejudice to fair competition between economic operators.

9 Article 1.10b PPA.
10 Article 2.87(c) PPA.
11 Article 2.115(1) PPA.
12 Article 2.115(4) PPA.
Contracting authorities are obliged to document decisions taken during the tendering process as well as the reasoning underpinning each decision. Under the procurement regulations, authorities are required to notify tenderers and supply certain information when they make an award decision. They must then 'stand still' for a minimum of 20 calendar days before signing the contract. This period allows unsuccessful tenderers time to challenge the contract award if they consider that the award decision is unlawful. The standstill requirement often proves to be onerous for contracting authorities, which must supply scores and a narrative of the characteristics and relative advantages of the winning bid to each unsuccessful bidder. Many contracting authorities therefore provide extensive details of their reasoning in the standstill notice so as to reduce the risk of delay caused by tenderers asking for more information and/or claims that the standstill notice is defective.

IX CHALLENGING AWARDS

Civil courts generally decide on public procurement disputes. However, sector-specific legislation can provide that the tender procedure is subject to administrative law. Tender documents may also provide that disputes must be resolved by way of arbitration, although this is rarely seen nowadays.

i Procedures

The vast majority of all public procurement cases are dealt with in summary proceedings. If a claimant initiates summary proceedings within 20 days after the notification of the award decision, the contracting authority or entity cannot enter into the contract until the request for provisional measures is decided on. The provisional measures obtained in these proceedings often finally resolve the dispute, as an appeal (or the initiation of proceedings on the merits) does not suspend the award of the contract.

The Grossman jurisprudence of the European Court of Justice is strictly applied in the Netherlands. Tenderers must consequently use all available options to request clarifications or notify the contracting authority or entity of any irregularities. In cases where the contracting authority or entity does not adequately respond, tenderers must initiate summary proceedings to prevent being estopped to invoke this at a later stage.

Contracting authorities and entities are encouraged to set up informal review commissions that can address complaints during an early stage of the tender procedure in order to avoid court proceedings. If no internal review commission is available, or if it simply does not respond to the complaint, tenderers can also submit a complaint to the national Public Procurement Expert Commission. These procedures are informal in nature, do not suspend an ongoing tender procedure and are not legally binding.

ii Grounds for challenge

Challenges may be brought on the following legal grounds: under the provisions of the PPA and the Public Procurement Decree; under the principles of the TFEU (principles of transparency, non-discrimination, equal treatment, free competition and proportionality); and under the terms of the tender documents.

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13 Article 2.56 PPA.
14 Article 2.127 PPA.
iii Remedies

The remedies that can be obtained in summary proceedings are diverse, and include orders to:

- suspend an ongoing tender procedure;
- tender or retender a contract;
- allow a tenderer to take part in the tender procedure; or
- award a contract to a specific tenderer, provided that the contracting authority or entity still wants to award the contract.

Once the tender procedure has resulted in the conclusion of a contract, the PPA provides legal grounds on which third parties can claim the annulment of the contract. These non-exhaustive grounds include the violation of certain essential public procurement rules such as publication requirements and the obligation to apply the mandatory 20-day standstill period. The claim for annulment must be made within 30 calendar days after notification of the conclusion of the contract, or within six months after the conclusion of the contract if no notification has taken place.

In addition to provisional measures or the annulment of a contract, tenderers can also claim damages caused by a breach of the public procurement rules. Damages can include tender costs, and also – under certain circumstances – lost profits.

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15 Article 4.15 PPA.
I INTRODUCTION

Portugal is a signatory to the World Trade Organization’s (WTO) Government Procurement Agreement (GPA), which provides for reciprocal market access commitments in procurement between the EC and other WTO members that are also signatories to the GPA.

As an EU Member State, Portugal has implemented Directive 2004/17/EC (Utilities Directive) and Directive 2004/18/EC (the Public Sector Directive).

These Directives were transposed into the Portuguese legal system through the Public Contracts Code (PCC), approved by Decree-Law No. 18/2008, of 29 January 2008 (subsequently amended).

In Portugal, the award of contracts is subject to compliance with the principles of the TFEU, in particular the free movement of goods, freedom of establishment and freedom to provide services, as well as with the principles deriving therefrom, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

The coordination of procedures for the award of contracts in the fields of defence and security is ruled by Directive 2009/81/EC (the Defence Directive). Through Decree-Law No. 104/2011, of 6 October 2011, Portugal implemented the Defence Directive into its legal system, which allows more flexibility in procurement procedures in these sectors. This Decree-Law also stipulates that, in line with Article 296 of the EC Treaty, certain contracts regarding both the defence and security sectors are excluded from its scope of application.

II YEAR IN REVIEW

In 2015 and 2016, draft legislation regarding the implementation of the new Public Procurement Directives (Directives 2014/24/EU, 2014/25/EU and 2014/23/EU) was under discussion. Portugal has already partially implemented these directives into its legal system, namely through Law No. 96/2015, of 17 August 2015, and Regional Legislative Decree No. 27/2015/A, of 29 December.

Law No. 96/2015, of 17 August 2015, establishes the legal framework for the access and use of electronic platforms for public procurement, which replaces the previous legal framework in force set forth in Law No. 143-A/2008, of 25 July, and Ordinance No. 701-G/2008, of 29 July. The Regional Legislative Decree entered into force on 16 October 2015.

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Regional Legislative Decree No. 27/2015/A, of 29 December, approved the public procurement regime in the Autonomous Region of the Azores, which updates the references to the Community thresholds and stipulates several procedural and substantive innovations arising from European Union law. The Regional Legislative Decree entered into force on 1 January 2016.

Furthermore, the Administrative Courts Procedure Code was changed by Decree-Law No. 214-G/2015, of 2 October 2015. The most relevant changes with an impact on the public procurement framework are mentioned in Section IX.i, infra. These changes entered into force on December 2015 and are applicable to new judicial procedures.

2016 witnessed no rulings likely to change the case law paradigm, only case law related to the regular interpretation of the Portuguese rules.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The PCC identifies the entities subject to government procurement rules as follows:

\( a \) the traditional public sector, including the central, regional and local authorities (Article 2/1), including:

- the state;
- autonomous regions;
- municipalities;
- public institutes;
- public foundations;
- public associations; and
- associations financed for the most part by the entities above, or subject to their management control, or where the majority of the members of the administrative, managerial or supervisory board are, directly or indirectly, appointed by the entities above;

\( b \) bodies governed by public law, of a public or private nature, as included in both the Utilities Directive and the Public Sector Directive (Article 2/2); and

\( c \) utilities within the special sectors – the transport, energy, water and postal sectors (Article 7):

- public undertakings (i.e., those subject to the dominant influence, either directly or indirectly, of the entities referred to in (a) and (b), including by means of holding the majority of the share capital or the majority of the voting rights, or holding the management control; or the right to appoint the majority of the members of the administrative, managerial or supervisory board;
- entities holding special or exclusive rights that have not been granted within the scope of an internationally advertised pre-contractual procedure; that aim to limit the exercise of activities included in the special sectors; and that substantially affect the ability of other entities to carry out such activities; and
- companies that are incorporated exclusively by utilities referred to in Clause 7/1 (point (c)) or financed by the same; subject to their management control, or whose administrative, managerial or supervisory board members are appointed by the said entities; and dedicated to the common pursuit of activities in the water, energy, transport or postal sectors.
Some procurement rules may also apply to contracts executed by public works concessionaires or by entities holding special or exclusive rights for the undertaking of public service activities, under certain circumstances expressly defined in Articles 276 and 277 of the PCC.

### ii Regulated contracts

The nature of contracts subject to public procurement rules is determined by the nature of the awarding entity that concludes the contract.

For purposes of contracts executed by entities belonging to the traditional public sector, public procurement rules apply to any contracts, regardless of their name or nature, the scope of which is subject to competition in the market. This is a vague concept that is not determined or defined by the law. It has been interpreted in a very broad manner. The PCC determines that it includes, *inter alia*:

- public works contracts;
- public works concessions;
- public service concessions;
- acquisition or lease of goods;
- acquisition of services; and
- company contracts.

As to contracts being executed between public sector entities or by bodies governed by public law (Article 2/2), public procurement rules apply only to the contracts referred to in points (a) to (e).

Some specific contracts are expressly excluded from the scope of public procurement rules, such as those contracts that are excluded from the scope of both the Utilities Directive and the Public Sector Directive, and contracts for the acquisition of real estate.

Special rules are established concerning the procurement procedures adopted for the award of utilities contracts. The PCC adopts more flexible rules, such as the possibility to freely choose from a broader range of types of procedure, including an open procedure, restricted procedure with pre-qualification or negotiation procedure; the lower minimum delays for submission of bids; or the applicability of special procedures such as the qualification systems.

As to defence procurement contracts, Decree-Law No. 104/2011, of 6 October 2011, established more flexible rules concerning, for example, the adoption of special procedures, such as:

- a negotiation procedure without publication of a notice;
- rules concerning qualitative selection including quality or environment management;
- confidential proceedings;
- protection of confidential information or security of supplies;
- an extension to a seven-year term of duration for framework agreements; and
- publicity and transparency rules.

As a general rule, the above-mentioned contracts are subject to the applicable procurement rules regardless of the contract value. However, contracts under the special utilities sectors are only subject to the rules if the relevant contract values equal or exceed the thresholds set forth in the Utilities Directive, Article 16(a) and (b).
The awarding entities may award contracts by means of a direct award procedure (not advertised and non-competitive) regardless of the contract value, if some material criteria are met. These material criteria concern:

\( a \) for all kinds of contracts:
- failed procurement (under certain conditions);
- extreme urgency arising from unforeseeable events not imputable to the awarding entity;
- contracts for the provision of telecommunication services;
- existence of an exclusive co-contractor because of technical, artistic or exclusive rights reasons; and
- contracts under secrecy or under special security measures;

\( b \) for public works contracts:
- new repeated works similar to works previously awarded, subject to the conditions set forth in the law; and
- works contracts under a determined threshold for research and development (R&D), not-for-profit study or experimental purposes only;

\( c \) for contracts for the acquisition or lease of goods:
- goods intended to replace or broaden previous supplies awarded to the same entity, provided different goods would cause incompatibility or disproportionate technical difficulties of use or maintenance;
- goods produced for R&D, not-for-profit study or experimental purposes only;
- goods quoted in the Raw Materials and Commodities Exchange;
- special advantageous acquisitions;
- goods acquired under a framework agreement executed with one entity; and
- the acquisition of water or energy by a utility acting in the water or energy special sectors; and

\( d \) regarding services contracts:
- new repeated services similar to services previously awarded, subject to the conditions set forth in the law;
- some services of an intellectual or financial nature indicated in category 6 of Annex ii.A of the Public Sector Directive;
- services related to a real estate acquisition or lease;
- arbitral or conciliation services;
- certain R&D services;
- contracts executed following a concept tender for the selection of design works, pursuant to the terms of reference; and
- services acquired under a framework agreement executed with one entity.

Regarding variations of contracts, a contract may be amended without the need to submit the amended contract to a competitive tender whenever the amendment does not affect the main scope of the contract and does not prevent, restrict or distort competition. Thus, an amendment shall be allowed only when it is objectively verifiable that the order of the evaluated bids in the tender procedure for the award of the initial contract would not be altered had the tender specifications contemplated this amendment.

Whenever the amendments breach the above-mentioned legal limits, the awarding authority must competitively tender the amended contract.
On the other hand, changing the contracting parties will not require the launching of a competitive tender if such an alteration is provided for in the existing contract, or when it is authorised during the performance of the contract by the contracting authority and the new entity complies with all capacity, technical and financial qualification criteria required under the original tender.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The public procurement regime set forth in the PCC deals with all special procedures – framework agreements and central purchasing, but also concept tenders, dynamic purchasing or qualification systems – and special rules set forth for the utilities sectors.

Framework agreements may be executed with one entity only or with several entities, depending on whether the tender specifications have been all or partially set forth in the tender documents respectively.

The award of a framework agreement is subject to the adoption of competitive procedures, considering the global amount of contracts to be executed under the agreement.

A framework agreement binds the private contractor to the contracts executed under the agreement. However, the contracting authority may execute contracts outside the scope of the framework agreement.

The term of a framework agreement must not exceed four years.

Central purchasing may be created by contracting authorities other than utilities acting in the special sectors (i.e., only entities included in the traditional public sector and bodies governed by public law).

Central purchasing may be created for the purpose of awarding bids, leasing or acquiring goods or services, or executing framework agreements and centralising the procurement of several entities. Central purchasing shall comply with the rules applicable to each contracting authority. Procurement through central purchasing is purely optional.

The PCC also sets forth the special proceedings instruments, which include concept tenders; dynamic acquisition systems intended to execute contracts for the acquisition or lease of goods or for the acquisition of services of current use by means of a totally electronic system; and qualification systems. The latter may only be adopted in the context of executing contracts designed for activities in the special utilities sectors.

ii Joint ventures

The public procurement rules do not apply to in-house relations between contracting authorities and publicly owned undertakings. The PCC has laid down the requirements for exclusion (in relation to in-house entities) in accordance with European Court of Justice case law: it requires the existence of control exercised by the contracting authority over the contracted party similar to the control exercised by the contracting authority over its own departments; and the carrying out of the essential part of the contracted party’s activity to the benefit of the contracting authority.

Accordingly, if a public-public JV complies with the above criteria, it may be contracted by its parent companies without being subject to the public procurement rules.

Also excluded from the scope of public procurement rules is the award by a contracting authority of a public service contract to an undertaking that stands as a contracting authority itself, given the existence of an exclusive right.
The PCC and Decree-Law No. 111/2012, of 23 May 2012, provide for a special legal framework for public-private partnerships. The private sector partner has to be competitively tendered and duly advertised. Only reasons related to public interest (as well as those mentioned in Section III.i, supra) may justify the adoption of a direct award procedure.

Special rules are set forth for special utilities sectors. JV companies may be deemed contracting entities provided they are incorporated exclusively by utilities referred to in Clause 7/1 of the PCC or comply with the requirements set forth in Section III.i, supra.

V THE BIDDING PROCESS

i Notice

Prior to the formal opening of the pre-contractual procedures, and in accordance with the transparency principle, the contracting authorities should disclose their annual procurement plan in a prior information notice that complies with the model provided in Appendix I of EC Regulation No. 842/2011, of 19 August 2011, for publication in the Official Journal of the European Union (OJEU).

Regarding agreements concerning utilities, the same must submit a periodic indicative notice, in accordance with the model in Appendix IV of Regulation 842/2011, for publication in the OJEU.

Moreover, all competitive tenders must be launched through publication of a tender notice, which may be at a national level – published in the Portuguese Official Gazette – or the European level if the contract’s value exceeds Community thresholds.

Contract award notices are also mandatory and are to be effected within 30 days following the award, in accordance with the model present in Appendix III, VI or XVII (as applicable) of Regulation 842/2011. As to utilities, the said notice obligation applies for contracts that amount to values that equal or exceed European thresholds.

Even if the notice of an award is not a requirement at the European level, the contracting authority may nonetheless submit a voluntary transparency notice disclosing its intention to execute the contract, pursuant to the model present in Appendix XIV of Regulation No. 842/2011, for publication in the OJEU.

Contract award information shall also be made available by means of publication on the public procurement platform, for the purposes of control by the competent national authorities.

ii Procedures

The PCC provides for the following procurement procedures:

a direct award: one or several bidders will be invited to submit bids;

b open procedure: any interested entity is free to submit bids after the publication of a tender notice;

c restricted procedure with pre-qualification: similar to (b), but comprises two stages: one for submitting technical and financial qualification documents and selecting candidates, and one for submitting bids;

d negotiated procedure: including the same two phases as the procedure in (c) and a third phase for the negotiation of bids; and

e competitive dialogue: whenever a contracting authority is not able to specify a definitive and concrete solution for the contract and launches a tender to which bidders submit solutions.
In general, awarding authorities may freely choose to adopt an open procedure or a restricted procedure with pre-qualification. For contracts designed for the utilities sector, awarding authorities may freely choose between those two procedures or the negotiation procedure.

The only special procedure applicable to the utilities sector is the qualification system.

Regarding the defence and security sector, Decree-Law No. 104/2011 provides for three procedures: competitive dialogue, a restricted procedure with pre-qualification (both governed by the rules of the PCC) and a third special procedure, the negotiation procedure, which may or may not be preceded by a contract notice.

Further to the European directives stating the importance of simplifying and dematerialising procurement procedures with a view to ensuring greater efficiency and transparency, the PCC opts unequivocally for electronic procurement, and the awarding authorities are bound to adopt electronic procurement procedures. General PCC provisions on electronic procurement are contained in the legal texts of Law No. 96/2015, of 17 August 2015.

iii Amending bids

The general rule that applies to all cases is that tender documents and bids shall not be altered during the whole procedure. Exceptions are, however, expressly foreseen.

The tender documents may be rectified by the contracting authority within the time limit for the presentation of bids. Interested parties are given the opportunity to identify, until five-sixths of the deadline for the submission of bids has elapsed, errors and omissions in the tender specifications, which shall subsequently be subject to approval by the contracting authority.

Any rectification regarding errors and omissions shall not imply amendments to any of the tender documents’ essential aspects. Whenever such amendments occur, the deadline for presentation of bids should be extended.

Furthermore, after the award decision and before the signing of the contract, the contracting authority may propose changes to the contract content, as long as such changes are imposed in the public interest and it is objectively demonstrated that the bid ranking would remain unchanged should the proposed adjustments be reflected in the bids. Nonetheless, such proposed changes cannot violate any of the tender documents’ imperative settings nor reflect the adoption of another bidder's bid.

Likewise, there are certain situations in which bids may be subject to amendments. Such is the case whenever bid negotiation occurs or, in the case of direct award with one bid, whenever the bidder is requested to improve its bid.

VI ELIGIBILITY

i Qualification to bid

Public procurement law sets forth conditions for interested parties to participate in tenders, and if a bidder does not comply with these requirements, it will be disqualified and excluded from the tender. These requirements certify the professional and personal suitability of bidders, and are distinct from the technical and financial capacity requirements whereby candidates' technical and financial capacity are assessed.

Parties will be excluded if they do not meet eligibility criteria for reasons that include:

a insolvency or similar;

b conviction for crimes affecting professional reputation;
Besides these eligibility criteria, in procedures allowing for a pre-qualification phase, contracting authorities may establish criteria to evaluate bidders’ technical and financial capacity. These criteria may include factors linked to the bidder and not to the bid to be presented, as in the European directives.

**ii Conflicts of interest**

Contracting authorities are strictly prevented from awarding a public tender should a conflict of interest arise. All public entities must comply with general rules regarding conflicts of interest, as established in the Administrative Procedure Code.

In general, such rules address situations where a member of the administrative authority has a special interest in the decision-making process, and comprise the following situations: cases of special interest in a given decision or tender as a result of some kind of involvement with a given bidder; family ties; and a business interest in a matter similar to the one under assessment.

For the reasons referred to above, bidders who have participated, directly or indirectly, in the preparation of tender documents may participate in the tender that will be launched, provided that the contracting authority takes appropriate measures to ensure that competition is not distorted by the participation of such bidder.

**iii Foreign suppliers**

Both foreign and national suppliers can and shall bid on the same level playing field. Moreover, the free movement principle determines that foreign EU suppliers cannot be obliged to set up a local branch or subsidiary, or have local tax residence.

**VII AWARD**

**i Evaluating tenders**

There is a general provision in the PCC that demands the absolute disclosure, at the beginning of the procedure, of all features of the evaluation methodology that cannot be altered during its course. Thus, the relevant criteria and their corresponding weight, as well as the evaluation methodology, the scoring system for every single criterion and factors concerning the contract’s execution, must be clearly specified.

The obligation to disclose the evaluation model in advance must be observed in all procurement procedures, with two exceptions: when the adopted criterion is the lowest price;
and in the case of a direct award, even when several bidders are invited to participate in a given procurement procedure and the award criterion is the most economically advantageous tender. In this later case, only the evaluation criteria shall be previously discussed.

According to the PCC, contracting authorities can award public contracts based on two criteria: the lowest price and the most economically advantageous tender.

According to the first criterion, only the price of the proposals is evaluated. Regarding the latter, as far as there is a connection to the subject matter of the public contract in question, various factors can be taken into consideration, namely quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

Once the proposals are submitted, the jury begins its evaluation and issues a preliminary evaluation report, which shall include a description of their analysis, an assessment of the legality of the proposals submitted, namely in relation to their absolute compliance with the tender specifications, as well as to the concrete application of the approved evaluation criteria.

All bidders that submit a proposal are notified and informed of the preliminary evaluation report, including the unsuccessful bidders.

At this stage, bidders are granted a brief period, usually of five working days, to comment on the analysis made by the jury. They have the opportunity to present a formal request asking for the modification of the preliminary report if they do not agree with its content.

Upon analysis of the request presented by the bidders, the jury has the opportunity to review its previous decision. In cases where changes are introduced that modify the proposals’ ranking, or if the jury decides to reject a proposal previously admitted and evaluated, a new preliminary evaluation report shall be issued and the bidders will be granted a new opportunity to review it.

However, if the jury decides to maintain its previous decision, or if only minor changes are introduced to the content of the preliminary report, the jury issues a final evaluation report with its final decision regarding the analysis and evaluation of the proposals submitted.

Once the final evaluation report is concluded, the jury transmits it along with all the documentation issued during the procedure to the competent department of the contracting authority, which, in most cases, confirms and approves the content of the jury’s final evaluation report.

Nevertheless, although such situations are rare, the contracting authority may also conclude that the final evaluation report lacks information; for instance, if the report is insufficiently grounded. In such cases, it can either address these insufficiencies itself, or return the report to the jury to be rectified.

Another possibility is to deem the procedure well instructed but its conclusions illegal, in which case the contracting authority can alter them accordingly.

Finally, the contracting authority will award the contract to the successful bidder that has presented the best bid in light of the adopted criteria. The act of award shall be written and duly grounded (the specific factual and legal grounds on which the act is based shall be clearly stated) and, if the call for bids has been advertised in the OJEU, the act of award will also have to be advertised in this publication.

At this point, the selected bidder is requested to present to the contracting authority all the necessary documents that duly confirm that his or her personal situation does not prevent him or her from entering into a public contract.
National interest and public policy considerations

Procurement procedures may comprise criteria aiming to address certain social and environmental considerations, provided they are linked to the subject matter of the public contract, are clearly stated in the procedure documents, do not confer unrestricted freedom of choice on the contracting authority and comply with the fundamental principles of the EU (such as the principle of non-discrimination).

Such requirements must be fulfilled in the award phase, and some shall be observed during performance of the contract. These can include fostering employment, fulfilment of health and safety requirements at work, social inclusion and human rights protection.

Contracting authorities cannot specify the provenance of goods and services, and thus must accept products that are of ‘equivalent quality’. In fact, according to the principle of equal treatment, no bidder shall be discriminated against on the basis of its nationality (or on the location of its headquarters), and procurement procedures exclusively aimed at national bidders are strictly prohibited.

Accordingly, any criterion aimed at directly or indirectly favouring products or services of national origin, national bidders or the national market (e.g., favouring bidders with their headquarters in Portugal) will be deemed illegal. The principle of non-discrimination plays a key role both in Portuguese and EU public procurement law.

As previously indicated, procurement legislation specific to the defence sector has been introduced by Decree-Law No. 104/2011, which is compliant with the standard Portuguese public procurement regime regarding the evaluation procedure and the national interest, as well as public policy considerations.

According to what is specifically stipulated in this Decree-Law, contracting authorities in the defence sector must also award contracts based on the two above-mentioned criteria. Furthermore, the Decree-Law in question specifically refers to the duty to comply with the basic public procurement principles, namely the principle of non-discrimination, extending to the defence sector the general prohibition on favouring national interests.

Nevertheless, the Decree-Law shall not apply to some specific contracts in the defence sector, namely the ones that are declared to be secret or that call for the protection of critical interests of the state. For this reason, the secrecy associated with the entering into force of these contracts may also lead to the conclusion that it would be preferable to buy national products to maintain national security.

VIII INFORMATION FLOW

According to the PCC and both the Utilities Directive and the Public Sector Directive, contracting authorities shall act in a transparent way. This general obligation is enshrined in the requirement to properly publicise public tender proceedings, and to make public all procedure documents, which shall have a clear content, thereby ensuring a level playing field among bidders.

In addition, any relevant decisions by the jury or contracting authority shall be notified to all interested parties, including unsuccessful bidders.

Special attention is given in the PCC to the importance of the notification regarding the decision to award the contract. Besides the duty to notify this final decision to all bidders that submitted a proposal, the PCC also stipulates a standstill period of 10 days between the
time of notification of the award decision in writing to all tenderers and the conclusion of the contract, so that unsuccessful bidders are allowed to challenge the decision before the contract has been signed.

Further to the compulsory measure implemented by the PCC obliging all public contracting authorities to use electronic platforms when launching public procurement procedures, transparency regarding this type of procedure has become absolute. The bidders have the opportunity to view and analyse competitors’ requests to participate as well as their bids on the day after the deadline for its submission, and before the preliminary evaluation report of the jury is issued.

This obligation to disclose the content of the requests to participate or of the bids will be effective in most cases. Nonetheless, in certain situations – namely when candidates or tenderers request those documents to be treated as confidential – non-disclosure may be allowed.

The request for the confidentiality of documents must be fully grounded. The candidate or tenderer concerned must demonstrate the need to protect the secrecy of the commercial, industrial, military or other type of information contained therein.

However, if after analysis of the classified documents the contracting authorities consider there to be no grounds for classification, they may decide to disclose the documents.

Another situation where the PCC safeguards confidentiality is the competitive dialogue, where the proposed solutions may not be revealed by contracting authorities to other participants without prior agreement, to prevent bidders from being deterred from participating for fear that the entity might reveal confidential information and, in particular, details of its proposed solution that might be used by other tenderers.

Confidentiality rules are stricter in procedures concerning the defence sector, especially where classified and strategic information is at stake. Indeed, in such situations contracting authorities should impose special requirements on bidders and on the jury to guarantee the confidentiality of certain information conveyed throughout the procedure.

In addition, when considered contrary to public interest or even contrary to the legitimate commercial interests of the tenderers, it may be thought preferable not to publicise certain information on the contract notice or the contract notice itself, provided such a decision is duly grounded.

IX CHALLENGING AWARDS

Procedures

In Portugal, it is possible to challenge all decisions issued in public procurement procedures through review procedures that are regulated by the contracting authorities or through judicial review proceedings under the jurisdiction of administrative courts.

The review procedure concerning pre-contractual procedures is characterised by its pressing urgency, aimed at avoiding excessive delays in the procurement procedure, and it must be brought within five days. Furthermore, whenever the review concerns the award, the qualification decision or the rejection of a complaint regarding any of these decisions, the contracting authority shall invite other bidders to submit their views.

Judicial reviews can be initiated before the contract is formally concluded, and also after its conclusion.
Judicial proceedings regarding pre-contractual litigation must be filed within one month after the relevant decision has been issued and notified to the bidder. After the conclusion of the contract, any unsuccessful bidder can also seek remedies within six months of the conclusion of the contract or of its notice.

As a general rule, judicial proceedings on pre-contractual litigation regarding proceedings for the award of public works contracts and concessions, public service concessions, acquisition or rental of moveable property and public service contracts follow a special proceeding laid down in Article 100 et seq. of the Procedural Code of Administrative Courts. Because of the importance of obtaining a swift ruling, this kind of proceeding usually takes no less than six months to obtain the first instance decision.

Accordingly, with the recent revision of the Procedural Code of Administrative Courts, the judicial proceedings on pre-contractual litigation are now applicable to the public service concessions.

Furthermore, the judicial proceedings on pre-contractual litigation filed to challenge the award decision of the contracting authority now have an automatic suspensive effect on the decision or on the contract’s execution, although the court may decide to lift the suspensive effect of said decision for public interest reasons and after a balanced consideration of all interests involved.

In what concerns judicial proceedings that are not filed for challenging an award decision, Portuguese law provides for administrative courts to grant interim measures.

ii Grounds for challenge

Decisions of contracting authorities as well as procedure documents can be challenged on grounds of illegality or of breach of the applicable procurement rules, namely the PCC.

Challenges can address substantive or procedural matters. Furthermore, procedure documents can be challenged for, inter alia, violation of the principles of non-discrimination, transparency and competition, as well as for failure to fully comply with PCC rules.

Challenges concerning procurement procedures are frequently brought before the contracting authorities and courts by unsuccessful bidders. Chances of success will mainly depend on the grounds invoked by the challenge.

iii Remedies

Courts can award damages and even terminate a contract in some circumstances as long as the contract has not been fully performed. However, in such case, it is still possible to award damages (e.g., costs for filing the protest and the bid’s preparation costs).

Finally, courts can impose fines for breaches of the procurement procedure’s rules.

X OUTLOOK

EU procurement law already strongly influences Portuguese procurement law.

The new Public Procurement Directives were published in the OJEU on 28 March 2014. They entered into force on 17 April 2014, and Portugal, as other EU Member States, had 24 months to implement the provisions of the new rules into national law, which have already elapsed. Portugal has not fully implemented the provisions of the 2014 Directives yet (see Section II, supra). It is expected that a revision of the Public Contracts Code will be enacted in the near future, fully implementing the said Directives.
Chapter 18

RUSSIA

Olga Revzina, Lola Shamirzayeva and Olga Vasilyeva

I INTRODUCTION

Broadly speaking, Russian government procurement (also referred to as public procurement) legislation provides for two different regulatory regimes depending on the contracting body: (1) for public authorities and (2) for public entities. This chapter is focused on government procurement related to public authorities unless otherwise stipulated. The key law regulating procurement involving public authorities and some related entities (contracting authorities) is Federal Law No. 44-FZ ‘On the Contract System in State and Municipal Procurement of Goods, Works and Services’ dated 5 April 2013 (Law No. 44-FZ). There are also numerous subordinate legal acts adopted in accordance with federal procurement legislation.

With respect to state defence procurement, in addition to general rules established by Law No. 44-FZ some peculiarities are set out in a separate law, Federal Law No. 275-FZ ‘On State Defence Procurement’ dated 29 December 2012. Generally, the procurement regime under Law No. 44-FZ applies to utilities procurement; however, there are also basic laws regulating certain utilities (water and heat supply systems, etc.) that should be considered.

The EU procurement directives and the World Trade Organization (WTO) Agreement on Government Procurement (GPA) do not apply in Russia. However, on 29 May 2013 the WTO Committee on Government Procurement granted the Russian Federation observer status, which may represent a first step towards Russia’s possible accession to the GPA as a full party in the near future.

The government and the Ministry of Economic Development are the key bodies responsible for setting government purchasing or procurement policy and guidelines. The control function in the area of compliance with procurement legislation is mainly exercised by the Federal Anti-monopoly Service of Russia (FAS), which investigates different violations in this area, challenges procurement proceedings, brings suits, etc. Similar control powers are vested in the Federal Service for Defence Contracts with respect to government defence procurements. In practice, the FAS also actively participates in developing government procurement legislation.

Law No. 44-FZ regulates relations aimed at meeting state and municipal needs for the purpose of enhancing the productivity and efficiency of the procurement of goods, works and services, promoting transparency and preventing corruption and other abuses in this area. Thus, the contract system under Law No. 44-FZ is based on the following principles:

1. uniformity of the contract system;

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Russia

b transparency;
c competition;
d professionalism of contracting authorities;
e promotion of innovation;
f responsibility for productivity in meeting state and municipal needs; and
g efficiency of procurement.

However, while certain principles are developed further in the provisions of the relevant procurement laws, some are more general in nature. Consequently, whether the action of a contracting authority will be in accordance with the legal principles may depend on how those are interpreted by the Russian courts and other competent bodies.

With respect to procurement involving public entities (as opposed to public authorities), the main law in this area is Federal Law No. 223-FZ ‘On the Purchase of Goods, Works and Services by Certain Types of Legal Entities’ dated 18 July 2011 (Law No. 223-FZ), which provides for a more liberalised procurement mechanism in comparison with Law No. 44-FZ. The following entities fall within the scope of this law:

a state corporations, state-owned companies and public companies;
b natural monopolies;
c companies engaged in regulated activities in the fields of electric power, gas, heat, water, etc.;
d autonomous institutions;
e legal entities where the Russian Federation holds a stake exceeding 50 per cent;
f subsidiaries where the entities listed above hold a stake exceeding 50 per cent;
g subsidiaries where the above-mentioned subsidiaries hold a stake exceeding 50 per cent;
h budget financed institutions in certain cases; and
i state and municipal unitary enterprises in certain cases (e.g., when their procurements are made based on the grants provided by Russian and foreign individuals and legal entities).

Law No. 223-FZ leaves determination of the appropriate procurement procedure to the discretion of the contracting entity (and in this respect is more flexible than Law No. 44-FZ). Thus, contracting entities should adopt their own procurement policies, including the procedure for preparing for and carrying out procurement as well as conditions for its application, procedure for conclusion and execution of contracts, and other related provisions. Until a contracting entity approves its own procurement policy, it must follow the procedures established by Law No. 44-FZ.

Following a legislative change introducing the concept of public companies, such companies were included in the scope of Law No. 223-FZ. Public companies are defined as unitary non-commercial organisations established by the Russian Federation, having powers and authority of public character and acting in the interest of the state and society.

State and municipal unitary enterprises, except for a limited number of cases, have been removed from the scope of Law No. 223-FZ. Starting from 1 January 2017, such enterprises must conduct procurement in accordance with the more stringent provisions of Law No. 44-FZ. Unitary enterprises may nonetheless engage in procurement under Law No. 223-FZ in a limited number of instances, provided that they have adopted their procurement policy and published it in the unified information system within the requisite deadline.
II YEAR IN REVIEW


Among other new provisions, the Law introduced:

a. a system of planned procurement based on annual and three-year procurement plans;
b. additional methods of selecting a supplier, including rules relating to requests for proposals, tenders with limited participation and two-stage tenders;
c. monitoring, auditing and public oversight of procurement; and
d. anti-dumping measures intended to ensure that procurement participants comply with their price undertakings and select suppliers on the basis of important criteria other than price.

This new Law led to the adoption of many new subordinate legal acts and has been updated numerous times since its enactment to keep up with economic policy developments and new practical challenges.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

A wide range of bodies are deemed contracting authorities pursuant to Law No. 44-FZ, including the following:

a. state (federal or regional) and municipal authorities;
b. state and municipal unitary enterprises;
c. the State Atomic Energy Corporation Rosatom;
d. the State Corporation for Space Activity Roskosmos;
e. regulatory bodies of state non-budgetary funds (pension fund, social insurance fund, federal and territorial compulsory medical insurance funds);
f. treasury enterprises that perform state functions or render state services based on the right of operative management;
g. certain budgetary non-commercial institutions; and
h. other institutions and entities in certain cases provided by law.

According to Law No. 44-FZ, any legal entity, regardless of its form of incorporation, ownership type, place of business or place of origin of its capital, and any individual, including those registered as a self-employed entrepreneur, may be a procurement participant. Since August 2015, an exception to this rule exists that prohibits offshore companies from participating in procurement. The list of offshore territories is established by the Ministry of Finance. For more information regarding procurement participants, see Section VI.iii, infra.
ii Regulated contracts

Government procurement rules regulate contracts for the supply of goods, carrying out of works and provision of services (including the acquisition of immovable property or lease of property).

There are specific rules with respect to utilities and defence procurement contracts, as well as to contracts in relation to provision of goods to be used in emergency situations. Specific rules also apply to:

- goods supplied for federal needs in accordance with federal and interstate target programmes;
- energy service agreements;
- communication services for the needs of public authorities, national defence, national security and law enforcement;
- development of drugs and psychotropic substances;
- agricultural products supplied for state needs;
- gas supplied for federal (or municipal) needs;
- scientific research and experimental development;
- educational services;
- production and distribution of national films;
- regular automobile and city electric transport transportation;
- design and exploration works or construction and reconstruction of capital construction projects;
- procurement of goods the manufacturing process of which has been established, modernised or developed in Russia; and
- some other procurements.

Concession agreements, privatisation and the provision of services by international financial institutions are not within the scope of the government procurement law. Concession agreements are regulated by Federal Law No. 115-FZ ‘On Concession Agreements’ dated 21 July 2005.

One innovation of Law No. 44-FZ is a type of service contract called a ‘life-cycle contract’, which allows for the establishment by the government of a contract providing for the procurement of goods or works, covering different stages of the life cycle of the object (design, construction, subsequent maintenance, operation, etc.). Under the previous regulation it was impossible to enter into one contract covering different types of works, and it was necessary to conduct a separate tender for each different type of works.

The provisions of Law No. 44-FZ do not provide for a competitive dialogue procedure, and in this respect the procurement rules are quite strict. Thus, the current legislation generally does not provide for the possibility of amending a draft public contract that is an integral part of procurement documentation at the stage of submission of bids. Bidders may only submit requests for clarification of documentation requirements. However, in certain cases stipulated by Law No. 44-FZ, the parties may agree to amend certain provisions of the public contract at the execution stage.

The amendment of material conditions in contracts following their execution is prohibited, except for the following amendments, which do not require a new procurement procedure: a change of contracting authority; a change of supplier in cases of legal succession;
or a change of the contract price by mutual agreement as provided by Law No. 44-FZ in certain cases. An existing contract may only be transferred to another supplier without a new procurement procedure in the case of legal succession.

**IV SPECIAL CONTRACTUAL FORMS**

**i Framework agreements and central purchasing**

Given that Law No. 44-FZ presumes the mandatory conclusion of public contracts without any amendments to contractual rights and obligations, framework agreements are not used in Russian procurements.

Contracting authorities are entitled to hold joint tenders or auctions in cases where they make purchases of the same goods, works and services. The authorities’ rights, duties and liabilities when holding joint tenders or auctions are to be defined by an agreement between the relevant parties. A contract with the winner of a joint tender or auction is required to be concluded by each contracting authority. The government establishes the procedure for holding joint tenders and auctions.

According to the procurement legislation, for the purpose of centralised purchasing the function of determining suppliers may be transferred to existing or specially created bodies (namely, state and municipal bodies or treasury enterprises). Under centralised purchasing, delegation of the functions of justifying purchases and determining the terms of a contract is not permitted, in particular for the fixing of the initial (maximum) price of a contract and the signing of the contract. Contracts must be signed by the contracting authority that procures the goods, services or works.

**ii Joint ventures**

Depending on the nature of the project, a company established by state public bodies may act in accordance with special legislative acts regulating their activity or under Law No. 223-FZ.

Procurement procedures stipulated by Federal Law No. 44-FZ are not applicable to public-private partnerships (PPPs). At present, PPP projects may be implemented under Federal Law No. 224-FZ ‘On Public-Private Partnership, Municipal-Private Partnership in the Russian Federation and Amendments to Certain Regulatory Acts of the Russian Federation’ dated 13 July 2015 (PPP Law); or Federal Law No. 115-FZ ‘On Concession Agreements’ dated 21 July 2005, which provides for a two-stage tender procedure for awarding concessions: pre-qualification and evaluation of bids. The PPP Law, which came into force on 1 January 2016, has introduced a unified legal regime for the implementation of long-term infrastructure projects based on PPP agreements at the federal level. Previously, PPP agreements were structured based on the general rules of the Civil Code and regional legislation. The adoption of the PPP Law is a positive legislative development that has resolved problems arising from the prior lack of clear and uniform regulation of PPP agreements. Currently, there are discussions and legislative plans to improve the provisions of the PPP Law for the purpose of increasing the number of projects implemented under it.
V THE BIDDING PROCESS

i Notice

Public procurements must be published within a unified information system that is located on a designated website.\(^2\) The content of the contract notice and terms for such notices will depend on the value of the contract, type of procurement procedure and other factors.

It is possible to place orders for goods, works or services without a procurement procedure or procurement publication in cases such as those set forth in Article 93 of Law No. 44-FZ (procurements from a sole supplier). Although in the area of procurements from a sole supplier there is generally no need for publication, there are some exceptions. For instance, there is a requirement to publish notices in relation to, \textit{inter alia}:

- procurements of goods, works or services from the natural monopoly companies falling within the scope of Federal Law No. 147-FZ of 17 August 1995 ‘On Natural Monopolies’, as well as procurements of services of the central depository;
- services in the areas of water supply, heat supply and gas supply (except for services related to the sale of liquefied gas); and
- services in the area of storing and importing or exporting narcotic agents and psychotropic substances.

The contracting authorities are obliged to publish their procurement plans for a three-year period and scheduled plans for each financial year based on their procurement plans.

ii Procedures

Where procurement regulations apply, contracting authorities must use one of the procedures prescribed by the relevant procurement regime. Procurements can be done through competitive methods of determining suppliers or from a sole supplier. Such competitive methods include:

- tenders (namely, public tender, tender with limited participation, two-stage tender, closed tender, closed tender with limited participation and closed two-stage tender);
- auctions (namely, electronic auction and closed auction);
- requests for quotations; and
- requests for proposals.

The prevailing type of procurement procedure is an electronic auction. Procurement from a sole source means procurement from a particular supplier without a tender, which may be done in exceptional cases envisaged by Law No. 44-FZ. These exceptional cases (the list of which has been extended with new cases during 2015 and 2016) include, for instance, the conclusion of the following contracts:

- the supply of Russian armaments and military equipment that have no Russian analogues and are made by the sole manufacturer, with the supplier of such armaments and military equipment;
- rendering services in relation to water supply, water discharge, heat supply, gas supply (except for the services related to the sale of liquefied gas);
- services in connecting to (cutting in) engineering networks at prices (tariffs) controlled in compliance with Russian Federation legislation;

\(^2\) www.zakupki.gov.ru.
d storing, importing or exporting narcotic agents and psychotropic substances;

e the procurement of goods, works or services for an amount not exceeding 100,000 roubles, provided that the total annual volume of procurements, which the contracting authority may make pursuant to this provision, must not exceed 2 million roubles or 5 per cent of the aggregate annual volume of the authority's procurements and must not comprise more than 50 million roubles (it is noteworthy that the 100,000 roubles limitation does not apply to contracting authorities operating outside of Russia, such as diplomatic or trade missions, consular offices, etc.);

f the delivery of items of cultural value (including museum collections, rare and valuable editions, manuscripts, archival documents) intended to replenish state museum funds, libraries, archive funds, film and photo funds, as well as similar funds; and

g the procurement of goods the manufacturing process of which has been established, modernised or developed in Russia, in accordance with a special investment contract, which is a new type of contract introduced in 2015 for the purpose of promoting national industry. The investor under such a contract must be approved by the government provided that certain conditions are met (eg, the investment should equal or exceed 3 billion roubles).

iii Amending bids
A bidder is entitled to modify or withdraw its application before the expiry of the period for filing applications, subject to the provisions of Law No. 44-FZ. In such cases, a tender participant or auction participant does not forfeit the right to the monetary assets provided to secure the application thereof. The modification of an application or a notice of its withdrawal is deemed valid before the expiry of the period for filing applications. In relation to requests for quotations, a bidder is entitled to change or withdraw its application for participation in the request only if the contracting authority has amended the notice making the request for quotations. Once the period for filing applications has expired, no changes to the bid may be made.

VI ELIGIBILITY

i Qualification to bid
There are two types of procurement procedures depending on whether they are one-stage or two-stage tenders. A separate pre-qualification stage is used in most tenders (tenders with limited participation, two-stage tenders, closed tenders with limited participation and closed two-stage tenders). The winner in the latter case is determined during the second stage of the tender from the bidders who passed the pre-qualification stage.

In any type of procurement procedure, the procurement commission must first verify whether a bidder meets mandatory unified requirements and any mandatory additional requirements established by the government.

Thus, a bidder may be excluded when the supplier is being determined, or the conclusion of a contract with the winning supplier may be cancelled at any time prior to concluding the contract if the contracting authority or procurement commission finds that the bidder does not satisfy mandatory unified and additional requirements, or has provided unreliable data in respect of satisfying the requirements.
Unified requirements include, in particular, the following:

1. **Satisfaction of the requirements established in compliance with the legislation of the Russian Federation for persons engaged in the supply of the goods, carrying out of the work and the provision of the services that are the object of the procurement**;
2. **A bidder shall not be in the process of liquidation, and there must be no decision of a court declaring a bidder bankrupt and initiating bankruptcy proceedings**;
3. **A bidder's activities are not suspended in accordance with the Code of Administrative Offences of the Russian Federation as of the date of filing an application for participation in purchases**;
4. **A bidder shall have no arrears on taxes, fees, debts or other mandatory payments to budgets of the budget system of the Russian Federation**;
5. **A bidding individual or the general director, members of the board of directors or chief accountant of a bidding legal entity have not been subject to criminal liability for certain crimes related to economic activities**;
6. **A bidder that is a legal entity has not been subject to administrative liability in accordance with the Code of Administrative Offences for illegal gratification of an official on behalf of a legal entity**;
7. **A bidder possesses the necessary intellectual property rights in case, as a result of the procurement, the contracting authority shall acquire such rights**;
8. **The absence of any conflict of interests, etc., between bidders and the contracting authority**; and
9. **A bidder is not an offshore company**.

The contracting authority may also establish a requirement for the exclusion of any bidder that is included in the register of unfair suppliers maintained by the FAS.

The government is entitled to establish additional mandatory requirements for participants in procurements of certain kinds of goods, works and services that are procured by way of tenders (except for public and closed tenders) or auctions, in particular for the availability of the following:

1. **Financial resources for a contract's execution**;
2. **Equipment and other material resources for a contract's execution held under ownership or on other legal grounds**;
3. **Work experience connected with the subject of a contract and business reputation**; and
4. **A required number of specialists and other employees with a definite qualification level for a contract's execution**.

The government is also entitled to establish additional mandatory requirements for participants in procurements of audit and related services and consulting services. Such additional requirements have been elaborated and are expected to be adopted.

In Russia, a lot of attention is given to compliance with formal requirements. Thus, in practice, the bidder may be disqualified if the application does not comply with all formal requirements or if certain documents are missing even when the bidder substantially meets all requirements.

**ii Conflicts of interest**

Law No. 44-FZ prohibits participation in procurement commissions by persons that have a personal interest in the results of the procurement or that may be influenced by a bidder.
In particular, the following persons cannot act as members of a procurement commission:

- individuals who were involved as experts in respect of the procurement documentation;
- individuals personally interested in the results of the selection of suppliers;
- individuals who are influenced by the procurement participants (member or shareholder of a relevant organisation, member of governing bodies, creditor, etc.);
- individuals married to the head of a procurement participant; or
- individuals who are members of the procurement control authority.

In the event that any member of a procurement commission is found to fall within any of the categories set out above, that member must immediately be replaced by another person.

Commission members may only be replaced by the decision of the contracting authority that adopted the decision on the establishment of the commission.

### Foreign suppliers

Generally, contracting authorities can accept bids from foreign suppliers provided that they comply with the qualification criteria. There is no requirement to set up a representative office or a subsidiary in the territory of Russia for the purpose of bidding. However, the participation of foreign suppliers may be restricted in a procurement if the procurement involves state secrecy. In addition, according to Law No. 44-FZ only Russian legal entities may participate in tenders for entering into a state contract envisaging mutual investment undertakings of a supplier or investor to establish, modernise or develop the manufacturing of goods in the territory of one of the Russia’s regions. This type of investment contract has been introduced with a view to support the national industry and manufacturing. Such a contract must provide for an investment amount of no less than 1 billion roubles and must be entered into for a period of no longer than 10 years. With respect to national interest issues, see Section VII.ii, infra.

### VII AWARD

#### i Evaluating tenders

The procurement documentation (in the case of tenders and auctions) along with the information specified in a notice of holding a procurement must also contain the criteria for the evaluation of bids, the weighting of these criteria and the procedure for consideration and assessment of bids in compliance with Law No. 44-FZ.

The process of the assessment of bids in relation to all procurements, except for auctions, requests for quotations, sole-supplier procurements and certain requests for proposals, is based on value and non-value assessment criteria. Value criteria include price, costs for operation and repair or life-cycle value (if applicable), and non-value criteria include qualitative, functional and environmental characteristics of the procurement object and qualification of the bidders. The latter refers to, in particular, the existence of financial resources, equipment and other material resources held by them under ownership or on some other legal grounds; work experience connected with the subject of a contract and business reputation; and specialists and other employees holding a specific level of qualification. To determine the winner the use of at least two criteria is required, provided that price is one of these.

The legislation specifies the weightings for the assessment criteria. The sum of the respective weightings for the assessment criteria must total 100 per cent. Thus, the proportion
of minimum value to maximum non-value criteria is generally 70/30 in relation to procurement of goods, and 60/70 in relation to procurement of works and services. However, there are certain exceptions. Thus, the proportion of 40/60 is established, for instance, for such goods, works and services as the performance of emergency rescue works, restoration of cultural heritage objects, and provision of medical, educational and legal services. In the case of creating and developing state (municipal) information systems and official websites, a 30/70 proportion applies, and in the case of scientific research works, 20/80.

ii National interest and public policy considerations

Under the procurement regulations, national interest can only be taken into consideration to a limited extent. Equal treatment and non-discrimination of suppliers is presumed. However, Russian suppliers may be granted certain advantages over foreign suppliers in certain cases in accordance with Article 14 of Federal Law No. 44-FZ.

Law No. 44-FZ establishes the following regimes for the admission of foreign goods, works and services to procurements:

a national regime: applies when and where the international agreements of the Russian Federation so provide; within the framework of the WTO, the application of the national regime will depend on the accession of Russia to the GPA and the conditions of that accession;

b prohibition or limitation of admission: established by the government to guarantee national defence and state security to protect the fundamentals of the constitutional system, internal market and the development of the Russian economy and to support Russian manufacturers. It is worth noting that some of the prohibitions or limitations currently in force do not apply to suppliers coming from Eurasian Economic Union Member States; and

c admission conditions: established by the Ministry of Economic Development upon the government’s instruction.

In addition, it should be mentioned that, from 1 January 2016, legal entities under the jurisdiction of Turkey as well as legal entities controlled by Turkish citizens or by legal entities under the jurisdiction of Turkey are not entitled to be procurement participants under Law No. 44-FZ.

Environmental considerations have become more important in recent years, although there is still generally little knowledge of how such considerations can best be taken into account in public procurements. There is as yet no wide practicing of ‘green’ procurement in Russia. However, Law No. 44-FZ introduced new criteria for bid evaluation (ecological characteristics of the procurement object), which is the first step towards establishing a system of green public procurement.

VIII INFORMATION FLOW

In Russia, access to information about the contractual system in the area of procurement is required to be unimpeded and free of charge. The openness and transparency of this information is to be ensured, in particular, by way of its placement in the unified information system. The information required by Law No. 44-FZ to be placed in the unified information system must be full and reliable. Data constituting a state secret are not published in the unified information system.
Based on the principles of transparency and ensuring competitive procedures, the contracting authority must provide all procurement participants with the same information and inform them about the proceedings of a public procurement. The procurement participants are entitled to receive clarifications regarding the provisions of procurement documentation.

It is a legal obligation of the tender commission to inform any unsuccessful bidders of the name of the successful competitor, the reasons for the rejection of the bid and the earliest date of the conclusion of the contract. However, there is no requirement to be specifically notified – the publication of the minutes of the tender commission regarding the procurement procedures is sufficient. Once the winner has been determined, the commission should publish the minutes of the bid evaluation no later than the day following the expiry of the period for consideration of applications by the commission.

Bidders are not granted access to the comprehensive procurement file (encompassing all procurement documents, submitted bids and proposals, all evaluation materials, score sheets and all other documentation related to or prepared in conjunction with evaluation, negotiation and the award process). However, they are granted access to the procurement documentation and minutes of decisions taken by the procurement commission, and can check the registers of concluded contracts.

Furthermore, contracting authorities must ‘stand still’ for a certain period; for example, in the case of electronic auctions or tenders, a contract may not be concluded until 10 days after the date of the publication in the unified information system of a protocol with the results of an electronic auction. This period allows unsuccessful bidders time to bring claims to prevent the contract award if they consider the award decision to be unlawful.

There are confidentiality obligations in relation to personal data and other types of data (e.g., commercial secrecy) in cases stipulated by federal law. The data constituting a state secret must not be published in the unified information system. Specific obligations to ensure confidentiality of information apply in the field of defence and security.

IX CHALLENGING AWARDS

i Procedures

There are two key procedures for reviewing complaints:

a administrative review through the authorised state body dealing with such claims, the Federal Anti-monopoly Service. In relation to the procurement procedure for state defence orders or other federal needs that deal with state secrets, the Federal Service on Defence Orders is the body for reviewing complaints; and

b court review through state arbitrazh courts.

Complaints regarding the actions (or inaction) of the contracting authority and procurement commissions can be filed no later than 10 days from the date of posting the minutes with the results of assessments of bids by the contracting authority on the official website.

Administrative review takes up to five business days. A copy of a decision taken as a result of an administrative review is published and sent to the interested parties within three business days after the decision is taken.

The deadline for court review of administrative decisions taken under administrative review is three months from the date of the decision.
Court appeals may be filed within three years from the date the applicant finds out or should have found out that his or her rights were violated (including for claims for the application of consequences of contract invalidity).

Court reviews must be performed within a ‘reasonable time’, which is determined based on the specific nature of each case. In practice, a first-level judicial review usually takes up to three months.

ii **Grounds for challenge**

Any procurement participant that believes a violation of the public procurement procedure has taken place may file an application for administrative review (complaint) or submit a claim to court. The application or claim should include certain information and needs to be accompanied by documents evidencing the grounds for the claim. Authorised state bodies may also submit applications and claims in the event of violations of the procurement legislation on a general basis.

iii **Remedies**

An application for review does not lead to an automatic suspension of the procurement procedure or the conclusion of the contract; however, the anti-monopoly authorities are entitled to suspend the procurement process until the application for review is examined. In the event of court proceedings, the claimant can apply to a court for the adoption of injunctive measures, which include the suspension of the conclusion of the contract.

Upon review of the complaint, the FAS can either issue a binding order to the affected contracting entity (including obliging it to rectify the relevant violations) or cancel the results of the procurement procedure.

A concluded contract may be cancelled by a court decision if the court rules that the procurement procedure that led to the conclusion of the contract violated procurement law.

The current legislation provides for various penalties for the breach of the procurement legislation by contracting authorities (or their officers) depending on the procurement law breached and the character of the administrative offence. Procurement participants may bear criminal liability, liability in accordance with anti-monopoly laws or liability for the non-performance of the relevant contracts provided that material harm has been inflicted on the interests of the state and society.

X **OUTLOOK**

Law No. 44-FZ came into force on 1 January 2014 and represents a progressive step in improving regulation of government procurement. This Law also requires the adoption of a significant amount of new subordinate legislation and government regulations to put a new contractual system into successful operation. A number of new legal acts have been issued, and the work on adopting the appropriate regulations in Russia is ongoing. There are also certain initiatives to amend procurement legislation in light of the current economic situation in Russia.
I INTRODUCTION

The law of government procurement in South Africa is informed primarily by Section 217 of the Constitution, which requires organs of state in the national, provincial and local spheres of government, and any other institution identified in national legislation, to contract for goods or services ‘in accordance with a system which is fair, equitable, transparent, competitive and cost-effective’. The entire legislative framework regulating government procurement in South Africa is based upon these five foundational principles, which are echoed in various further pieces of legislation, most notably the Public Finance Management Act (PFMA) and the Local Government: Municipal Finance Management Act (MFMA).

A further hallmark of government procurement law under South Africa’s constitutional dispensation lies in the constitutional imperative of public procurement being employed as a means of addressing discriminatory policies and practices under the public procurement system of the previous dispensation. The Constitution specifically indicates that the above-mentioned five foundational principles of public procurement do not prevent organs of state or other institutions from implementing procurement policies that provide for ‘categories of preference in the allocation of contracts’ and ‘the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination’. In fact, the Constitution makes provision for the enactment of national legislation to prescribe a framework within which the policy of preferential procurement must be implemented.

The Preferential Procurement Policy Framework Act (PPPFA) prescribes the framework within which these preferential procurement policies may be implemented. In terms of the PPPFA, an organ of state must determine its preferential procurement policy and implement it within the framework established by that Act. This framework prescribes that preference points may be allocated for specific goals, such as contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability. Aside from limited exceptions (which are touched on below), all government procurement in South Africa takes place within this framework.

1 Andrew Molver is a partner and Gavin Noeth is a senior consultant at Adams & Adams.
2 Section 217(1) of the Constitution of the Republic of South Africa of 1996.
3 Act 1 of 1999.
5 Section 217(2) of the Constitution of the Republic of South Africa of 1996.
6 Section 217(3) of the Constitution of the Republic of South Africa of 1996.
7 Act 5 of 2000.
A further key piece of legislation is the Broad-Based Black Economic Empowerment Act\(^8\) (B-BBEE Act), which empowers the Minister of Trade and Industry to issue codes of good practice on black economic empowerment that may include, \textit{inter alia}, ‘qualification criteria for preferential purposes for procurement and other economic activities’. The B-BBEE Act requires every organ of state and public entity, as defined therein, to apply any relevant code of good practice issued in terms of the B-BBEE Act in developing and implementing a preferential procurement policy.\(^9\) It is these codes that determine the B-BBEE status of any procuring entity and, hence, that determine the preference points allocated to any bidder in terms of the preferential procurement framework.

Lastly, the Promotion of Administrative Justice Act\(^10\) (PAJA) provides for the judicial review of ‘administrative action’, which includes almost all government procurement decisions, and sets out both the codified grounds of review and established remedies. Those procurement decisions falling outside the ambit of the PAJA may be reviewed in terms of the constitutional principle of legality, which constitutes a component of the rule of law.

South Africa is not a member of the European Union, and the European Union directives therefore do not apply to government procurement within the South African context. South Africa is a founding member of the World Trade Organization, but is neither a party nor an observer to the Agreement on Government Procurement.

\section*{II YEAR IN REVIEW}

Recent policy developments have been aimed at placing greater reliance on public procurement as a tool for achieving economic transformation and addressing socio-economic imbalances deriving from South Africa’s pre-democratic past. In the year under review this was substantively given effect through the coming into effect of the new Preferential Procurement Regulations of 2017, which were issued into law on 20 January 2017, replacing the Preferential Procurement Regulations of 2011. The regulations aim to use public procurement as a lever to promote socio-economic transformation, empower small enterprises, rural and township enterprises and designated groups, and to promote local industrial development.\(^11\)

The 2017 Preferential Procurement Regulations introduce a number of significant changes. Perhaps the most controversial is that the regulations purport to give government the power to apply ‘pre-qualification criteria to advance certain designated groups’ in awarding state tenders. Regulation 4 permits an organ of state to advertise any invitation to tender on condition that only a particular category of bidders may tender, which categories include those having a ‘stipulated minimum B-BBEE status level’, exempted micro enterprises (EMEs) and qualifying small business enterprises (QSEs) and bidders agreeing to subcontract a minimum of 30 per cent to various categories of EMEs or QSEs and bidders agreeing to subcontract a minimum of 30 per cent to various categories of EMEs or QSEs. By permitting organs of state to apply a pre-qualification criterion that requires all tenderers to have a minimum B-BBEE status level, the regulations appear to circumvent the limitations imposed by the PPPFA as to what weighting is to be attached to a tenderer’s B-BBEE status in evaluating and awarding a tender. Whereas under the PPPFA a maximum of 10 or 20 points out of 100 (depending on

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8. \text{\footnotesize Act 53 of 2003.}

9. \text{\footnotesize Section 10(1)(b) of the Local Government: Municipal Finance Management Act 53 of 2003.}

10. \text{\footnotesize Act 3 of 2000.}

the value of the tender) can be allocated for B-BBEE status, the new regulations elevate the importance of B-BBEE status to the extent that it can entirely preclude certain bidders from tendering at all, irrespective of how functional and cost-effective such bidders might be. This contradicts the PPPFA’s clear intention to promote price as the most determinative factor in awarding government tenders, with the matter of ‘preference’ playing a substantially smaller role. It is likely that a challenge will be brought to have this regulation declared *ultra vires* and invalid.

Other noteworthy changes introduced by the new Preferential Procurement Regulations include the following:

a. a change in the threshold of the evaluation of a bid on the basis of price and preference, whereby tenders are assessed on the basis that, in contracts with a value of equal to or above 30,000 rand and up to 50 million rand (the previous threshold was up to 1 million rand), price shall count for 80 points and preference shall count for 20 points (out of a total of 100 points) and in contracts with a value of more than 50 million rand, price shall count for 90 points and preference shall count for 10 points (previously above 1 million rand); and

b. organs of state are required to identify tenders, where it is feasible, in which the successful bidder must subcontract a minimum of 30 per cent of the contract value for contracts above 30 million rand to certain categories of qualifying entities.

The Department of Justice and Constitutional Development recently published a proposed Code of Good Administrative Conduct in terms of the Promotion of Administrative Justice Act (PAJA). The Code is intended to provide guidance to administrators to ensure that the decisions they take are lawful, reasonable and procedurally fair. It also aims to help administrators comply with the requirement that reasons must, when requested, be given for decisions. The Code does not impose additional legal obligations on administrators than those imposed by the Constitution and PAJA, but is there to assist administrators to comply with their legal duties and, in doing so, improve their services. That being said, the draft Code indicates that administrators should follow the guidelines in the Code as closely as possible as departure from the guidelines could be an indication that the Constitution and the requirements of PAJA have not been complied with. The deadline for public comment on the Code was 17 February 2017 and publication of the final Code is now awaited.

The Department of Trade and Industry has also initiated a new ‘Strategic Partnership Programme’ (SPP) to develop and support programmes or interventions aimed at enhancing the manufacturing and services supply capacity of suppliers with links to strategic partners’ supply chains, industries or sectors. The objective of the SPP is to encourage large private-sector enterprises in partnership with government to support, nurture and develop small to medium-sized enterprises (SMEs) within the partner’s supply chain or sector to be manufacturers of goods and suppliers of services in a sustainable manner and to support B-BBEE policy through encouraging businesses to strengthen the element of Enter and Supplier Development of the B-BEE Codes of Good Practice. The SPP will be available on a cost-sharing basis between government and the strategic partners for infrastructure and

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business development services necessary to mentor and grow enterprises. The grant will be capped at a maximum of 15 million rand per financial year over a three-year period based on the number of qualifying suppliers and is subject to the availability of funds.

In the matter of State Information Technology Agency SOC Ltd v. Gijima Holdings (Pty) Ltd the Supreme Court of Appeal held that where a state organ seeks to set aside its decision to award a tender under PAJA, it does not have the liberty of avoiding the 180-day time limit within which PAJA requires such reviews to be brought by instead bringing the review in terms of the broader constitutional principle of legality. The Court held that where administrative action (which includes procurement decisions) is under review, the principle of legality should only ‘act as a safety-net or a measure of last resort when the law allows no other avenues’ to challenge the administrative action, and not as a ‘first port of call or an alternative path to review, when PAJA applies’. However, the question of whether a litigant has a choice of instituting a review application in terms of PAJA or legality was left open by the Constitutional Court in the recent case of City of Cape Town v. Aurecon South Africa (Pty) Ltd. The Court did, however, emphasise that whether a litigant brings a review application under PAJA or in terms of the principle of legality, the application must still be brought within a reasonable time period.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

Section 217(1) of the Constitution imposes the five foundational principles of public procurement on all organs of state in the national, provincial or local spheres of government, or any other institution identified in national legislation. Section 239 of the Constitution further defines an organ of state as any department of state or administration in the national, provincial or local spheres of government, or any other functionary or institution that exercises a power or performs a function in terms of the Constitution, a provincial constitution or any legislation.

Not all institutions that are subject to the procurement provisions of the Constitution are bound by the PFMA and the PPPFA. The PFMA only applies to those national and provincial public entities that are not only established in terms of legislation, but that are also fully or substantially funded by way of a levy imposed in terms of national legislation, and accountable to Parliament. Similarly, the PPPFA only applies to those institutions falling within the ambit of Section 239 of the Constitution that are also recognised by the Minister of Finance, through notice, to also be subject to the provisions of the PPPFA.

The PFMA regulates procurement by national and provincial public entities through Regulations 16 and 16A of the Treasury Regulations of 2005 (the Treasury Regulations) issued in terms of the PFMA. Regulation 16 of the Treasury Regulations, which deals with public-private partnerships (PPPs), applies to all national and provincial departments and the national and provincial public entities listed in Schedule 3 to the PFMA, while Regulation 16A, which deals with general supply chain management, only applies to the national public

15 Id at para 38.
entities listed in Part A of Schedule 3 of the PFMA and provincial public entities listed in Part C of Schedule 3 of the PFMA, thereby excluding national and provincial public business enterprises from these regulations. Under Regulation 16A the procurement of goods and services as well as the disposal and letting of state assets, including the disposal of goods, is no longer required. Even though certain public entities are not bound by these regulations, they are still bound by Section 217 of the Constitution.

The MFMA regulates procurement by municipal entities through the Municipal Public Private Partnership Regulations of April 2005 and the Municipal Supply Chain Management Regulations of May 2005, both issued in terms of Section 168 of the MFMA.

ii Regulated contracts

Generally, the five foundational principles of South African public procurement law would demand that the procuring authority advertises and holds a competitive bidding procedure. Where it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from a competitive bidding process are recorded and approved by the accounting officer or accounting authority. Within the local government context, an accounting officer may deviate from the supply chain management policy if there is an emergency, if the goods or services are produced or available from a single provider only, or if the acquisition is of special works of art or historical objects where specifications are difficult to compile, if the acquisition is of animals for zoos, and in any other case where it is impractical or impossible to follow the official procurement processes.

The threshold value of contracts is also used to determine the appropriate type of procurement procedure. At national or provincial government level, the following thresholds apply: for contracts up to 2,000 rand contracting authorities may procure by means of petty cash (no quotation or competitive bidding); for contracts above 2,000 rand but not more than 10,000 rand, verbal or written quotations may be obtained; and for contracts above 10,000 rand but not more than 500,000 rand, written price quotations should be obtained. All contracts above 500,000 rand are subject to a competitive bidding process. At the municipal level, the same thresholds generally apply, except that written price quotations should be obtained for contracts above 10,000 rand and up to 200,000 rand, and above this value competitive bidding must be used.

Because of the competitive process followed in public procurement, contracting parties may not conclude a contract that is materially different from that specified in the initial call for bids. Further, transferring an existing contract to another supplier or provider without a new procurement procedure is generally not allowed.

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18 Regulation 16A of the Treasury Regulations 2005.
21 Regulation 36(1)(a)(i) of the Municipal Supply Chain Management Regulations.
22 Regulation 36(1)(a)(ii) of the Municipal Supply Chain Management Regulations.
23 Regulation 36(1)(a)(iii) of the Municipal Supply Chain Management Regulations.
24 Regulation 36(1)(a)(iv) of the Municipal Supply Chain Management Regulations.
25 Regulation 36(1)(a)(v) of the Municipal Supply Chain Management Regulations.
26 National Treasury Practice Note No. 8 of 2007/2008.
27 Regulation 12(2)(a) of the Municipal Supply Chain Management Regulations.
IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

In the national and provincial spheres of government accounting officers or accounting authorities of organs of state may opt to participate in transversal term contracts facilitated by the relevant treasury, in which event the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract.28 The accounting officer or accounting authority may also, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of the organ of state and the relevant contractor.29

A municipality may procure goods or services under a contract secured by another organ of state. This is, however, subject to:

a the initial procurement having been done by tender process;
b there being no reason to believe this was not validly procured;
c there being demonstrable benefits or discounts as a consequence; and
d there being written approval from the other organ of state and the provider of the goods or services.30

The Finance Minister, in a meeting of the National Assembly in March 2016, noted that this practice is subject to ‘misuse’ and announced that the regulation is being scrutinised as part of the above-mentioned broader review process targeting the entire legislative framework for supply chain management. Guidelines to assist municipalities with the appropriate application of the regulation are expected to be finalised by July 2016.31 To date no changes have been made to the regulation, nor have any such guidelines been published. However, the High Court in Blue Nightingale Trading 397 (Pty) Ltd T/A Siyenza Group v. Amathole District Municipality32 provides the necessary guidance on the interpretation and application of Regulation 32(1) of the Municipal Supply Chain Management Regulations.

In appropriate circumstances framework agreements are permitted, provided that there must first be a public tender process through which the successful bidders with whom the framework agreement is concluded are selected. The award of a job-specific contract under a framework agreement does not, by law, require an additional competitive procedure. However, in practice, most contracting authorities require quotations from at least three of the suppliers with whom framework agreements have been concluded, while some contracting authorities use a rotation system.

National Treasury published the Standardised PPP Provisions as National Treasury PPP Practice Note Number 01 of 2004, which must be used in conjunction with the National Treasury PPP Manual issued as a series of National Treasury PPP Practice Notes in 2004.

Although the Standardised PPP Provisions provide standard terms, project-specific annexures dealing with a range of specifications, penalties, payments and other project-specific issues must be developed and included for each PPP agreement on a case-by-case basis.

30 Regulation 32(1) of the Municipal Supply Chain Management Regulations.
32 [2016] 1 All SA 721 (ELC); [2015] ZAECCEL 16 (ELC); [2016] JOL 35098 (ELC).
Standardised PPP provisions have not yet been developed for municipal PPPs. The Municipal Service Delivery and PPP Guidelines of 2007\(^{33}\) require that such provisions be developed in accordance with the national and provincial Standardised PPP Provisions.\(^{34}\)

ii Joint ventures

PPPs have been dealt with above. PPPs are joint ventures between organs of state and the private sector. A PPP can only exist where the private party:\(^{35}\)

a. performs an institutional function on behalf of the institution;

b. acquires the use of state property for its own commercial purposes;

c. assumes substantial financial, technical and operational risks in connection with the performance of the institutional function or the use of state property; and

d. receives a benefit for performing the institutional function or from utilising the state property.

PPPs on both a national and provincial level, as well as a municipal level, are procured by way of open tender.\(^{36}\) Municipalities may choose to provide municipal services by entering into a service delivery agreement with a municipal entity, another municipality or a national or provincial organ of state.\(^{37}\) In such instance, where the arrangement resembles a public-public partnership, the municipality is not required to comply with the usual procurement rules. Other instances where the ordinary prescripts of procurement law may potentially not apply will be where a contracting authority is contracting with its wholly-owned subsidiary (where that subsidiary is practically an extension of the contracting authority). Procurement from a joint venture in which a private party has a shareholding will generally require that a procurement process be followed, unless the appointment of the private joint venture partner (i.e., the acquisition of shares by the private party in the joint venture) occurred through a public procurement process, and the contract between the joint venture and the contracting authority was specifically envisaged therein.

V THE BIDDING PROCESS

i Notice

The processing of bids through the centrally managed eTender Publication portal became compulsory for national and provincial government entities with effect from 1 April 2016, and will become compulsory for municipalities from 1 July 2016.\(^{38}\) In addition, bids must

\(^{33}\) Paragraph 7 of Module 5. These guidelines were jointly issued by the Minister of Finance and the Minister for Provincial and Local Government pursuant to Section 168(1)(d) of the MFMA.

\(^{34}\) The writer of this section acted for lenders on the first ever municipal PPP to reach financial close in South Africa.

\(^{35}\) Definition of public-private partnership in Regulation 16.1 of the Treasury Regulations of 2005 and definition of public-private partnership in Regulation 1 of the MFMA PPP Regulations.

\(^{36}\) Regulation 16.5 of the PFMA PPP Regulations read as a whole, read with PPP Manual Module 5: PPP Procurement; Regulation 4 of the MFMA PPP Regulations read as a whole, read with Municipal Service Delivery and PPP Guidelines Module 5: PPP Procurement.

\(^{37}\) Section 80(1) of the Municipal Systems Act 32 of 2000.

be advertised in at least the Government Tender Bulletin. Organs of state must disclose up front the criteria that will be applied in the selection and evaluation process, and bids may not be evaluated on undisclosed criteria.

### ii Procedures

The type of procurement procedure to be used in each case is determined by the amount involved (see above regarding regulated contracts). All procurement, either by way of quotations or through a bidding process, must be within the threshold values determined by the National Treasury. The accounting officer or accounting authority must ensure that bid documentation and the general conditions of contract comply with the instructions of the National Treasury, and they must include evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA.

Generally speaking, the process followed in competitive bids is by way of a committee system involving at least a bid specification committee, a bid evaluation committee and a bid adjudication committee. The bid specification committee must compile the specifications for each procurement. The bid evaluation committee must evaluate bids in accordance with the specifications for a specific procurement and the points system as set out in the supply chain management policy of the procuring entity and as prescribed in terms of the PPPFA. Lastly, the bid adjudication committee must consider the report and recommendations of the bid evaluation committee, and either (depending on its delegations) make a final award or a recommendation to the accounting officer to make a final award, or make another recommendation to the accounting officer on how to proceed with the relevant procurement.

### iii Amending bids

As a general rule, changes to the bid specifications after a call for bids has been advertised, to allow bidders to amend or withdraw their bids after submission, has the potential to defeat the requirements of fairness and transparency, and it is, therefore, generally not allowed. Bidders also cannot validate defective bids by submitting mandatory documentation after the close of the tender.

### VI ELIGIBILITY

#### i Qualification to bid

A bidder may not be awarded a tender if:

- the bidder or its directors are listed as a company or persons prohibited from doing business with the public sector;

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39 National Treasury Instruction Note 1 of 2015/2016. However, in *MEC for Public Works and Infrastructure, Free State Provincial Government v. Mofomo Construction CC (A138/2016) [2016] ZAFSHC 196* (24 November 2016), the court held that constructions tenders (which is subject to other specialised legislation requiring construction tenders to be advertised on the website of the Construction Industry Development Board) are not required to be published on the Government Tender Bulletin, as would be the case for non-construction tenders.

40 Regulation, and Regulation 26(1)(a) of the Municipal Supply Chain Management Regulations.

41 Regulation 28(1)(a)(ii) of the Municipal Supply Chain Management Regulations.

42 Regulation 29(1)(b)(ii) of the Municipal Supply Chain Management Regulations.

43 *Rodpaul Construction CC v. Ethekwini Municipality 2014 JDR 1122 (KZD).*
the bidder fails to provide written proof from the South African Revenue Service that it
has no outstanding tax obligations or has made arrangements to meet outstanding tax
obligations;
the bidder has committed a corrupt or fraudulent act in competing for the particular
contract;
the bidder has abused the institution’s supply chain management system; or
the bidder failed to perform on any previous contract.  

Before a bid is assessed on its merits, it will be checked whether it is ‘responsive’ in the sense
that it includes all requisite information and documentation. Non-responsive bids are usually,
in terms of the relevant bid documentation, disqualified and not considered any further.

ii  Conflicts of interest

Employees in the public sector may not perform remunerative work outside their employment
except with the written permission of the executive authority of the relevant department.  
The members of contracting authorities are also prohibited from holding private interests in
contracts with that contracting authority.  
The PFMA requires supply chain management
officials and other role players to ‘recognise and disclose any conflict of interest that may
arise’.  
Municipalities are prohibited from making any award to a person who is in the
service of the state or, if that person is not a natural person, of which any director, manager,
principal shareholder or stakeholder is a person in the service of the state; or who is an adviser
or consultant contracted with the municipality or municipal entity.  
In all tender processes,
a bidder is required to complete and submit a declaration of interest form in which it is
required to declare any relationship it may have with any employee of the state. Failure to
submit this form generally results in disqualification.

The Public Administration Management Act (PAMA) promulgated in 2014 will,
upon its commencement (the date of which is still to be announced), prohibit all state
employees at all levels of government from doing business with the state. The PAMA will
supersede and homogenise the legislation and regulations currently in place in respect of
conflicts of interest.

The Prevention and Combating of Corrupt Activities Act states that any person who,
directly or indirectly, accepts, agrees to or offers to accept any gratification from any other
person, whether for the benefit of him or herself or for the benefit of another person, as
an inducement to award a tender, is guilty of the offence of corrupt activities relating to
procuring and withdrawal of tenders.

44 Regulations 16A.9.1 and 16A.9.2(a)(iii) of the Treasury Regulations of 2005, Regulation 38 of the
Municipal Supply Chain Management Regulations.
45 Section 30(1) of the Public Service Act 103 of 1994.
46 Section 17(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.
47 Regulation 16A8.3 of the Treasury Regulations of 2005.
48 Regulation 44(a) to (c) of the Municipal Supply Chain Management Regulations.
49 Act 11 of 2014 (commencement date still to be announced).
50 Section 13(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.
In addition to the above-mentioned preventative measures, legislation also provides corrective measures that permit decisions to be reviewed and set aside where the outcome was unduly influenced.\textsuperscript{51}

iii Foreign suppliers

There is nothing prohibiting foreign suppliers from bidding. However, in order to qualify for B-BBEE status and earn the associated preference points allocated under the PPPFA they will need to form a bidding consortium or joint venture with appropriate B-BBEE entities. In order to be compliant and competitive, foreign bidders must meet minimum local content requirements where these apply.

VII AWARD

i Evaluating bids

All bid documentation must include the evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA. Furthermore, an invitation to tender must indicate whether that tender will be evaluated on functionality and, in such scenario, must also indicate the evaluation criteria for measuring functionality, the weight of each criterion, the applicable values and the minimum qualifying score for functionality.\textsuperscript{52} Functionality, price and preference (i.e., in respect of B-BBEE status) should be weighted and assessed in the manner prescribed by the PPPFA and the 2017 Preferential Procurement Regulations.\textsuperscript{53}

In terms of the 2017 Preferential Procurement Regulations, for a tender to be regarded as being acceptable and to be considered further it must meet any pre-qualification criteria and the minimum qualifying score for functionality as indicated in the tender invitation.\textsuperscript{54} Only tenders that meet the pre-qualification criteria (if any) and the minimum functionality threshold shall progress to evaluation in terms of price and preference.\textsuperscript{55} At that stage, the tenders shall be assessed on the basis that, in contracts with a value equal to or above 30,000 rand and up to 50 million rand or less), price shall count for 80 points and preference shall count for 20 points; and in contracts with a value of more than 50 million rand, price shall count for 90 points and preference shall count for 10 points.\textsuperscript{56} Bid points are applied on the basis that the bidder with the lowest price will achieve 80 or 90 points for price, depending on the contract value, with the price scores of the remaining bidders being determined relative to that of the lowest-priced bid by employing the formula prescribed by the 2017 Preferential Procurement Regulations. The preference points, which are added to the points allocated in respect of price, are determined by having regard to each bidder’s status in terms of the codes issued under the B-BBEE Act.

\textsuperscript{51} Section 6(2) of the Promotion of Administrative Justice Act 3 of 2000.
\textsuperscript{52} Regulations 4(2) and 5 of the Preferential Procurement Regulations of 2017.
\textsuperscript{53} Preferential Procurement Regulations of 2017.
\textsuperscript{54} Regulation 4(4) of the Preferential Procurement Regulations of 2017.
\textsuperscript{55} Regulations 6 and 7 of the Preferential Procurement Regulations of 2017.
\textsuperscript{56} Section 2(1)(b) of the Preferential Procurement Policy Framework Act 5 of 2000 and Regulations 6 and 7 of the Preferential Procurement Regulations of 2017.
Unless objective criteria justify otherwise, the tender must be awarded to the bidder scoring the highest number of points. If two or more tenderers score an equal number of points the contract must be awarded to the tenderer with the highest B-BBEE score.

It follows that the functionality of any given bid serves only as a gatekeeping measure, while the award of the bid to the ultimately successful bidder will be determined on the basis of how that bidder, once having passed the functionality threshold, scored in terms of price and preference. A division of the High Court has found that the functionality of a particular bid, especially where this is significantly superior to that of the lowest-priced bid without being considerably more expensive, may constitute an objective criterion justifying the award of the tender to somebody other than the highest scoring bidder. This approach is, however, yet to be endorsed by South Africa’s highest courts.

Once a tender award has been made it must be published on the eTender Publication portal. In addition to publication on the eTender Publication portal, accounting authorities or accounting officers for departments, constitutional institutions, public entities listed, or required to be listed, in Schedules 3A, 3B, 3C and 3D to the PFMA, or any subsidiary of any such public entities, are also required to publish all tender awards in the Government Tender Bulletin and other media by means of which the tender was advertised.

ii National interest and public policy considerations

As indicated above, preferential procurement policies have been used to promote substantive equality through the application of preferential treatment to designated groups when awarding government contracts. As is apparent from the newly promulgated 2017 Preferential Procurement Regulations, government is placing far more emphasis on the need to achieve substantial economic transformation in South Africa through preferential procurement; however, there are concerns regarding the lawfulness of the manner in which government is seeking to achieve these objectives.

In addition to this, the Department of Trade and Industry may designate particular sectors in line with national development and industrial policies for local production, where only locally produced services, works or goods or locally manufactured goods with a stipulated minimum threshold for local production and content will be considered in respect of government tenders. Where there is no designated sector, a specific tendering condition may be included to the effect that only locally produced services, works or goods or locally manufactured goods with a stipulated minimum threshold for local production and content will be considered, on condition that the prescript and threshold are in accordance with specific directives issued for this purpose by the National Treasury in consultation with the Department of Trade and Industry.

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57 Section 2(f) of the Preferential Procurement Policy Framework Act 5 of 2000. Regulation 11 of the Preferential Procurement Regulations of 2017 provides for such objective criteria to be stipulated in the tender.

58 Regulation 10(1) of the Preferential Procurement Regulations of 2017.


60 National Treasury Instruction Note 1 of 2015/2016.

61 Regulation 16A.3(b) of the Treasury Regulations of 2005 and National Treasury Instruction Note 1 of 2015/2016.

62 Regulation 8(1) of the Preferential Procurement Regulations of 2017.

63 Regulation 8(3) of the Preferential Procurement Regulations of 2017.
There is no express prohibition that tender invitations may not specify that goods and services must have national quality marks. That being said, where it is necessary for a tender to specify a particular brand name or quality mark to clarify an otherwise incomplete tender specification, the tender must specifically indicate that an ‘equivalent’ product will be permitted.64 For the most part, South African law on government procurement does not provide for different rules for different sectors. Although the PFMA and MFMA regulate the financial management of national and provincial government and local government respectively, the principles and requirements underscoring both pieces of legislation are much the same. There are a few bodies and industries with their own specific procurement requirements, but these are by far the exception.

VIII INFORMATION FLOW

Authorities must provide clear notification of the intended procurement, including the applicable process, methodology and criteria. Naturally, all bidders are entitled to the same measure of information, failing which the fairness and equity of the bidding process would be compromised.

Bidders are entitled to be notified of the outcome of their bids, irrespective of whether these are successful or not. Furthermore, bidders are also entitled to be provided with notification of the award of the tender, which must be provided within a sufficiently reasonable time to enable aggrieved bidders to challenge the procurement decision should they so desire.65 Entities subject to the PFMA must publish notice of an award on the eTender Publication portal within seven working days of making an award.66 Where a procurement decision constitutes administrative action as defined in the PAJA (which is usually the case), the decision maker is also enjoined to provide adequate notice of any right of review or internal appeal available to interested parties, together with adequate notice of the right of such parties to request reasons for the decision.67

The above position is entrenched by Section 32(1) of the Constitution, which grants everybody the right of access to any information held by the state. The Promotion of Access to Information Act68 (PAIA), which was enacted to give effect to this constitutional right, permits any person to request any information held by the state, which the state is enjoined to provide, subject to there being no grounds for refusal. Within the procurement context, this normally results in bidders being entitled to the procurement file after the tender decision has been made, with certain confidential information belonging to other bidders being withheld. The PAIA may not be relied upon following the commencement of judicial proceedings to challenge a procurement award. In that context, however, the procuring authority is

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64 Paragraph 3.4.2 of the National Treasury’s Supply Chain Management Guide for Accounting Offices/Authorities of 2005. In the matter of Searle and Others v. Road Accident Fund and Others 2014 (4) SA 148 ASP it was held that the National Treasury’s Guide forms part of what the Constitutional Court in AllPay described as the ‘constitutional and legislative procurement framework’, which contains supply chain management prescripts that are legally binding. It was accordingly held that the Guide is legally binding, and not merely an internal prescript that may be disregarded at a whim.

65 Regulation 16A 6.3(d) of the Treasury Regulations of 2005.

66 National Treasury Instruction Note 1 of 2015/2016.

67 Sections 3(2)(b)(iv) and 3(2)(b)(v) of the Promotion of Administrative Justice Act 3 of 2000.

68 Act 2 of 2000.
obligated in terms of the rules of court to make the complete ‘record’ of the procurement decision (which includes all information received and generated by it in that regard) available to the applicant, which is then entitled to rely upon this in supplementing its case.

IX CHALLENGING AWARDS

Public procurement expenditure continues to account for a particularly high portion of South Africa’s GDP. Increased dependency on public contracts and ongoing irregularity and corruption within the government procurement context have caused challenges of procurement awards to remain commonplace.

Generally speaking, judicial review proceedings take in the region of six months to one year to finalise, albeit that they can be conducted more quickly (where expedited time periods are agreed to) or over longer periods (where complexities, interlocutory issues or appeals arise). The institution of judicial review proceedings does not automatically suspend the implementation of the tender, and it is therefore in an aggrieved bidder’s interests to interrupt the implementation of the tender, either by agreement or urgent interdictory application, pending the outcome of the judicial review proceedings.

i Procedures

The overwhelming majority of procurement awards constitute administrative action, as defined in the PAJA. For this reason, the procedure ordinarily applicable for challenging procurement decisions is as prescribed in the PAJA. In consequence thereof, prior to instituting judicial review proceedings it is required that an applicant first exhausts any internal remedies provided for under any other law.69

Any proceedings for judicial review must be instituted ‘without unreasonable delay and not later than 180 days’ after the date on which any proceedings instituted in terms of internal remedies are completed or, where no such remedies exist, from the date on which the person concerned was informed of the decision, became aware of the decision and the reasons for it, or might reasonably have been expected to have become aware of the decision and the reasons.70 Our courts have found that the requirement that judicial review proceedings be instituted ‘without unreasonable delay’ is independent from that requiring such proceedings to be instituted within 180 days of the exhaustion of internal remedies or of having become aware of the decision and reasons for it.71 Judicial review applications can therefore be dismissed on account of an unreasonable delay, notwithstanding the proceedings having been initiated within the prescribed 180-day period. Aggrieved bidders must therefore act with the utmost expediency when seeking to challenge procurement awards. Our courts have also recently confirmed that the 180-day period is equally applicable to organs of state seeking proactively to review and set aside their own procurement decisions.72

In the limited instances where government procurement does not constitute administrative action, and it is reviewed on the constitutional principle of legality, common law would apply. Although it does not have the same crisp requirements as regards

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69 Section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000.
70 Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000.
the procedure for instituting review applications, it is advisable to try and adhere to the aforementioned principles applicable to the review of procurement decisions constituting administrative action.

ii Grounds for challenge

The PAJA enumerates various grounds of review that include:

- lack of authority;
- bias;
- non-compliance with a mandatory and material procedure or condition;
- procedural unfairness;
- material influence by an error of law;
- ulterior purpose or motive;
- consideration of irrelevant considerations or failure to take relevant considerations into account;
- unauthorised or unwarranted influence;
- arbitrariness or capriciousness;
- unlawfulness;
- irrationality;
- failure to take a decision; and
- unreasonableness.

Although the grounds of review provided for under the PAJA are not specifically available for reviews brought in terms of the principle of legality, the latter is rapidly developing as a parallel body of law, based upon the rule of law, and encompasses general substantive grounds of review (such as lawfulness and rationality), while those of a procedural nature are being developed at a rapid pace.

iii Remedies

South African courts are constitutionally obligated to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of such inconsistency.

Once having made a finding of Constitutional invalidity, South African courts are empowered in terms of the PAJA to ‘grant any order that is just and equitable’, which would include giving orders:

- directing the procuring authority to give reasons or act in the manner the court requires;
- prohibiting the procuring authority from acting in a particular manner;
- setting aside the procurement decision and remitting this for reconsideration, or, in exceptional cases, substituting the procurement decision or correcting a defect resulting from it;
- in exceptional circumstances, directing the procuring authority to pay compensation;
- declaring the rights of parties relating to the procurement decision; or
- granting a temporary interdict or other temporary relief.

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73 Section 6(2) of the Promotion of Administrative Justice Act 3 of 2000.
74 Section 172(1) of the Constitution of the Republic of South Africa of 1996.
Subject to a court’s obligation to declare any conduct inconsistent with the Constitution invalid, the courts, in exercising their just and equitable jurisdiction, may either limit the retrospective effect of the declaration of invalidity or suspend the declaration of invalidity for any period and on any conditions.75

The Constitutional Court, in *Trencon Construction (Pty) Ltd v. Industrial Development Corporation of South Africa Ltd and Another*,76 has clarified the test for exceptional circumstances justifying a substitution order in the context of unlawful tender awards. Having regard to the doctrine of separation of powers, the Court held that when determining whether to grant a substitution order, it must be determined whether the court is in as good a position as the administrator to make the decision and whether the decision of the administrator is a foregone conclusion. The Court held that these two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors (such as delay, bias or incompetence of the administrator). The Court concluded that the ultimate consideration is whether a substitution order is just and equitable, which will involve a consideration of fairness to all implicated parties. The Court emphasised that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

Ordinarily, aggrieved bidders are not entitled to claim damages arising from breaches of procurement law, and must therefore act with haste to secure meaningful relief in relation to the tender itself. This would include either setting aside the tender decision for re-adjudication, obtaining an order of substitution in respect of the award of the tender, or alternatively obtaining an order directing the commencement of a new tender process where the initial process or formulation of the tender documentation was flawed. A bidder is, however, entitled to recover damages where it can show that it would have been awarded the tender but for fraud or dishonesty on the part of the procuring authority. In the case of otherwise unlawful tender decisions, compensation can be awarded for out-of-pocket expenses, with interest.77

Although not subject to fines, bidders in breach of procurement procedures will be listed on the National Treasury’s tender defaulters’ register, in terms of which they will be precluded from being awarded procurement contracts for as long as they remain on the register (which can be for between five and 10 years). Officers of the procuring authority who are in contravention of the procurement laws will incur liability and sanctions in terms of the governing legislation.78 The procedure for dealing with dishonest bidders is now also specified in the 2017 Preferential Procurement Regulations.79 In terms of the 2017 Preferential Procurement Regulations, where a tenderer has submitted false information regarding its B-BEEE status level, local production content, or any other matter required in terms of the regulations that will affect or has affected the evaluation of a tender, or where a tenderer has failed to declare any subcontracting arrangements, the organ of state must allow such tender an opportunity to make representation in response to the allegations. If an organ of

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75 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC).
76 2015 (5) SA 245 (CC).
77 *Darson Construction (Pty) Ltd v. City of Cape Town* 2007 (4) SA 488 (C).
79 Regulation 14 Preferential Procurement Regulations of 2017.
state concludes, after considering the tenderer’s representations, that such false information was submitted by the tenderer, it must disqualify the tenderer or terminate the contract in whole or in part; and, if applicable, claim damages from the tenderer, or if the successful tenderer subcontracted a portion of the tender to another person without disclosing, penalise the tenderer up to 10 per cent of the value of the contract. In addition, the organ of state is required to inform National Treasury, in writing, of any actions taken in this regard and provide written submissions as to whether the tenderer should be restricted from conducting business with any organ of state. National Treasury must then determine whether to restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years and maintain and publish on its official website a list of restricted suppliers.

In a recent case of *City of Cape Town v. Aurecon South Africa (Pty) Ltd*, the Constitutional Court declined to declare the awarding of a tender constitutionally invalid on the ground that the application was inexcusably late.80 The case illustrates that although the courts are obliged to declare any conduct that is inconsistent with the Constitution invalid, they may decline to discharge this obligation where a review application is brought out of time. Litigants therefore may not sit back and do nothing on the mistaken belief that the court cannot close its eyes to constitutionally invalid conduct.

**X OUTLOOK**

There has been a notable policy shift towards placing increased reliance on government procurement as a tool for increasing the speed and extent of socio-economic transformation, and we expect to see further developments of this nature in the year ahead. As part of the policy shift, the government has reiterated that it is in the process of reviewing the entire supply chain management legislative framework with a view to developing a single procurement law that, *inter alia*, seeks to improve efficiency in the procurement environment and eliminate corruption.

A draft Public Procurement Bill has been anticipated since the beginning of 2016, and was mentioned by the Finance Minister during his budget speech in May 2016. Although the Public Procurement Bill has not yet been released for comment, it is anticipated that this will take place soon. In a speech delivered by the President in September 2016, he indicated that the draft bill is likely to be tabled in Parliament early in 2017. He commented that the then current procurement legislation has ‘failed to substantially re-shape the skewed ownership and control of the South African economy’. The President went on to say that it is the government’s ultimate intention to repeal the PPPFA and its associated regulations, and to introduce a more flexible preferential procurement framework that is responsive to government objectives. The President also declared that the 2017 Preferential Procurement Regulations would be introduced as an interim measure to make the PPPFA more responsive to economic transformation imperatives. The stronger emphasis placed on transformation by the new Preferential Procurement Regulations can accordingly be viewed as a precursor to more drastic measures being introduced through the contemplated Public Procurement Bill.

In keeping with its intent to ramp up reliance on public procurement as a lever for socio-economic transformation, and despite strong political opposition, government has forged ahead with its decision to procure the construction of nuclear power plants to generate 9,600MW of electricity per annum. The procurement will carry an estimated cost of between

80 *City of Cape Town v. Aurecon South Africa (Pty) Ltd* [2017] ZACC 5.
500 billion and 1 trillion rand, making it the country’s most expensive procurement to date. As a result of the lack of transparency regarding the procurement process thus far, there is already legitimate concern as to whether a lawful procurement process will be followed going forward. Already the first judicial challenges to the procurement have been initiated, and this looks set to dominate the public procurement landscape for at least the next few years.
I  INTRODUCTION

The key legislation for Spain’s public procurement regime consists of three main laws:
the Law on Public Procurement, Compilation Text approved by Royal Decree 3/2011, of
14 November (PPL); the Law on Public Procurement in the water, energy, transport and
postal services sectors, 31/2007, of 30 October; and the Law on Public Procurement in the
defence and security sectors, 24/2011, of 1 August. These Laws respectively implement the

In addition, the PPL is implemented through two Royal Decrees: Royal Decree
1098/2001, of 12 October, approving the General Regulation of the Law on Public
Administrative Contracts; and Royal Decree 817/2009, of 8 May, which partially implements
Law 30/2007, of 30 October. Spain is a party to the World Trade Organization Agreement
on Government Procurement (GPA), which is in force and has been applicable since
1 January 1996.

The above-mentioned legislation rests on the guarantee of the principles of free access
to tenders, the publicity and transparency of the procedures, and the non-discrimination and
equal treatment of candidates, ensuring the effective use of public funds.

II  YEAR IN REVIEW

Contracts Directive and 2014 Utilities Contracts Directive) had to be implemented into
Spanish law before 18 April 2016. Two pieces of draft legislation – the draft of the new PPL
and the draft of the new Law on Public Procurement in the water, energy, transport and
postal services sectors – were adopted on 17 April 2015, although the recent political crisis
delayed its implementation and a new draft was adopted on 2 December 2016.¹

Consequently, some provisions of the new EU Procurement Directives are directly
applicable until intervention from the Spanish parliament.² On 15 March 2016, the

¹ Raquel Ballesteros is a partner at Bird & Bird (International) LLP.
² The lack of a parliamentary majority from the general elections held in December 2015 led to the election
being repeated, and no government was formed until June 2016. This led to the suspension of several
pieces of draft legislation (such as the draft of the new PPL and the draft of the new Law on Public
Procurement in the water, energy, transport and postal services sectors).
³ The direct effect of the EU Procurement Directives can be relied upon in respect of all the provisions that
are unconditional and sufficiently clear and precise, that is to say, those provisions in respect of which
Member States do not have any discretionary powers.
The government’s Contracts Advisory Board issued a recommendation addressed to all Spanish contracting authorities on the potential direct effect of the EU Procurement Directives. In addition, on 1 March 2016 the Administrative Tribunals of Contractual Appeals approved guidance on the applicability of the EU Procurement Directives after the deadline for compliance.

Despite this, until the Spanish legislation implementing the EU Procurement Directives is approved, the above-mentioned legislation remains in force and must be construed in accordance with the provisions of the EU Procurement Directives.

However, the current PPL establishes a framework that already includes some of the regulations and administrative provisions necessary to comply with the EU Procurement Directives and it was amended in 2015 to include certain provisions of the EU Procurement Directives as well as to foster competition and to increase the participation of small and medium-sized enterprises, promoting sustainability in the national economy.4

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The concept of ‘public sector’ used by the PPL is only applicable to the effects of this particular Law,5 and is wider than the definition of ‘public sector’ under Articles 2 and 3 of the General Budgetary Law, 47/2003, of 26 November.

According to Article 3 PPL, three levels of bodies are subject to it, classified on the grounds of their nature and characteristics. These levels are interconnected and sometimes overlap. This is commonly known as ‘the concentric circles theory’, since each of the levels is partly included within the others. The principle ruling this theory is that, the closer the contracting entity is to the centre of the circles, the greater the applicability of the PPL to it. According to the theory, all public administrations are contracting authorities and belong to the public sector, while not all of the bodies included within the public sector are public administrations or contracting authorities.

Classification, from the most distant to the closest level, is as follows:

- first level: public sector;
- second level: public administrations. This category includes those entities and bodies that, within the public sector, are also considered public administrations; and
- third level: contracting authorities. This level includes all entities and bodies considered as public administrations; and those entities or bodies with their own legal personality specifically created to satisfy needs in the general interest, and that are not of an industrial or commercial nature, so long as they are mainly financed by one or more subjects considered to be contracting authorities, when said subjects control

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4 These provisions include the new regulation of the prohibitions to contract, which was approved by Law 40/2015, of 1 October, establishing the legal regime for public authorities; and the new regulation of reserved contracts for sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, and of such contracts to be performed in the context of sheltered employment programmes, which was approved in Law 31/2015.

5 Although now it is also used by Law 19/2013, of 10 December, on transparency.
their management, appoint more than a half of the members of their administrative, directive or surveillance organs, and associations created by one or several of the subjects considered to be contracting authorities.6, 7

This distinction is highly important since, depending on the level the contracting entity is classified under, the contract shall be of an administrative or private nature, with all the consequences of the applicable legislation that this implies. 8

ii Regulated contracts

The PPL regulates public contracts on public works, supplies and services and public works concessions, as well as public-private collaborations9 and mixed contracts.10

Contracts relating to military equipment, weapons or ammunition intended to be used by the army, the police and other similar forces, or to any works, supplies or services related to them, regardless of their price, are subject to the Law on Public Procurement in the defence and security sectors, which frequently declares the PPL to be directly applicable in a suppletive capacity.

In addition, the PPL regulates a particular category of contracts that is very common within the local sector, although not envisaged by the Public Sector Directives, consisting of public contracts for public services management.11 However, due to the direct effect of the EU Procurement Directives, any public contracts for public services management that may be classified as services concession contracts subject to harmonised regulation shall be governed by the directly applicable provisions of the 2014 Concession Contracts Directive.

‘Minor contracts’ exist for public works contracts12 whose value is below €50,000 (or €18,000 for other types of contracts). They only require the approval of the corresponding expenditure and their incorporation in the invoice to be awarded to anyone with full capacity and holding the required professional licence.13 However, publicity is a general requirement in Spain’s public procurement regime, and it is mandatory except when justified reasons allow for the use of the negotiated procedure without publication of the contracts notice.14

The assignment of an awarded contract is expressly regulated under Article 226 PPL and subject to specific requirements.15 The possibility of making amendments to an awarded

6 See Article 3 PPL.
7 The draft of the new PPL establishes the same classification system as the PPL, but it widens the subjective scope of the Law, thereby including political parties, trade unions and business organisations.
8 For more detailed information, see Articles 18 to 21 and 189 to 193 PPL.
9 The draft of the new PPL eliminates the role of the public-private collaboration contract. Experience has shown that the objective of this type of contract can be achieved using other contract models, in particular via concession contracts.
10 See Articles 5 to 12 PPL.
11 See Articles 275 to 289 PPL.
12 See Article 111.2 PPL for special rules applicable to works.
13 Articles 111 and 138 PPL. The draft of the new PPL maintains the same legal regime: see Articles 118 and 131.
14 Article 142 PPL. In addition, see Section V, infra.
15 The draft of the new PPL regulates the assignment of the contract to stop any assignment from concealing a contractual modification that might demand the same requirements and conditions as the PPL.
Spain

contract is also expressly provided for in Articles 107 and 108 PPL, although in a very limited way (i.e., within the limit of what is necessary to address the requirements that must be fulfilled) and under certain, reasonably justified, circumstances.  

In any case, the essential contractual terms governing the tendering procedure or the award of the contract cannot vary.  

In addition, due to the direct effect of 2014 Public Contracts Directive, there exists an obligation to publish and give notification of the modification of contracts.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

To rationalise public procurement, the PPL regulates framework agreements and systems of dynamic purchasing applicable to supplies contracts (e.g., contracts mentioned in Article 9.3a PPL), and works, services and supplies contracts that are considered ordinary use. Their duration is limited to four years, and both are subject to publicity requirements similar to other contracts. Neither type of contract shall be used abusively or in any way that endangers the principle of free competition.

The PPL also regulates central purchases, paying special attention to the state central purchasing body, to which regional governments may revert in the event that they do not create their own bodies. Central purchases are intended to centralise homogeneous works, supplies and services contracts within the state’s public sector entities.

ii Joint ventures

Article 4.1.n excludes from the scope of the PPL agreements between entities or bodies considered as technical services and the public sector entity they are linked to. Technical services are entities controlled by a public sector entity in the same way and with the same intensity as the public sector entity controls its own activities (e.g., a public sector entity may entrust to the technical service a delegation of its management, something which is quite usual in the public-public joint ventures field). In any case, this possibility must be expressly stated in the regulation that created the technical service. When a company develops this function, all of its share capital must be in public ownership.

Despite this exclusion, all contracts entered into by technical services to carry out their activities are subject to the PPL.

In any case, it is important to state that as a consequence of the direct effect of the EU Procurement Directives, the provisions of Article 12 of the 2014 Public Contracts Directive have been applicable in Spain since 18 April 2016.

Mixed-capital corporations are vehicles for collaboration between public entities and private parties, and these are regulated by the PPL in Additional Disposition 29; in these, the private partner must be competitively tendered according to the PPL or, when applicable, Additional Disposition 29.

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16 Articles 201 to 205 of the draft of the new PPL establishes a similar regime for the modification of contracts as that established in the PPL, but is more restrictive than the regime set out in the 2014 Public Contracts Directive.
17 See Articles 202 and 203 of the draft of the new PPL.
18 Articles 194 to 207 PPL.
19 The draft of the new PPL establishes the legal regime of the framework agreements, systems of dynamic purchasing and central purchasing in Articles 216 to 228.
the rules governing public-private collaboration contracts. According to Article 11 PPL, this particular type of contract shall be used when the activities to be performed are particularly complex because of technological or innovative reasons.

V THE BIDDING PROCESS

i Notice

According to Article 142 PPL, public procurement procedures launched by public administrations, except for those negotiated procedures stated in Article 177, shall be advertised in the Official State Gazette. Nevertheless, procedures launched by regional governments, local entities or public bodies linked to any of them may be advertised in corresponding official regional or local gazettes. When contracts are subject to harmonised regulation, they must be published in the Official Journal of the EU, this last being the publication that matters for all applicable legal purposes.  

Notwithstanding the aforesaid, contracting entities shall share information regarding contracts to be awarded by them on the internet in their contracting profiles, and through the platform for public sector contracts. Furthermore, due to the direct effect of 2014 Public Contracts Directive, the contracting authorities shall offer, by electronic means, unrestricted, direct and free-of-charge access to the procurement documents from the date of publication of any notice. Finally, publication in the Official Journal of the EU will suffice for tendering procedures launched by non-contracting authorities.

ii Procedures

Public sector contracts shall be awarded by applying open or restricted procedures, negotiated procedures with or without publication of the contract notice, or through the competitive dialogue procedure. As a result of the direct effect of the 2014 Public Contracts Directive, it shall not be possible to use the procedure negotiated with or without publication of the contract notice for value reasons exclusively. In addition, contracting authorities shall use the new procedure of innovation partnerships in accordance with the provisions under Article 31 of the 2014 Public Contracts Directive.

Article 148 PPL regulates electronic auctions. These may be used in open and restricted procedures as well as in those negotiated procedures referred to in Article 170(a) after a complete evaluation of the tenders by the contracting entity. The auction shall be based on the price or on other tendering criteria that can be quantifiable and that can be expressed as a percentage. Both criteria and the formula used for its quantification must be stated in the award advertisement.

iii Amending bids

There are opportunities to introduce changes or variations during the procurement process, although limited, when awarding criteria other than price are to be considered. According
to TACRC Ruling No. 43/2011, quoting the government’s Contracts Advisory Board, these are understood to be an exception to the ban on simultaneous proposals, making their admission possible when they are expressly established in the contractual documents and up to the limits stated therein. The contracting entity may only take into account those amendments when stated in the contractual documents, which shall indicate clearly what those amendments consist of. They must also be included in the tender advertisement.

VI ELIGIBILITY

i Qualification to bid

Contractors willing to enter into a contract with an entity belonging to the public sector must meet the minimum economic, financial, professional soundness and technical feasibility requirements in the manner determined by the contracting entity. This requirement shall be replaced by the contractor’s classification as a works or supplies contractor when this is mandated by the PPL.

Both the minimum requirements and the necessary documents and means to accredit them, must be stated clearly in the contractual documents and in the tender advertisement.

Professional or material resources to be linked necessarily to the performance of the contract may be included in the contractual documents. They may also be stated as essential obligations for the contractor, the infringement of which can lead to the termination of the contract or to penalties imposed on the contractor.

Finally, to avoid being disqualified, the contractor cannot fall under any prohibition to contract with public sector entities as set out in Article 60 PPL, any prohibitions under the PPL or relevant Spanish legislation or, if these exist, similar regulations of the country of establishment, inter alia:

a conviction in a final judgment of a serious criminal offence;
b proceedings pending for any kind of measures under the Spanish Bankruptcy Law 22/2003, of 9 July;
c serious infringements related to professional misconduct, distortions of competition, labour integration and equal opportunities, and the discrimination of foreign persons or persons with disabilities; or for any serious infringement in the employment or environmental fields, or of tax and social security obligations; or
d misrepresentation, ineligibility, termination of any public contract entered into by a cause attributable to the contractor, or wrongful withdrawal in any procedure for the award of a public contract.

ii Conflicts of interest

Together with the ban on entering into contracts with public sector entities on the grounds of Article 60 PPL, Article 56 establishes a general rule on conflicts of interest. Those companies

24 Report 19/2004, of 12 November, which distinguishes between ‘variations’ or alternative proposals and ‘improvements’.
25 The draft of the new PPL establishes a regime of variants that is very similar to that established in the PPL and it limits the use of improvements as a criterion for the award of public contracts: it shall not be possible to assign a value greater than 2.5 per cent to the ‘improvements’ criterion.
26 See Title II, Chapter II, Articles 54 to 85.
27 Article 60.1.f and g PPL.
involved in the writing of the technical specifications or of any other preparatory document for the contract cannot participate in the bid if their participation may cause an infringement of the principle of free competition or may be interpreted as privileged treatment of those companies.

Pursuant to TACRC Ruling No. 105/2013, of 14 March, two conditions are required to apply this restriction: the inclusion in writing of the above-mentioned documents (even if it is an indirect participation, through non-binding documents, as long as the information contained in the documents has eventually been incorporated into the contractual documents), and that the privileged treatment or the restriction of free competition is duly accredited.

The Administrative Tribunal of Contractual Appeals of Madrid has gone further in its Ruling No. 219/2014, of 10 December, declaring an award null and void because the company that was awarded the contract was a client of the entity (an external auditor) in charge of the assessment of the technical offer, according to the concept of conflict of interest stated in Article 24 of the New Public Sector Directive.

Additionally, due to the direct effect of the 2014 Public Contracts Directive, the measures established in Article 41 of the Directive shall apply in relation to the ‘prior involvement of candidates or tenderers’. As such, the draft of the new PPL imposes an obligation on contracting authorities to take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the context of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

iii Foreign suppliers

Foreign suppliers can participate in bids under equal conditions as national suppliers as long as they meet the contracting entities’ requirements regarding capacity or soundness.

Foreign individuals or legal persons from countries outside the EU must prove their capacity through a report from the Spanish permanent diplomatic mission or consular section of the country where the contractor has its legal domicile. This must be accompanied by a certificate of reciprocity on public procurement from the corresponding Spanish permanent diplomatic mission, unless the contractor is from a country that is party to the GPA and the contract is subject to harmonised regulation.

When the contractor is from a Member State, a registration indicating capability in the relevant registry under the state of establishment’s legislation, or an affidavit or certificate in the forms established in the PPL regulations, will suffice.29

28 See also Ruling No. 73/2016 of 29 January and No. 34/2010 of 23 December.
29 Ruling No. 139/2012 of June 2012 and No. 607/2013, of 4 December.
30 See Article 70 of the draft of the new PPL.
31 See Article 84 PPL on EU qualification certificates.
VII AWARD

i Evaluating tenders

Once the tendering procedure has been advertised, bidders shall lodge a sole secret tender. The documents referring to soundness, technical feasibility and the concrete offers shall be provided in separated, sealed and signed envelopes. Offers are binding in their stated terms and cannot be withdrawn without a reasonable justification.

Criteria to evaluate the proposals shall be directly linked to the contract (e.g., price, quality, deadline for the performance); however, they must be stated in the contractual documents, as must the way in which they will be weighted.

Evaluation according to criteria quantifiable through objective formulae shall be made after the evaluation of other criteria. If more than a sole criterion is taken into account, the weighting of these shall be available for the bidders and, when that weighting is not possible, criteria shall be listed in order of importance.

In the case of a tie among bidders, TACRC Ruling No. 31/2014, of 17 January, establishes that draws may be subject to a valid tiebreaker criterion when no other criterion has been established.

Mistakes contained in the information to be included in each envelope may lead to the bidder’s exclusion if such mistakes imply a situation of inequality between bidders. Many appeals brought before the TACRC are grounded on this rule. In fact, in Rulings No. 719/2015, of 23 July, and No. 424/2015, of 8 May, the TACRC held that it constitutes inequality if the contracting entity, through formulae, knows details of the evaluation criteria before assessing other criteria.

In addition, due to the direct effect of the 2014 Public Contracts Directive, a tender may be refused if it does not comply with the relevant obligations in the fields of environmental, social and labour law established by Union law, national law and collective agreements, or if it does not comply with international environmental, social and labour law provisions.

ii National interest and public policy considerations

Environmental and social considerations shall be taken into account as awarding criteria or as special performance conditions, but in both cases they must be expressly stated in the contractual documents and tender advertisements. They can even be used as a tiebreaker criterion, according to PPL Additional Disposition 4, which refers to the hiring of people with disabilities and workers at risk of social exclusion, and to non-profit entities. National interest is taken into account when imposing confidentiality obligations.

VIII INFORMATION FLOW

The award of the contract must be notified to all bidders, even if they are unsuccessful, and must be published through the contracting profile of the contracting entity. The award must be reasonably justified and include all the information necessary to allow unsuccessful bidders to challenge the award.
Confidentiality obligations, when imposed, shall be stated in the contractual documents or in the contract itself, expressing their scope and temporal limits. The contracting entity must not communicate\(^{35}\) information related to the award when, for example, its publication might be contrary to the law or the general interest, the contracts have been declared secret, their execution should be accompanied by special security measures or for reasons of national security. Likewise, information about their formalisation can be unpublished.

In addition, confidentiality also has relevance when awards are challenged, especially when an appealing bidder makes use of his or her right to access the administrative file (which includes the other bidders’ offers) to lodge a fully reasoned appeal and any of the remaining bidders have declared parts of their offer confidential for commercial reasons.

The Administrative Tribunal of Contractual Appeals of Madrid, on the basis of previous reports by the State Procurement Consultative Council,\(^{36}\) declared in Ruling No. 203/2014, of 26 November, that although confidentiality of offers has to be respected, information contained in them may be necessary to challenge an award. The balancing of these rights, therefore, has to be considered on a case-by-case basis, with the reasoning of the contracting entity being essential in evaluating whether the correct balance has been maintained between them.

**IX CHALLENGING AWARDS**

In 2016,\(^{37}\) 1,244 appeals were brought before the TACRC, and were decided within 43 calendar days.

The TACRC found more than 25 per cent of the cases in favour of the appellant; 505 appeals were rejected on the grounds of the appeal itself; and 362 were rejected because of formal issues. This means that the TACRC ruled for the appellant in only 37 per cent of the appeals, which is less than in 2015 (39 per cent).\(^{38}\)

Only 77 of the TACRC’s decisions have been brought before the courts of law, which represents 8 per cent of all its decisions. TACRC rulings are usually confirmed.

**i Procedures\(^{39}\)**

Article 40 PPL provides for a special appeal to challenge public sector contracts. This appeal shall be heard by the TACRC, which is not judicial but rather administrative in nature. Nevertheless, according to Article 41, regional governments are entitled either to create their own administrative tribunals or to reach an agreement with the TACRC to allow it to hear appeals against the contracting entities within their territorial scope. When nothing has been stated, rules applicable to regional governments shall also be applicable to local entities.

The aforesaid tribunals shall hear proceedings for a declaration of invalidity of a contract (Article 37 PPL and those regulated in Law 31/2007); appeals for infringements of special rules stated in Law 31/2007; and special contractual appeals regulated in the PPL and in Law 24/2011.

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\(^{35}\) Articles 26,1,1, 153 and 154 PPL.


\(^{37}\) Data from the TACRC Annual Report 2016.

\(^{38}\) Data from the TACRC Annual Report 2016.

\(^{39}\) Articles 31 to 50 PPL.
Regarding this third proceeding, it is a preventive and voluntary appeal, and bidders may choose to bring an action directly before a court of justice instead. In any event, rulings of the administrative tribunals can be appealed before an administrative court of justice. Due to the direct effect of the European Union directives, the scope of this special appeal has been modified and is now applicable to the following public sector contracts:

- works;
- supplies;
- services;
- public-private collaboration contracts;
- public works concessions subject to harmonised regulation;
- public services concessions subject to harmonised regulation; and
- framework agreements subject to harmonised regulation.

The appeal shall be lodged within 15 working days from the date on which the decision or act intended to be appealed was notified. The regulation on the special appeal and the organisation of the TACRC approved by Royal Decree 814/2015, of 11 September, contains detailed rules concerning the calculation of deadlines.

ii Grounds for challenge

Despite the specific grounds stated for the invalidity of contracts in Article 37 PPL, there are numerous grounds for contractual appeals including, inter alia, confusing wording in the contract documents, arbitrariness, and errors or mistakes, when weighing the awarding criteria.

Any individual or legal person whose rights or interests may be harmed or in any other way affected by the decisions or administrative acts appealed shall be able to bring an appeal in relation to:

- tendering procedure notices;
- contractual documents;
- administrative acts that are relevant to the award of the contract, involve the exclusion of a bidder, infringe the principle of fair hearing or cause an irreparable harm to rights or fair interests;
- administrative decisions excluding bidders; and
- the award of the contract.

As a consequence of the direct effect of the European Directives, beyond the aforementioned grounds, other grounds for challenge include contract amendments and orders for execution by their own means that do not meet the legal requirements.

iii Remedies

Administrative tribunal decisions may declare the annulment of illegal decisions taken during the tendering process, including the suppression of discriminatory technical, economic or financial conditions that could have been included in any relevant document or advertisement.

40 According to the draft of the new PPL, this special appeal is mandatory and previous to an appeal before the court of justice.

41 See TACRC Ruling No. 402/2013, on framework agreements not subject to harmonised regulations.
It is also possible that, as a consequence of such decision, the contracting entity awards the contract to another bidder. In the event that the appellant has suffered any harm, the contracting entity may be compelled to compensate all damage inflicted on him or her.

Finally, fines can be imposed on the grounds of bad faith and recklessness in respect of challenges to awards. In fact, during 2015, 19 fines totalling €55,411 were imposed.\textsuperscript{42}

\section{OUTLOOK}

In 2017 it is probable – and desirable – that the new PPL and the new Law on Public Procurement in the water, energy, transport and postal services sectors will be approved, after which the transposition of the EU Procurement Directives will be complete. However, due to the direct effect of the EU Procurement Directives and given what was established in the recommendation issued by the government’s Contracts Advisory Board on 15 March 2016, many TACRC rulings, as well as those of other regional administrative tribunals (especially the Administrative Tribunal of Contractual Appeals of Madrid), in contractual appeals, have started to apply criteria provided in the new Procurement Directives even though these have not yet been implemented.

\textsuperscript{42} Data from the TACRC Annual Report 2016.
I INTRODUCTION

The key procurement legislation applicable in England, Wales and Northern Ireland is the Public Contracts Regulations 2015 (PCR), the Utilities Contracts Regulations 2016 (UCR), the Concession Contracts Regulations 2016 (CCR), and the Defence and Security Public Contracts Regulations 2011 (Defence Regulations), referred to collectively in this chapter as the 'procurement regulations'.

The PCR, UCR and CCR do not apply to Scotland, which has its own procurement legislation. The Defence Regulations apply throughout the United Kingdom (including Scotland).

The procurement regulations implement the corresponding EU directives. The PCR came into force on 26 February 2015.3 The UCR4 and CCR came into force on 18 April 2016.5 On 18 April 2016, contracts for health services above £589,148 in value let by the National Health Service (NHS) and clinical commissioning groups became subject to the 'light touch regime' in the PCR (see Section V.ii, infra). Separate procurement regulations6 specific to the health sector continue to apply (alongside the PCR) to contracts for NHS healthcare services regardless of contract value.

The Small Business, Enterprise and Employment Act 2015 (SBEE Act) gives the UK government power to make further regulations in relation to procurement, although none have been made to date. Additionally, the case law of the Court of Justice of the European Union (CJEU) and the General Court is taken into account.

While Member States must implement most provisions in the EU directives, there are a number of optional provisions. The UK has adopted some, but by no means all, optional provisions; for example, it has continued to allow the use of central purchasing bodies, but is postponing to the maximum extent possible the mandatory use of full e-communications.

1 Amy Gatenby and Louise Dobson are managing associates and Bill Gilliam is a partner at Addleshaw Goddard LLP.
2 Except for defence and security procurement, where the rules are UK-wide, this chapter focuses on the legislation in England, Wales and Northern Ireland.
3 Replacing the previous Public Contracts Regulations (2006).
4 Replacing the previous Utilities Contracts Regulations (2006).
5 The EU directives corresponding to the UK regulations currently in force are, therefore, 2014/24/EU, 2014/25/EC, 2014/23/EC, 2009/81/EC and 89/665/EEC. References in this chapter to the EU directives are to those EU directives currently implemented in the United Kingdom, unless otherwise stated.
6 The Procurement, Patient Choice and Competition Regulations (No. 2) 2013.
The Cabinet Office (part of HM Treasury) has responsibility for central government procurement policy; it and the Crown Commercial Service (CCS), an executive agency of the Cabinet Office, publish guidance notes and procurement policy notes (PPNs) on a range of issues. In Northern Ireland, policy and guidance are issued by the Central Procurement Directorate, and the Welsh Minister for Finance and Government Business has issued the Wales Procurement Policy Statement. The Scottish government issues its own guidance under the equivalent Scottish legislation.

Formal legal challenges to procurement decisions are made in the High Court. However, less formal options exist. The Cabinet Office’s ‘mystery shopper’ scheme allows bidders to make complaints anonymously, and the SBEE Act reinforces this by enabling the investigation of procurement processes and practices of certain contracting authorities by a government minister. Bidders can also refer matters to NHS Improvement, formerly Monitor, where the contracting authority is a Clinical Commissioning Group or NHS England. Pursuant to the Procurement, Patient Choice and Competition Regulations (No. 2) 2013, NHS Improvement has powers to investigate and use its enforcement powers to prevent or remedy breaches of procurement law, and can even declare arrangements for the provision of NHS healthcare services ineffective if there has been a serious breach.

II YEAR IN REVIEW

A key development this year was the UK’s vote on 23 June 2016 to leave the EU. This will inevitably have an impact on UK procurement law as the vast majority of the UK’s procurement rules are derived from EU directives. Although there is currently uncertainty regarding what ‘Brexit’ will mean for UK procurement law in the long term (as this will depend on the trade agreements that the UK negotiates with the EU and other trading partners), it is clear that the EU procurement rules (as implemented in the UK regulations) will continue to apply until the UK formally leaves the EU (which is not expected to be before March 2019).

Even after Brexit, the indications are that the UK government intends to retain all existing EU law as a transitional measure and so the current UK regulations are likely to remain in force until there is space in the parliamentary agenda to review and amend them in light of the UK’s new trading relationships. Although this approach will require clarification of issues such as the relevance of EU case law and the EU directives (particularly their recitals) to the interpretation of the UK regulations, and practical matters such as whether contract notices can continue to be published in the Official Journal of the European Union, this approach means that in practice UK procurement law is unlikely to see significant changes in the short to medium term.

There have also been several key court decisions, including EnergySolutions, which concerned a claim for damages by two unsuccessful bidders brought against the Nuclear Decommissioning Authority (NDA) in relation to the award of a £7 billion contract for decommissioning 12 nuclear facilities. The judgment was critical of the way the procurement process was conducted, finding that the NDA had manipulated aspects of the evaluation to achieve its preferred outcome, including failing to disqualify a tenderer on a pass/fail question when it ought to have done. The Court was also critical of the lack of record-keeping by the NDA during the process. In March 2017, with appeals on aspects of the case still outstanding

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before the Supreme Court, the UK government announced that the NDA had agreed settlement payments to the two claimants totalling £97.5 million, to bring the proceedings to an end, and that the contract entered into at the end of the flawed tender process will be terminated early, after five years, rather than continuing for the full 14-year term.

We continue to await the first declaration of ineffectiveness in England, Wales or Northern Ireland, and instead have seen further consideration by the Court of the adequacy of damages for bidders who are charities, not-for-profit organisations or otherwise operating in the third sector. Challenging bidders continue to have mixed success in applications by contracting authorities to lift the automatic suspension. As a reminder, the suspension is activated as soon as proceedings are issued by a challenging bidder prior to the award of a contract, and prevents the award of that contract pending the final outcome of a challenge, an earlier order of the Court or the consent of the challenging bidder. In the Kent case, the unsuccessful incumbent bidder failed to maintain the suspension, despite many similarities to both Bristol Missing Link and Counted, in which other health and social care providers were successful. Kent argued that as a not-for-profit organisation, damages were not an adequate remedy, but the Court decided that there was no reason why damages should be regarded as inadequate simply because the challenging bidder had bid on the basis of making little, if any, profit margin on the contract. The engagement by successful bidders, who take on a formal role in any challenge by seeking ‘interested party’ status, continues to develop after the decision in Group M in late 2014, which means that interested parties can seek and may recover their legal costs of involvement in any challenge.

We have also seen a continuation of the auditing of procurement procedures for projects that are wholly or partly funded by the European Regional Development Fund (ERDF). The level of scrutiny of those procurements, and the size of clawback of funds that may be sought can be considerable. Consequently, it is advisable to ensure that procurement requirements are not only followed but that the procurement procedure is carefully documented and those records preserved, to assist in satisfying any such audit inquiries.

III SCOPES OF PROCUREMENT REGULATION

i Regulated authorities

The PCR regulate most public sector entities. Many are specifically listed in the PCR (e.g., government departments, local authorities); others are regulated on the basis that they are ‘bodies governed by public law’.12

Contracts awarded by private firms are regulated by the PCR in limited circumstances for certain projects. Contracting authorities are required to ensure that, where they subsidise certain works and services contracts by more than 50 per cent, the subsidised contract is
competitively tendered under the PCR. More generally in relation to grant-funded projects, a condition of the funding may in practice require grant recipients to let contracts for the project by competitive tender.

The UCR apply to utility activities carried out by a utility that is publicly owned or that operates on the basis of special or exclusive rights granted by a public authority. Thanks to EU derogations, the UCR do not apply to exploration for and exploitation of oil and gas, or to the generation and supply (but not transmission) of electricity and gas, on the basis that these are competitive markets.

The Defence Regulations apply to utilities and contracting authorities as defined in the UCR and the PCR respectively (and in the equivalent Scottish regulations).

ii Regulated contracts

Generally, contracts for the construction of works, supply of goods and provision of services valued at or above specified EU financial thresholds are subject to the procurement regulations.

The current financial thresholds are as follows:

<table>
<thead>
<tr>
<th></th>
<th>PCR</th>
<th>UCR Defence Regulations</th>
<th>CCR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goods</td>
<td>£106,047 or 164,176**</td>
<td>£328,352</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Services*</td>
<td>£106,047 or 164,176**</td>
<td>£328,352</td>
<td>£4,104,394</td>
</tr>
<tr>
<td>Works</td>
<td>£4,104,394</td>
<td>£4,104,394</td>
<td>£4,104,394</td>
</tr>
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</table>

* For the new 'light-touch' services, the threshold is £589,148 under PCR, £785,530 under UCR and £4,104,394 under CCR (there is no light touch regime for the Defence Regulations)

** Broadly, the lower threshold applies to central government and the higher threshold to all other authorities.

Below-threshold contracts are not subject to the procurement regulations, but some form of advertisement and a fair, competitive tender procedure is required if there may be certain cross-border interest. The PCR, however, contain limited additional provisions for below-threshold contracts that are designed to assist small to medium-sized enterprises (SMEs) which go beyond the requirements of the 2014 Public Sector Directive (e.g., the advertising obligations outlined in Section V.i, infra).

The UCR apply only to regulated utility activities. Procurements in relation to a utility’s other activities are unregulated unless the utility is also a contracting authority for the purposes of the PCR.

The Defence Regulations apply to contracts for military equipment, works or services and equipment, works or services involving, requiring or containing classified information.

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13 PCR 13.
14 See Alstom Transport v. Eurostar International Limited [2012] EWHC 28 (Ch) paragraphs 70 and 71, where the court held that Eurostar was not a utility.
15 In this chapter, the term ‘above-threshold contract’ is used to refer to contracts meeting these EU financial thresholds and ‘below-threshold contract’ to those that do not meet them.
16 See Commission ‘Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provision of the Public Procurement Directives’, OJEU 2006 C 179/02.
17 See CCS ‘Guidance on provisions that support market access for small businesses’, August 2015.
18 As listed in UCR 9 to 15.
One area that can cause particular difficulties is land redevelopment. Land redevelopment often requires cooperation between a local authority and a private developer, and these arrangements are negotiated directly between a major local landowner and the authority without a competitive process. In practice, a number of local authorities have taken such arrangements outside the procurement regulations by avoiding imposing any legally binding obligation upon the developer to build.20

### IV SPECIAL CONTRACTUAL FORMS

#### i Framework agreements and central purchasing

Framework agreements are extensively used. Many are multi-supplier frameworks, typically involving a mini-competition among all framework panellists at the call-off stage. The CCS frameworks for central government are an example of this. Single-supplier frameworks are also common.

Framework agreements are often established by one authority on behalf of itself and a (frequently very large) number of other authorities.

Dynamic purchasing systems are not widely used at present.

Utilities have used both framework agreements and qualification systems widely to reduce the burden of procurement processes, often establishing single-supplier framework agreements for one or two control periods (i.e., five or ten years). Under the UCR, frameworks must now be limited to eight years, unless a longer period can be justified.

#### ii Joint ventures (JVs)

Public-public JVs are common. They have typically relied on the *Teckal*21 or the *Hamburg Waste*22 exceptions for ‘in-house’ and cooperation agreements in the public sector that meet certain conditions, which are not subject to competitive tender under the procurement regulations. These exceptions are now ‘codified’ in the PCR, UCR and CCR.23

JVs have sometimes been used in public-private partnerships (PPPs), but typically the appointment of the JV partner is advertised and tendered.

PPPs have typically been procured under the competitive dialogue procedure. The PCR now provide the option of the competitive procedure with negotiation.24 This has obvious similarities with competitive dialogue, but the greater flexibilities25 offered by the competitive dialogue procedure may mean that it remains the more attractive option.

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20 This relies on the CJEU decision in C-451/08 *Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben*. See also *R (on the application of Midlands Cooperative Society Ltd) v. Birmingham City Council* [2012] EWHC 620 (Admin); and *AG Quidnet Hounslow LLP v. Mayor and Burgesses of the London Borough of Hounslow* [2012] EWHC 2639 (TCC).
21 C-107/98 *Teckal Srl v. Comune di Viano and another*.
22 C-480/06 *Commission v. Germany*.
24 See Section V.ii, infra.
25 For example, under competitive dialogue the authority is not required to set out its minimum requirements at the outset of the procurement, and there is more flexibility to clarify, fine tune and optimise final tenders and to confirm financial commitments and other terms of the winning bid, provided essential aspects are not materially altered and there is no risk of distortion of competition or discrimination.
The UCR have separate rules on JVs and intra-group supplies. In practice, however, they have not been as widely used as the public sector rules embodied in the Teckal and Hamburg Waste exceptions.

V THE BIDDING PROCESS

i Notice
Above-threshold contracts must be advertised in the Official Journal of the EU (OJEU). The PCR also require contracting authorities to publish details of these contracts on the government portal (Contracts Finder). Similarly, the PCR require that, where a contracting authority advertises contracts that meet lower minimum thresholds (£10,000 or more in the case of central government authorities, and £25,000 or more for sub-central contracting authorities or NHS trusts), it must also publish information about the opportunity on Contracts Finder, regardless of any other means it uses to advertise the opportunity. (This requirement does not apply to contracting authorities carrying out devolved functions in Scotland, Wales and Northern Ireland.)

Voluntary ex ante transparency (VEAT) notices are increasingly used where authorities directly award a contract without a competitive process, to seek to overcome the risk of the contract being declared ineffective because it was not properly advertised in the OJEU. However, a VEAT notice is unlikely to offer such protection unless the authority, acting diligently, had a legitimate belief that the procurement regulations did not apply.

ii Procedures
For above-threshold contracts, the procurement regulations generally require use of one of the prescribed procedures. Under the PCR these are the open, restricted, competitive with negotiation, competitive dialogue and innovation partnership procedures. The PCR also provide for the negotiated procedure without prior publication of an OJEU advertisement (that is, a direct award) in certain exceptional circumstances. The UCR retain the open, restricted and negotiated procedures, and introduced the competitive dialogue and innovation partnership procedures.

The PCR and UCR include light-touch regimes for the award of contracts for health, social, education and other specific services. Subject to compliance with certain mandatory requirements (e.g., principles of transparency and equal treatment), contracting entities have significant flexibility in determining the procedures to be applied.

The PCR apply a number of procedural requirements to below-threshold contracts. In addition to the advertising requirements (described in Section V.i, supra), these are a prohibition on including a separate pre-qualification stage in the tender process and a requirement to publish information on Contracts Finder in respect of contracts that have been awarded.

26 See footnote 15.
27 C-19/13 Ministero dell’Interno v. Fastweb SpA, paragraph 50.
29 Set out in PCR Schedule 3, UCR Schedule 2 and CCR Schedule 3.
Under the CCR, contracting entities are free to decide on the procedure to be followed, subject to certain specified safeguards; even lighter requirements apply in respect of light-touch services.

The Defence Regulations offer unrestricted use of the restricted and the negotiated (with prior advertisement) procedures. The competitive dialogue procedure is available for particularly complex contracts and the negotiated procedure (without prior advertisement) in extremely limited circumstances.

Historically the competitive dialogue procedure was widely used for public sector procurements but, as part of the drive towards lean procurement, there has been a presumption against its use since January 2012.  

Under the Defence Regulations and the UCR, authorities and utilities generally use the negotiated procedure with prior advertisement in the OJEU.

iii Amending bids

In a number of court cases, the courts have upheld an authority’s refusal to allow bidders to correct defects in, or omissions from, their bid.  

However, whether the authority may allow correction of defects in, or omissions from, bids has not often arisen in the courts. In our experience, authorities take different approaches to this issue.

The PCR and UCR contain express provisions dealing with tenders where information or documentation appears to be incomplete or erroneous. Although those provisions appear to allow authorities to request information or documentation to clarify or complete information or documents at tender stage (as well as pre-qualification stage), the authority must observe the principles of equal treatment and transparency in exercising this right. Therefore, any decision to allow the submission of such information must be taken with care and with regard to those principles.

VI ELIGIBILITY

i Qualification to bid

The procurement regulations replicate the grounds for assessing bidders’ fitness to contract set out in the corresponding EU directives.

Recent Cabinet Office and CCS publications have focused on the qualification stage. In particular:

a authorities must now use a standard Selection Questionnaire (which has been aligned with the requirements of the European Single Procurement Document) and have regard to associated CCS guidance on the selection stage that develops general principles including self-certification, ‘self-cleaning’ and proportionality;  

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32 PCR 56(4); UCR 76(4).
33 Cabinet Office and CCS PPN ‘Standard Selection Questionnaire (SQ)’, 9 September 2016. The guidance is issued under PCR 107(1).
selection criteria relating to a bidder’s reliability, as demonstrated by its performance of past contracts, must be established and applied in procurements by central government departments, their executive agencies and non-departmental public bodies for contracts relating to information and communications technology, facilities management and business processing outsourcing and which have a value of £20 million or greater, and bidders convicted of tax offences or successfully challenged under the ‘General Anti-Abuse Rule’ can be excluded from public procurements.

ii Conflicts of interest

The PCR, UCR and CCR require authorities to take appropriate effective measures to prevent, identify and remedy conflicts of interest. Economic operators may be excluded from participation in a procurement procedure where a conflict of interest cannot be effectively remedied by other less intrusive means. The provision is very wide, extending to ‘financial, economic and other personal interest’ that is either actual or even ‘perceived’ to compromise impartiality. It remains to be seen how it will be applied by the courts; in Counted4, the Court noted that ‘other personal interest’ need not be financial, but could amount to anything pertaining to the relevant individual.

iii Foreign suppliers

The procurement regulations do not prevent foreign suppliers from tendering for public contracts, but utilities may (or in some cases must) reject certain bids to supply goods from third (non-EU) countries with which the EU does not have reciprocal agreements.

The PCR, UCR and CCR only confer a right to challenge a breach of the regulations upon:

- a person from an EEA state;
- a person from a World Trade Organization Government Procurement Agreement (GPA) state, where the GPA applies to the procurement concerned; and
- a person from another state if a relevant bilateral agreement applies.

The Defence Regulations only confer rights to challenge breaches of the regulations on persons who are nationals of, and established in, an EU Member State.

36 PCR 24; UCR 42; CCR 35. There are no express conflict of interest provisions in the Defence Regulations, but the same obligations arise because of the duty to comply with the principle of non-discrimination – see T-160/03 AFCon Management Consultants and others v. Commission, paragraphs 75 and 90; although this case was decided under internal Commission rules, the same principles are likely to apply under the Defence Regulations.
37 PCR 57(8)(e); UCR 80; CCR 38(16)(d).
39 UCR 85.
40 The EEA comprises the EU Member States plus Liechtenstein, Norway and Iceland.
41 For example, PCR 89.
42 For example, PCR 90(1)(a).
43 For example, PCR 90(1)(b).
In addition to the 28 EU Member States, the other GPA states are Armenia, Canada, Hong Kong, Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, Montenegro, Moldova, the Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States.

Arguably, foreign persons who do not have a right to challenge under the procurement regulations may seek to bring a similar challenge by way of judicial review or for breach of an implied contract. In practice, however, many foreign-owned businesses have rights to challenge because they bid through a subsidiary incorporated within the EEA.

VII AWARD

i Evaluating tenders

Most contracts are awarded using award criteria implementing a blend of quality and price. Approaches to setting award criteria vary. Many authorities use a very detailed marking scheme with each small element of the project receiving a predefined mark (e.g., 0.3 per cent for proposals on staffing levels); others take a much broader approach, with no subcriteria and global figures for each criterion of, say, 15 or 20 per cent. Tenders structured to be entirely pass or fail on quality aspects, with the rest of the evaluation based on price, are also encountered.

Under the PCR, UCR and CCR, authorities must disclose the evaluation criteria from the date of publication of the notice in the OJEU. This allows bidders to understand what is important to the authority and to decide whether to participate accordingly. Where the Defence Regulations apply, authorities must disclose the marking criteria, at the latest, when issuing the contract documents (e.g., in the invitation to tender).

The courts tend to uphold disclosure of the main criteria and subcriteria only, on the basis that disclosure of the finer detail would not in fact affect the content of bids. Nevertheless, in practice many authorities disclose full details of the marking scheme, regardless of whether this is strictly required by law.

There has also been a move towards adoption of ‘real time’ evaluation, where evaluators discuss and score bids orally in a panel meeting to arrive at a group score. This leaves processes especially vulnerable and it is also incompatible with the decision in Geodesign and the reporting and documentation requirements.

ii National interest and public policy considerations

Under the procurement regulations, national interest can be taken into account only to a limited extent. Authorities may not favour local business. For example, while specifications may refer to British Standards, they must expressly permit equivalent standards from other European jurisdictions. Authorities may take account of social and environmental considerations only where there is a sufficient link to the subject matter of the contract.

44 In Scotland, contracts must be awarded on the basis of best price/quality ratio; price or cost alone cannot be used as the sole award criterion.
45 PCR 49; UCR 69; CCR 32.
46 In Healthcare at Home Ltd v. The Common Services Agency [2014] UKSC 49, the Supreme Court endorsed the test of whether the ‘reasonably well-informed and normally diligent’ bidder would have understood the criteria in the same way.
The government has adopted a policy on how procurers should deal with businesses that have adopted certain aggressive tax avoidance measures.\textsuperscript{48} Another key government policy is securing access to public contracts for SMEs. This policy is in part implemented through the PCR\textsuperscript{49} and reinforced by CCS guidance.\textsuperscript{50} More measures aimed at SME participation may be imposed under the new SBEE Act, noted in Section I, \textit{supra}.

Further policies include obtaining commitments from suppliers to provide training and apprenticeships.\textsuperscript{51}

\textbf{VIII INFORMATION FLOW}

During the procurement process, authorities must ensure they give bidders sufficient information to enable them properly to understand the authority’s requirements and to ensure a ‘level playing field’. This is particularly important where an incumbent service provider will be in a privileged position when a new procurement is run because it has additional information. The PCR and UCR require authorities to take appropriate measures to ensure that competition is not distorted by the participation of bidders that have had prior involvement in the procurement procedure (e.g., in the preparation stage).\textsuperscript{52} Where the distortion of competition cannot be effectively remedied by other less intrusive means, bidders may be excluded from the procedure.\textsuperscript{53}

Authorities may withhold information from bidders on a number of grounds such as the public interest, the legitimate commercial interest of any person or possible prejudice to fair competition between economic operators.\textsuperscript{54} Additionally, authorities must not disclose information reasonably stipulated by the bidder as confidential,\textsuperscript{55} and under the Defence Regulations an authority may impose measures to protect classified information.\textsuperscript{56}

Under the procurement regulations, authorities are required to notify bidders and supply certain information when they make an award decision. They must then ‘stand still’ for a minimum of 10 calendar days before signing the contract.\textsuperscript{57} This period allows unsuccessful bidders time to bring a legal challenge to prevent the contract award if they consider that the award decision is unlawful, provided that the bidders are otherwise within the limitation period for procurement claims. The standstill requirement often proves to be onerous for authorities, which must supply scores and a narrative of the characteristics and relative advantages of the winning bid to each unsuccessful bidder.

Many authorities consider that best practice is to give fulsome details of their reasons in the standstill notice, so as to be seen to be transparent, to flush out any complaints as soon as

\textsuperscript{48} See Section VI.i, \textit{supra}.
\textsuperscript{49} See Sections III and V.i, \textit{supra}.
\textsuperscript{50} For example, PPN 05/15 ‘Prompt payment policy and reporting of performance’, 27 March 2015.
\textsuperscript{51} PPN 14/15 ‘Supporting apprenticeships and skills through public procurement’, 27 August 2015.
\textsuperscript{52} PCR 41; UCR 9.
\textsuperscript{53} For example, PCR 57(8)(f).
\textsuperscript{54} See, for example, PCR 50(6) and 86(6).
\textsuperscript{55} See, for example, PCR 21.
\textsuperscript{56} Defence Regulations 11.
\textsuperscript{57} See, for example, PCR 86 and 87.
possible, to seek to ensure that the time for bringing a challenge in the courts is running on any complaints (see Section IX.i, infra), and to reduce the risk of delay where a bidder asks for more information and claims that the standstill notice is defective.

IX CHALLENGING AWARDS

The EU rules on challenging procurement decisions, some of which are optional, have been implemented in the procurement regulations. The main options that have been adopted are that courts are not to make declarations of ineffectiveness where overriding reasons relating to the general interest require the contract to be maintained and that, in certain circumstances, courts may shorten the contract instead of declaring it ineffective.58

Legal proceedings in the UK can be costly and time-consuming. The losing litigant is generally required to pay 60 to 70 per cent of the other party’s legal costs in addition to all of its own legal costs, and in procurement cases this can extend to meeting the majority of the legal costs of the successful bidder if, as an interested party, the presiding judge feels the successful bidder has assisted the court.59 The courts may agree to expedite procurement cases at the parties’ request, which means that a typical first instance judgment may be handed down within a number of months following commencement of proceedings. Nonetheless, because of the cost, delay and inherent litigation risk in proceedings, many cases are settled without a full trial.

Procurement challenges necessarily require the establishment of confidentiality rings to protect tenderers’ commercially sensitive and confidential information. Disclosure of key information may be anticompetitive, prevent a fair and equal re-tender, or negatively affect the commercial interests of a bidder. The Technology and Construction Court in England and Wales is due to publish guidance on confidentiality rings in procurement proceedings, which will include precedent orders for confidentiality rings and should ease the process for establishing such rings in future claims.

The trend continues towards increased challenges. Pre-action correspondence challenging a decision is frequently written and can be successful. In England, it is still rare for a bidder to be successful in a court challenge, although there have been more bidder-friendly decisions in recent years, particularly on upholding automatic suspension, as in Bristol Missing Link60 and Counted4.61 Northern Ireland is perceived by some to be more bidder-friendly due to recent decisions although, as with the courts in England, in reality much turns on the specific facts and merits of the cases that have actually proceeded to a hearing or trial. The case of Lowry Brothers62 shows that the authority can succeed in Northern Ireland.

i Procedures

Procurements can provide their own complaints mechanisms, but High Court litigation is the main method of challenge to awards.

58 See Section IX.iii, infra.
60 See footnote 9.
61 See footnote 38.
Each High Court jurisdiction (England and Wales, Northern Ireland and Scotland) is separate, and has its own case law, save that the Supreme Court is the highest appellate court for all UK jurisdictions. Each court will have regard to relevant case law from the other jurisdictions.

The reason that challenges tend to be brought in the High Court stems largely from the very short time limit set for commencing these proceedings. At 30 calendar days (from when the claimant knew or ought to have known of grounds for bringing a claim), the limitation period for procurement claims is the shortest in English law. It can be extended (to three months) where the court determines there is good reason. The trend in England has been to uphold the limitation period strictly,63 but in Northern Ireland the courts are more flexible.64

Claims under the procurement regulations can be brought in the High Court by economic operators, including contractors, suppliers and service providers.

Some bidders and third parties, such as subcontractors, who do not enjoy protection under the procurement regulations, bring claims in judicial review in the High Court, asking the Court to review the decision of the public authority.

ii Grounds for challenge

Claims may be brought for breach of a duty owed to the bidder under the procurement regulations if the bidder either suffers or risks suffering loss. Examples include:

- undisclosed evaluation criteria and weightings, in breach of the obligations in the procurement regulations, or the duty of transparency under the Treaty on the Functioning of the European Union, or both;65
- manifest error in evaluation;66 the error must be obvious, and expert evidence is not permitted to prove it;67
- failure to exclude abnormally low tenders;68
- unlawful abandonment of procurement;69 and
- post-award material changes to contracts, in reliance on pressetext Nachrichtenagentur.70

There are four grounds for judicial review of decisions:

- error of law;
- irrationality or Wednesbury71 unreasonableness (which is the closest that judicial review comes to a review of the merits);

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70 C-454/06 pressetext Nachrichtenagentur GmbH v. Republic of Austria and others. In Gottlieb, R (on the Application of) v. Winchester City Council [2015] EWHC 231 (Admin) the claimant was granted relief on this basis in a judicial review claim. The pressetext principles are now codified in the PCR, UCR and CCR (e.g., PCR 72).
procedural unfairness or breach of natural justice; and

legitimate expectation.

iii Remedies

The procurement regulations provide three main remedies: suspension, ineffectiveness and damages.

The ‘automatic’ suspension, which is unique to procurement challenges, arises when a claim form is issued before the contract is awarded, and does not require a court hearing. Once in place, the authority cannot award the contract until the court ends the suspension, or the parties end it by agreement or a consent order.

In England, in cases where authorities have applied to lift the automatic suspension, they have usually been successful (although much turns on the merits of those cases in which applications are actually made). However, we may be entering a new, more bidder-friendly phase. Traditionally, it has been extremely difficult to maintain the suspension in contracts in the health and social care sector, where patient wellbeing and safety are paramount, but in Bristol Missing Link and Counted472 the courts were persuaded to do so. In Northern Ireland, suspensions have generally been maintained.73

Under the procurement regulations, the court may also set aside the decision or amend a document.

A declaration of ineffectiveness may be made when one of the grounds for ineffectiveness is satisfied. For the PCR,74 these are:

- where a contract is awarded illegally without advertisement in the OJEU where this is required;
- awarding a contract in breach of the standstill period or automatic suspension with another breach of the procurement regulations; and
- awarding a specific contract under a framework agreement when reopening of competition is required or when tendering procedures are not followed in a dynamic purchasing system.

Ineffectiveness means that a contract is prospectively, but not retrospectively, ineffective from the date of the declaration. The court can deal with matters consequent on the contract being declared ineffective. It must also impose penalties and may award damages. Some contracting authorities and utilities make contractual provision for the parties’ rights and responsibilities in the event of a declaration of ineffectiveness (as expressly permitted by the procurement regulations75 and encouraged by government guidance76).

2015 saw the first ever successful claim in the UK for a declaration of ineffectiveness. This was in Scotland in the Lightways Contractors case.77 The court found that a call-off

72 See footnotes 9 and 10.
74 Under the UCR, the third ground (c) only relates to contracts awarded under a dynamic purchasing system; under the CCR, only the first two grounds ((a) and (b)) apply.
75 For example, PCR 101(5) and (6).
contract under a framework had been awarded to an economic operator not on the original framework. In the absence of any other valid procurement process, the award was unlawful and the contract declared ineffective.

Unless grounds for ineffectiveness exist, damages are the only remedy that can be awarded under the procurement regulations after the contract has been entered into. Claims for damages are usually for wasted bid costs, or loss of profit or opportunities.

The remedies available in judicial review are a quashing order (to set aside the decision made) and a mandatory order (requiring the authority to make the decision again). Damages may also be sought, although not as a sole remedy.

With substantial increases to court fees in April 2015, there has been a trend towards non-monetary procurement claims, as these are considerably cheaper to bring than claims involving damages but still have the benefit of attracting the automatic suspension. It remains to be seen what the effect of this will be on applications to lift automatic suspensions, as one of the main considerations for the court in such applications is whether damages would be an adequate alternative remedy. If no damages are claimed at the outset, non-monetary claims may become a potential means to frustrate applications to lift until there is judicial consideration of the issue.

**X   OUTLOOK**

Over the next 12 months we are likely to see a period of consolidation as the changes brought about by the transposition of the 2014 Procurement Directives become increasingly familiar to contracting authorities and utilities. In particular, we will see more procurements conducted under the new CCR and UCR (in force as of April 2016), which are still in their infancy. We are also likely to see contracting authorities preparing to implement elements of the UK regulations that are not yet fully in force, such as the rules relating to e-communications which will, in most circumstances, apply from 18 October 2018.

Naturally, in the longer term the focus will be on the impact of Brexit on the UK's procurement regime and the extent to which the UK's evolving negotiations with the EU shed any light on the future shape of UK procurement law. In the meantime, it is possible that, particularly with the UK's triggering of Article 50 of the Treaty on the Functioning of the European Union, which commences the formal process of leaving the EU, the UK courts may feel they have greater latitude to decide cases without such strict adherence to European case law as they once did. However, whether this will actually be the case remains to be seen.
JAVIER ARREOLAE

Nader, Hayaux & Goebel, SC

Javier specialises in project finance and public-private partnerships, restructuring and workouts, banking and finance, real estate and asset-based financing, with niche practice in aircraft financing and leasing, mainly representing financial institutions and institutional lessors.

Javier’s projects practice is focused on PPPs, where he has been involved in structuring, development and financings of PPPs and infrastructure projects, advising governmental agencies, banks, developers and construction companies in industries as diverse as social infrastructure, energy, roads and water projects. Javier is a key member of the firm’s restructuring, bankruptcy and workouts practice and has more than 15 years’ experience handling significant cases, mainly representing creditors. Javier is actively involved in asset based financing with an extraordinary track record representing lenders in large real estate financings; as well as guarantors, lenders and lessors in commercial and corporate aircraft financing and leasing.

Javier is recognised by the leading legal publications for his outstanding expertise. Chambers Latin America ranks Javier as a leading individual in aviation, projects and banking and finance, and he is recommended by sources who highlight ‘He is a great facilitator with a keen understanding of business and legal issues.’ Another quote in the guide states, ‘He is really impressive. He understands the laws of other jurisdictions and can draw parallels between these and Mexican law.’

Javier speaks fluent English and spent a year working at international law firm Mayer Brown LLP in New York. Previously he worked in-house at Mexico’s state-owned development bank, Banobras, SNC and at Banco de Mexico. Javier received his LLM (with honours) and Certificate in Management from the Northwestern Pritzker School of Law and the Kellogg School of Management, having graduated (with honours) as a lawyer from the Mexico Autonomous Institute of Technology (ITAM). He is a member of the American College of Commercial Finance Lawyers.

ELIZABETH ASHUN

Bentsi-Enchill, Letsa & Ankomah

Elizabeth Ashun is a senior associate in the construction infrastructure and transportation team at Bentsi-Enchill, Letsa & Ankomah. Elizabeth qualified in England and Wales in
2004 and in Ghana in 2014 and advises on transactions within the real estate, construction, infrastructure and transport sectors.

RAQUEL BALLESTEROS
Bird & Bird (International) LLP
Raquel Ballesteros specialises in public law and regulated sectors, and has headed the public law practice of Bird & Bird’s Madrid office since joining the firm in November 2005, as one of the founding partners of Bird & Bird in Spain.

She has extensive expertise in public procurement, advising clients in non-contentious and, also, contentious matters, representing them before national and European courts, in particular in certain sectors such as life sciences, healthcare, ICT and defence.

With a special focus on these sectors, Raquel specialises in public procurement of innovation (PPI) as well as innovative public procurement (pre-commercial procurement (PCP), pre-operational validation (POV), cascade contracts before EC contracting authorities, competitive dialogues, etc.), advising clients in European projects funded by the European Commission under the 7th Framework Programme, first, and the Horizon 2020, subsequently (Decipher, Unwired).

Raquel has been appointed as an expert in public procurement for the European Commission, whom she has advised (and continues to advise) in a number of European projects (Eucise 2020, Ewisa, Broadmap).

Raquel chairs as an arbitrator in a number of arbitration courts (the Madrid Chamber of Commerce and the European Arbitration Association Courts of Arbitration, as well as the Spanish Court of Arbitration) and teaches on the master’s degree course on European Union law at the Carlos III University of Madrid, focusing on public procurement and life sciences/healthcare matters.

She regularly speaks in national and international conferences in her sectors of specialisation and ranks in the best international legal directories such as Chambers and Partners, The Legal 500 and Best Lawyers.

JULIA BATISTELLA MACHADO
Veirano Advogados
Julia Batistella Machado is an attorney at law in São Paulo, Brazil. Between 2016 and 2017, she was part of the team developing studies on Brazilian public-private partnerships (PPPs) and logistics infrastructure regulation for the federal government of Brazil in research conducted by the Centre for Analysis of Risk and Regulation (CAAR/LSE) in London and sponsored by the UK Prosperity Fund. Julia is a graduate of the Federal University of Rio Grande do Sul and holds an MSc in financial and commercial regulation from the London School of Economics and Political Sciences. Alongside Brazil, she has lived and worked in Spain and the UK.

VINCENT BRENOT
August Debouzy
Vincent Brenot, a member of the Paris Bar, worked 10 years at Freshfields Bruckhaus Deringer LLP, where he became counsel in 2008, and five years at Willkie Farr & Gallagher LLP as a partner in the public and environmental law practice area.
Vincent Brenot has extensive experience in all types of French public procurement contracts, assisting and representing before the tribunals a number of French and international clients, including bidders and public awarding entities and authorities.

He works with the government, regulatory and environmental law team. The team in charge of this practice handles all aspects of public matters and regulated industries, including general administrative law, constitutional, European and international public law, human rights and fundamental freedoms, governmental contracts, expropriation law, public finance, urban planning and environmental law.

JONATHAN DAVEY

Addleshaw Goddard LLP

Mr Davey specialises in procurement and commercial law, and heads Addleshaw Goddard’s 60-lawyer strong commercial group.

First ranked in Chambers UK for procurement law, Jonathan frequently advises a variety of public bodies as well as significant private sector clients on procurement law and commercial matters.

Chambers’ directory describes him as a ‘standout name’ in procurement, sought after for his insights on specialist topics, having noted previously that ‘his advice is excellent, particularly in minimising risk’. One interviewee described him as ‘a high-quality procurement lawyer who knows the law really well, is very measured and exercises sound judgement’.

He was founder of and first chair of the Procurement Lawyers’ Association, and speaks and writes widely on procurement and commercial law topics in the UK and abroad.

He won the Who’s Who Legal Global Procurement Lawyer of the Year award in 2014, 2015 and 2016.

His experience includes leading the AG team advising the Danish government on the Fehmarnbelt Tunnel project, a €6 billion, 19km road and rail tunnel linking Denmark and Germany; advising the Department for Transport on aspects of rail franchising and advising the Houses of Parliament on their proposed multi-billion pound refurbishment programme.

LOUISE DOBSON

Addleshaw Goddard LLP

Since qualifying in 2007, Louise Dobson has focused on commercial dispute resolution and risk management, with a focus on procurement challenges and high-value complex contractual disputes. She acts for both public and private sector clients and provides advice on live claims alongside dealing with dispute avoidance and risk management work, assisting with contract negotiations, terminations, exit strategies and payments and supporting tender teams with high-value procurement processes and the related contracts.

Ms Dobson is ranked in Chambers and Partners 2017 as an ‘Associate to Watch’ for litigation in Yorkshire and sources note in that Louise ‘is establishing herself firmly in the Yorkshire litigation market by acting on a number of high-profile procurement cases’. One source notes: ‘Louise’s technical knowledge and ability to handle and understand a mass of detail from the client was terrific. She guided me through a tense and stressful time with sound commercial awareness, real effectiveness and patient and diligent client service.’

Ms Dobson has particular experience working in the health sector, advising arm’s-length bodies of the NHS on complex contractual claims, businesses in the healthcare, life sciences and pharmaceutical sectors, and dealing with the management of confidential
and commercially sensitive data and information in procurement disputes (whether personal, patient or business data). During the course of 2015, she successfully acted alongside Bill Gilliam for the claimant in Counted4 Community Interest Company v. Sunderland City Council [2015] EWHC 3898 (TCC). She is also a member of the Procurement Lawyers’ Association.

CLARE DWYER
Addleshaw Goddard LLP

Clare Dwyer is a commercial litigator, described by Chambers and Partners in 2014 as ‘very bright, very able, and very approachable’, with ‘particular expertise in public procurement litigation’. She has been involved in several high-profile cases in this field, including two widely reported Northern Ireland cases, Henry Bros v. Department of Education and Mclaughlin & Harvey v. Department of Finance and Personnel. She regularly advises on procurement challenges, both for and against public authorities.

She is a member of the Procurement Lawyers’ Association (PLA). She was involved in drafting the PLA response to the government consultation on shortening limitation periods for public procurement claims, and in the drafting of the proposed litigation protocol for public procurement claims. She also trains clients in dealing with problems arising from the conduct of public procurement processes, and other issues of public law such as human rights.

Mrs Dwyer deals with a wide range of other disputes, from multimillion-pound warranty claims to trust and tax litigation, arbitration and judicial review. Her clients range from those in the public sector (such as educational institutions, NHS trusts, local authorities and other public bodies) to leading manufacturers, retailers and service providers.

She is a CEDR-accredited mediator, and has higher rights of audience in civil proceedings.

RODRIGO ESTEVES DE OLIVEIRA
VdA Vieira de Almeida

Rodrigo Esteves de Oliveira has a law degree and a master’s degree (LLM) in administrative law, both from the University of Coimbra faculty of law, where he was also admitted to a PhD.

He is an assistant professor at the University of Coimbra faculty of law, and is a lecturer there in postgraduate studies in law and at the University of Lisbon faculty of law, the Catholic University of Portugal, Lisbon and the Catholic University of Portugal, Oporto. He also lectures regularly at the Centre for Judicial Studies (for the training of judges and public prosecutors).

He joined VdA in 2006 and is currently a partner in the public law area of practice. In this capacity, he has been involved in several projects and transactions, mainly in public procurement, public regulation and matters concerning administrative concessions.

Rodrigo is the author of various articles and publications on matters within his fields of expertise, and is admitted to the Portuguese Bar Association.
VANESSA FRANYUTTI J
Nader, Hayaux & Goebel, SC

Vanessa specialises in projects and project finance, energy, financing of public entities, real estate finance and investment, and mergers and acquisitions.

Vanessa’s projects practice focuses on project finance and public-private partnerships including the Mexican PPS model, energy and infrastructure projects. Vanessa was instrumental in implementing the PPS scheme in Mexico, advising both the national government and the government of the state of Mexico on the structuring, bidding and implementation of the first PPS projects. She has since continued to be involved in major PPP projects including hospitals, roads, water treatment plants and prisons.

Regarding her real estate practice, she has particularly strong experience in financing and investments in the hospitality sector as part of a wide real estate practice that also covers the retail, residential and industrial markets. Her hospitality work includes advising on investments in hotels, mega-developments and time-share regimes and the related financing.

Vanessa has strong international experience and speaks fluent English. She regularly advises multinational clients, particularly major hotel, tourism and leisure groups, on real estate investments and development in Mexico as well as in forming bidding consortia and other aspects of infrastructure and energy projects in Mexico. She also advises financial institutions participating in tourism, energy and infrastructure.

Vanessa is recognised by the leading legal publications for her outstanding expertise. *Chambers Latin America* describes Vanessa as ‘very talented, devoted and confident’ and ranks her as a leading individual in both real estate and projects, emphasising that she is ‘great at PPS for hospitals and water treatment plants’. *Who’s Who Legal* also identifies Vanessa as an expert in banking, construction, project finance and real estate and *The Legal 500* has placed her as a leading lawyer in projects, stating she has ‘unrivalled knowledge’ in PPPs. Other recent editorial commentary in *Chambers Latin America* highlights Vanessa as ‘an extraordinary lawyer who will help the deal move forward’ and ‘a superb, very focused lawyer who is knowledgeable and has the capacity to see a deal from multiple points of view.’

Vanessa obtained her LLM from the University of Chicago Law School, having graduated as an attorney from the Instituto Tecnológico Autónomo de México with honours.

AMY GATENBY
Addleshaw Goddard LLP

Amy Gatenby has been a solicitor in England and Wales since 2006 and is a managing associate in Addleshaw Goddard’s procurement team. She specialises in all aspects of EU and UK public procurement law and regularly advises both public and private sector clients on a wide variety of non-contentious and contentious procurement matters.

She routinely advises public authorities and utilities on high-profile procurement processes for major projects, and advises on all aspects of the procurement process from the structuring of a transaction and whether the public procurement regulations apply, to pre-market engagement, choice of procedure, drafting contract notices, designing effective evaluation models, material change risk and handling award challenges. She is also a member of the Procurement Lawyers’ Association.

Her recent experience includes advising the Corporate Officer of the House of Lords and the Corporate Officer of the House of Commons in relation to the restoration and renewal programme for the Palace of Westminster and the development of the House of
Commons Northern estate. She is also advising the Department for Transport on the West Midlands and West Coast rail franchise competitions.

**BILL GILLIAM**
*Addleshaw Goddard LLP*

Bill Gilliam is a commercial dispute resolution and litigation partner. He specialises in heavyweight disputes. He has particular expertise in the management and resolution of procurement challenges.

He has an enviable track record of success in litigation and arbitration, together with all forms of alternative dispute resolution, including expert determination, negotiation and mediation.

Mr Gilliam acts for national and international clients in a wide range of fields and has considerable experience of advising both private and public bodies in a range of sectors, including health, transport, retail and technology. He has led many of the highest-profile procurement litigation cases in recent years, including *Network Rail v. Mermec* (successful strikeout of a claim that was just out of time), *Covent Garden Market Authority v. Bouygues* (including a major hearing dealing with a complex disclosure exercise) and *Roche Diagnostics v. Mid Yorkshire Hospitals NHS Trust* (precedent-setting application for specific and early disclosure from the defendant trust). In December 2015, he successfully acted for the claimant in *Counted4 Community Interest Company v. Sunderland City Council* [2015] EWHC 3898 (TCC), the first reported case dealing with automatic suspension under the Public Contracts Regulations 2015.

As noted in *Chambers and Partners 2017*, he is praised by sources as being ‘staggeringly good’, and one satisfied client notes: ‘Commercial awareness is Bill’s outstanding quality along with his effectiveness in negotiations.’ Mr Gilliam is praised by clients in *The Legal 500* for being ‘one of the best lawyers in the region’ with ‘a dynamic approach and an ability to see the big picture’.

**VICTOR AGUIAR JACURU**
*Veirano Advogados*

Victor Jacuru has focused his professional experience in the areas of administrative and regulatory law, assisting clients in proceedings and consultations related to public bidding and concessions. Victor Jacuru also operates in consultations for specific regulated sectors, including ports, airports, railways and energy. In addition, Victor Jacuru assists clients in administrative and judicial proceedings related to public law. He holds an LLM from the University of Coimbra, and was recognised in *The Legal 500*, Latin America, in 2016, for his practice in public law.

**FRANK JUDO**
*Liedekerke*

Frank Judo graduated with a licentiate in law from KU Leuven in 1998, where he also studied philosophy, modern history and canon law. He has been associated with Liedekerke since 1998 and has been a partner since 2008. Alongside his advocacy practice, he has also published numerous articles on a wide range of matters. Between 1998 and 2004, he was a
lecturer at the Institute for Constitutional Law at KU Leuven, where he continues to hold a post as a voluntary academic assistant. He is a member of the High Council of Justice.

**MARJUT KAARISTE**
*Castrén & Snellman Attorneys Ltd*

Marjut Kaariste advises both public and private sector clients in public procurement matters. Marjut also specialises in EU and Finnish competition law, competitive neutrality, and state aid matters. In addition to her law degree from the University of Turku, she holds a master’s degree in economics and business administration from the Turku School of Economics.

**BREGJE KORTHALS ALTES**
*De Brauw Blackstone Westbroek*

Bregje Korthals Altes specialises in public procurement law, and has argued many cases before Dutch courts as well as the European Court of Justice. While at De Brauw, she has acted as interim legal counsel for Schiphol and senior lawyer for the Ministry of Foreign Affairs, focusing on procurement in both capacities. She also has significant experience in international commercial arbitration, with a particular emphasis on sectors such as energy and natural resources, healthcare, telecommunications and technology. In addition to her practice, Bregje regularly lectures on public procurement at the University of Amsterdam.

**ANNA KUUSNIEMI-LAINE**
*Castrén & Snellman Attorneys Ltd*

Anna Kuusniemi-Laine specialises in public procurement, competition law compliance, state aid and competitive neutrality issues. She advises clients in both contentious and non-contentious matters at the national and EU levels. Her clients include Finnish and international companies as well as public sector entities. Anna has special expertise in the construction, energy and ICT industries and in life sciences. Anna holds an LLM degree in European law from the University of Amsterdam.

*Chambers Europe, The Legal 500, Best Lawyers* and *Who's Who Legal* rank Ms Kuusniemi-Laine among Finland’s top legal experts. In 2015, 2016 and 2017, she received the International Client Choice Award in the projects and procurement category.

**JOHANNA LÄHDE**
*Castrén & Snellman Attorneys Ltd*

Johanna Lähde specialises in public procurement, which she has long and diverse experience in. She advises both enterprises and contracting entities on questions related to procurement procedures during tender processes and on procurement appeals in the Market Court. Johanna has a strong background in state administration, and she also advises clients on legal issues that relate to general public administration, such as the publicity of documents, state aid regulation and administrative legislation.

Johanna worked for many years in law drafting in the Ministry of Employment and the Economy and as a judge in the Market Court. During her career in the Ministry she, *inter alia*, was a member of many expert working groups developing procurement procedures as well as a government representative in working groups of the European Council and Commission.
She also has practical experience of arranging tendering processes in contracting entities. Johanna lectures regularly on public procurement law and is a co-author of a textbook on the publication of procurement notices.

**JOSÉ LUIS LARA**

*Philippi PrietoCarrizosa Ferrero DU & Uria*

José Luis Lara is a partner in the public law department at Philippi PrietoCarrizosa Ferrero DU & Uria. He holds a bachelor of laws, a master’s in law and a PhD (c) in law, Pontificia Universidad Católica de Chile. He is a professor of administrative law at the Pontificia Universidad Católica de Chile Law School, and professor of public procurement and coordinator of the public law LLM at the same university, and professor of the public procurement LLM of the Univerisdad Diego Portales. He is the Director of the Diploma of Public Procurement at the Pontificia Universidad Católica de Chile Law School. He was assigned as a member at the ‘Dirección de Compras y Contratación Pública’ of the Office of Public Procurement for 2012. He is the author of several articles on administrative and public procurement law and co-author of the following books: *Index of the Administrative Procedure Act* (2011) and *Administrative Procedure and Public Procurement* (2013). He has advised various public and private clients in several matters on public procurement. He previously worked at Novoa & Associates (2001–2005), Philippi, Yrarrázaval, Pulido & Brünner (2005–2010) and the Ministry Secretariat General of the Presidency (2010–2012).

**DIVINE KWAKU DUWOSE LETSA**

*Bentsi-Enchill, Letsa & Ankomah*

Divine Kwaku Duwose Letsa is a partner at Bentsi-Enchill, Letsa & Ankomah, Accra, Ghana. He obtained an LLB degree from the University of Ghana in 1973 and was enrolled to practise in the Supreme Court of Ghana in 1975.

During his career, he has practised as an in-house solicitor, private legal practitioner and a state counsel. In 1990, he co-founded the law firm Bentsi-Enchill & Letsa, now Bentsi-Enchill, Letsa & Ankomah. He has served in all departments of the firm – litigation, corporate, commercial, project finance, real estate, etc. – and has a particular interest in shipping and aviation.

He now heads the firm’s construction, infrastructure and transportation practice team.

He has a number of publications to his credit and has conducted cases, some of which are featured in the reports of the Superior Courts of Ghana. He often makes presentations at seminars, workshops and conferences.

**DIRK LINDEMANS**

*Liedekerke*

Dirk Lindemans holds a law degree (1974) from KU Leuven as well as a degree in administrative law (1975) from the Vrije Universiteit Brussel. He is a former president of the Dutch-speaking Order of Lawyers within the Brussels Bar (2000–2002) and president of the Disciplinary Council of Lawyers in Brussels. He has been a partner at Liedekerke since 1989 till 2015. He is now of counsel.
THEO LING
Baker McKenzie
Theo Ling is a partner based in the Toronto office of Baker McKenzie. He heads the firm’s Canadian international commercial law practice group, and is chair of the firm’s global privacy and information management leadership team. His international commercial and regulatory practice is focused on technology-based issues and the converging computer, internet and communications industries, as well as supply chain, procurement and outsourcing issues. Beyond his international commercial and regulatory practice, Theo has been active in developing innovative solutions driven by data analytics in the areas of legal processes and compliance, where his work has been recognised by the Financial Times of London in 2016 as being at the forefront of innovation in the Canadian legal market.

DANIEL LOGAN
Baker McKenzie
Daniel Logan is a partner based in the Toronto office of Baker McKenzie. Daniel has over 20 years of domestic and international transaction experience in complex IT and outsourcing transactions. In that context, he has worked with all levels of the Canadian government – federal, provincial and municipals – in their procurement of technology and services to support Crown business operations. Beyond his transactional experience, Daniel has been active in developing innovative solutions driven by data analytics in the areas of legal processes, compliance and contract management, where his work has been recognised by the Financial Times of London, in its 2015 Special Report on North American Innovative Lawyers, as being at the forefront of innovation in the Canadian legal market.

MICHELE LYRA DA CUNHA TOSTES
Veirano Advogados
Michele Lyra is experienced in litigation and has worked on a number of sophisticated commercial and corporate litigation matters. In more than 15 years of practice in litigation, she has assisted companies from different sectors, including clients in the banking, tobacco, pharmaceutical and mining industries. Ms Lyra has coordinated administrative and judicial litigation matters related to public bids and concessions. She offers clients extensive experience, helping with administrative and judicial cases in various regulated sectors, such as energy, ports, and oil and gas. Ms Lyra has also been involved in some of the firm’s most prominent litigation matters regarding antitrust and competition issues, including cartel cases. Brazilian and foreign clients value her ability to provide counsel in the areas of contracts, torts, consumer law, administrative law and commercial arbitration. Ms Lyra holds an LLM from the State University of Rio de Janeiro, awarded with honours, and has been a lecturer for universities in Brazil.

STIJN MAEYAERT
Liedekerke
Stijn Maeyaert graduated with a Master of Laws from Ghent University (2013). He joined Liedekerke in 2013. He is mediator in public affairs (KU Leuven 2016) and since 2014 has
been part-time affiliated with the Centre for Government and Law of the University of Hasselt, where he gives tutorials on constitutional law.

**PHILIPP J MARBOE**

*Wolf Theiss Attorneys-at-Law*

Philipp J Marboe is an attorney-at-law and counsel at Wolf Theiss, and a member of the regulatory and procurement practice group. Before joining Wolf Theiss he was junior partner in a leading Vienna-based Austrian and central European practice. He has extensive professional experience in public commercial law, focusing on procurement law, including public passenger transport services, project development and contract law. In recent years, he has advised on major infrastructure and PPP projects, including railways projects, in Austria and central and eastern Europe. One particular area of focus in his practice is the planning and implementation of tender procedures. Moreover, Mr. Marboe advises and represents Austrian and international clients – both bidders and contracting authorities – in review proceedings. He gained international experience in working at the Vienna office of a British multinational law firm and for a law firm in Paris.

Mr Marboe frequently lectures on regulatory and procurement-related topics, and has authored numerous publications in his field. He studied law at the University of Vienna and the Autonomous University of Madrid, and wrote his doctoral thesis in international law at the French Institute of International Relations. Mr Marboe is fluent in German, English, French and Spanish.

**ANA MARTA CASTRO**

*VdA Vieira de Almeida*

Ana Marta Castro has a law degree from the University of Lisbon faculty of law. She has a postgraduate degree in administrative law from the University of Lisbon faculty of law, and a postgraduate degree in public procurement law and practice from the Catholic University of Portugal, Lisbon, as well as a postgraduate degree in public procurement law, on ‘New Frontiers for Public Procurement’, from the University of Lisbon faculty of law.

She joined VdA in 2006 and is a managing associate in the public law practice, where she has been actively involved in several transactions, namely in the telecommunications, banking, education, energy, public health, transport and roads sectors. In this capacity, she has advised several leading clients, in Portugal and abroad, in the following areas: administrative law, public procurement, public regulation and administrative litigation.

Ana Marta delivers training courses and workshops on matters within her fields of expertise, including public procurement, and she is admitted to the Portuguese Bar Association.

**EMMANUELLE MIGNON**

*August Debouzy*

Emmanuelle Mignon, a senior member of the French Council of State (France’s supreme administrative court), joined August Debouzy in February 2015 as a partner after 10 years working as a judge in the Council of State and 10 years in top government institutions.
Within the Council of State, she was consecutively rapporteur at the litigation division and the internal affairs division, manager of the resource centre, government commissioner and assessor.

She worked for eight years with Nicolas Sarkozy, advising him on his various ministerial and political duties. She was his chief of staff while he was President of the French Republic.

From 2010 to 2012, she was general secretary at EuropaCorp, Luc Besson’s film production studio.

She works with the government, regulatory and environmental law team. The team in charge of this practice handles all aspects of public matters and regulated industries, including general administrative law, constitutional, European and international public law, human rights and fundamental freedoms, governmental contracts, expropriation law, public finance, urban planning and environmental law.

ANDREW MOLVER
Adams & Adams

Andrew Molver, a partner at Adams & Adams, is a litigation specialist with particular expertise in public procurement and administrative law. As a founding member of the firm’s public procurement law group, a large part of his practice involves the judicial review or enforcement of tender awards, in respect of which he has handled various high-profile and high-value matters both for and against organs of state and other public bodies. He also advises several private sector clients and public authorities on a range of procurement-related issues within multiple industry sectors.

LUCA MORICHETTI FRANCHI
Legance – Avvocati Associati

Luca Morichetti Franchi provides legal assistance to national and international clients operating in areas regulated by administrative law, with specific reference to public contracts. He joined Legance – Avvocati Associati in 2015 and graduated maxima cum laude from LUISS Guido Carli University Law School in 2016. His native language is Italian and he is fluent in English.

GAVIN NOETH
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Gavin Noeth is a senior consultant specialising in project finance, infrastructure projects (including energy) and public-private partnership procurement, including public procurement law, and is a member of the public procurement law group at Adams & Adams. He acts as a public procurement transaction adviser for government departments and entities in South Africa and other parts of Africa, and has been involved in a large number of procurement transactions acting for governments, sponsors and lenders. Gavin has 20 years’ experience in projects and infrastructure development in diverse industries and sectors including toll roads, rail, ports, prisons, mining, renewable energy, government office accommodation, South African export credit finance as well as property finance and trade finance.
LAURA NORDENSTRENG-SARKAMO  
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Laura Nordenstreng-Sarkamo specialises in matters related to public procurement, state aid and competitive neutrality. Laura has particular expertise in matters related to public procurement. She has developed her expertise in this field working as a referendary at the Market Court prior to joining Castrén & Snellman. Laura has extensive knowledge of both public procurement legislation and legal praxis. During the period from 2008 to 2010, she also participated in the drafting of public procurement legislation working as a part-time secretary for a committee considering the reform of legal remedies in the public procurement sector. 

Laura advises clients frequently also in other matters related to public sector legislation, such as publicity of documents and administrative legislation. Due to her former public sector career, she has extensive knowledge of public sector legislation and operating models.

UDO H OLGEMÖLLER  
_Allen & Overy LLP_  
Udo Olgemöller advises on administrative law, public procurement law and state aid, including aspects relating to European and constitutional law. His practice includes advising companies and local authorities on urban planning projects. He also specialises in the organisation and commissioning of public transport services by rail and road.

FILIPE SCHERER OLIVEIRA  
_Veirano Advogados_  
Filipe Oliveira focuses his practice in the areas of mergers and acquisitions, contracts and administrative law including handling related litigation. He has experience in drafting and negotiating M&A contracts in a wide range of industries including energy, higher education and construction. Mr Oliveira also assists Brazilian and international companies with drafting of complex commercial contracts, especially those related to service renderings and equipment supply for infrastructure projects. He also advises clients throughout all stages of the public bidding process in several Brazilian states and on matters related to government contracts. In the litigation area, Mr Oliveira has handled a number of high-profile cases involving regulatory law, particularly in the energy sector. He recently represented a concessionary of energy distribution in several lawsuits against the Brazilian Energy Agency (ANEEL) worth over 1 billion reais. He has also counselled clients in arbitrations concerning large infrastructure projects and commercial disputes. Mr Oliveira brings an international perspective to clients gained from his time spent studying and living in the United States.

PAULA OMODEO  
_Estudio Beccar Varela_  
Paula Omodeo has been a lawyer at Estudio Beccar Varela since 2014 and a senior associate since 2015. She is a member of the administrative law department. Her practice areas include public procurement, public concessions, public-private partnerships, public services regulations, state liability and project financing. Before joining the firm she worked at the Secretaría Legal y Técnica de la Nación, the legal bureau of the federal government (2011–2013) and
as an associate at Negri & Teijeiro Abogados y Dondo & Oliva Beltrán (2009–2010). Paula received her law degree from Austral University (2009) where she graduated with honours and completed an LLM at the same institution (2011–2012), thesis pending. Mrs Omodeo is professor of administrative law at the Catholic University of Argentina.

OLAF OTTING

*Allen & Overy LLP*

Olaf Otting is head of the public law group of Allen & Overy in Germany. Before joining Allen & Overy he was partner in a leading German practice. He deals with a wide range of projects and transactions in the public sector. Mr Otting has specific experience and expertise in public procurement, real estate and environmental law. He is the chair of the public procurement committee of the German Bar Association.

FILIPPO PACCIANI

*Legance – Avvocati Associati*

Filippo Pacciani focuses on public law. He has developed a considerable and specialised expertise in the public contracts sector both at a judicial and extrajudicial level. He deals with tender procedures aimed at awarding a complete range of public contracts (i.e., works, services and supply contracts, work concessions, public-private partnerships) assisting both contracting authorities in structuring the tender process and leading companies and/or lenders respectively in participating in tender procedures and financing public contracts. Due to the high-profile experience gathered in the public contracts sector, he has been involved in pivotal transactions closed over the last years on the Italian infrastructure market.

Filippo is mentioned in *Chambers and Partners* as follows: ‘Lauded for his ability to manage complex issues’ (2015), he ‘handles a broad range of contentious and advisory issues with a particular focus on public contracts’ (2014). ‘A very strong lawyer who is always at the disposal of his clients’ (2013), and he ‘receives considerable positive recognition’ (2012), ‘a wonderful administrative lawyer and explains the problems very clearly’ (2011).

Filippo, graduated, *maxima cum laude*, at the Federico II University in Naples in 1994 and has been entitled to plead before the Council of State and Court of Cassation since 2010. He is author of several articles on public law specialised reviews.

ANNE PETTERD

*Baker McKenzie*

Anne Petterd is a principal in the technology, communications and commercial team. She is currently based in Singapore at Baker McKenzie and was formerly a partner in the Sydney office. She advises on major defence and government projects and procurement requirements, focusing on the telecommunications industry, and advises on telecommunications regulatory and transactional matters. She regularly advises on Australian consumer law requirements, and customs and export control requirements.
PAULO PINHEIRO

VdA Vieira de Almeida

Paulo Pinheiro has a law degree from the University of Lisbon faculty of law and a postgraduate degree in European legal studies from the College of Europe in Bruges, Belgium.

He is an assistant professor at the University of Lisbon school of law and at the School of Management, Lisbon.

He joined VdA in 1998. He is currently the partner in charge of the public law and health practice. In this capacity, he has been involved in several transactions and projects in the following sectors: health, telecoms, energy and natural gas, transport, water and waste. He has also been actively working in regulation and public procurement matters involving these sectors, and in establishing public-private partnerships.

Paulo is the author of various articles and publications on matters within his fields of expertise.

CATARINA PINTO CORREIA

VdA Vieira de Almeida

Catarina Pinto Correia has a law degree from the faculty of law of the Catholic University of Portugal, Lisbon and a master's degree in European community law from the College of Europe in Bruges, Belgium. She has a postgraduate degree in EC competition law from King’s College London and a postgraduate degree in public procurement and concessions from the University of Lisbon faculty of law.

She joined VdA in 1996 and is a managing associate in the public law practice. In this capacity, she has been involved in several matters of administrative law (general and specific), including in the areas of public procurement, administrative concessions and public-private partnerships, and public regulation. She has participated in several transactions, mainly focused on the energy, postal, transport, infrastructure and telecom sectors.

Catarina is the author of various articles and publications on matters within her fields of expertise and is admitted to the Portuguese Bar Association.

MICHAEL RAINEY

Addleshaw Goddard LLP

Michael Rainey is a specialist adviser on public procurement law. He works with a wide range of authorities to structure and conduct efficient and effective procurement processes. He also advises on the bidder side, reviewing and challenging processes and award decisions.

He has a wealth of experience in drafting and negotiating public contracts for works, goods and services. His work is focused on a number of sectors, mainly transport, energy, local government, health and water.

Mr Rainey’s expertise covers managing and defending procurement challenges for authorities, including correspondence with unsuccessful bidders, explaining the risks and requirements of the contentious process, and guiding authorities through the detailed rules on standstill and limitation.

He is a member of the Procurement Lawyers’ Association.
VASANTH RAJASEKARAN
*Seth Dua & Associates*

Vasanth Rajasekaran is a partner at Seth Dua & Associates. He has considerable expertise in relation to international arbitration, infrastructure projects (roads, power, airports, ports, railways, water and sanitation), defence, aerospace and aviation, PPP projects, procurement law and general litigation. He has advised many foreign companies on Indian procurement law and policies in several key infrastructure PPP projects across various sectors. He recently advised the government’s Ministry of Finance on the procurement process, and has also drafted the procurement manual for their *sui generis* socioeconomic PPP.

OLGA REVZINA
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Olga Revzina is the head of the firm’s infrastructure and private-public partnership (PPP) practice in Russia. She specialises in infrastructure development projects, including PPP (concession) projects. Olga advises public clients (state authorities, state-owned companies), Russian and international sponsors and lenders, as well as subcontractors and operators on all aspects of transport projects (airports, toll roads, rail roads, ports, parking), utilities (water services, heating systems, waste disposal) and energy projects. She is a member of the Paris Bar and the Moscow Bar. She is an advocate in Advocate’s Bureau ‘Herbert Smith Freehills’.

Chambers Europe has ranked Olga Revzina in the first tier for PPP in Russia since 2007.

KENAN SCHATTEN
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Kenan Schatten graduated with a Master of Laws from the University of Brussels (ULB) in 2014 and a Master of Laws (LLM) from Queen Mary University of London in 2015. He joined Liedekerke in 2016.

MATHIEU SCHIMMEL
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Mathieu Schimmel specialises in public procurement and competition law. He has acted for numerous international corporations and financial institutions. He holds degrees from Utrecht University and the Institut d’études politiques de Paris (Sciences Po). In addition to his practice, Mathieu regularly lectures on public procurement at the Vrije Universiteit Amsterdam.

ANTONIA SCHNEIDER
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Antonia Schneider has been a junior associate in the public law department at Philippi Prieto Carrizosa Ferrero DU & Uria since 2014. She holds a bachelor of laws from the Universidad de Chile. She is a teaching assistant on the public law LLM at the Pontificia Universidad Católica de Chile Law School and at the Universidad Diego Portales.
SUNIL SETH
Seth Dua & Associates

Sunil Seth is a co-founder and senior partner at Seth Dua & Associates with professional experience that spans over 25 years of advising multinational and Indian corporations in setting up business operations in India as joint ventures or wholly-owned subsidiaries, either as greenfield projects or through the M&A route. He has advised clients in sectors as diverse as aerospace, defence, automotive, industrial, engineering, consumer goods, infrastructure, construction, real estate, hospitality, healthcare, power, oil and gas, water, roads and transport. He has rich and extensive experience in advising clients on procurement laws, policies and regulations across various sectors. He has delivered papers at various international conferences and has contributed articles to leading international publications and journals.

LOLA SHAMIRZAYEVA
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Lola Shamirzayeva is an associate in the infrastructure and private-public partnership (PPP) practice at Herbert Smith Freehills in Russia. She specialises in advising private investors, public authorities, state-owned companies and financial organisations on PPP and concession projects. Her experience includes advising clients on major infrastructure projects in Russia and CIS countries.

Lola graduated from the National Research University Higher School of Economics in 2012 with honours. Lola joined Herbert Smith Freehills in 2013.

KINA SINCLAIR
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Kina Sinclair is an associate at Addleshaw Goddard LLP and has acted on a range of public procurement projects for contracting authorities and for bidders. She advises clients primarily in the utility, health and nuclear sectors on the application of the EU Procurement Directives and issues arising throughout procurement processes.

JUAN ANTONIO STUPENENGO
Estudio Beccar Varela

Mr Stupenengo is a senior associate at Estudio Beccar Varela and serves in its administrative law department. In the past, he has served as clerk for the Federal Court of Appeals in Administrative Matters and for the District Court in Administrative and Tax Issues of the City of Buenos Aires. He is a lawyer (law degree, 2000) and specialised in administrative law and public administration at the University of Buenos Aires (2006). Mr Stupenengo is professor of administrative law at, inter alia, the University of Buenos Aires, the Catholic University of Argentina, the Government Solicitor’s School of Law and the City of Buenos Aires Attorney General School of Law. Mr Stupenengo is ranked by Chambers Latin America 2016 as being among the most recognised public law attorneys in Argentina. He has participated in several congresses as a lecturer in matters related to public and administrative law. He is the author of various publications in this area.
JONATHAN TAM  
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Jonathan Tam is an associate in the Toronto office of Baker McKenzie. He received his law degree from the University of Toronto and his undergraduate degree from Harvard University. He has assisted on numerous procurement projects for multinational companies with a focus on technology outsourcing.

AURÉLIEN VANDEBURIE  
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Aurélien Vandeburie holds a PhD in law from the University of Namur (2013). His thesis was on public property and state lands. He joined Liedekerke in 2013 and is now counsel. Alongside his advocacy practice focused on government procurement rules, he is a lecturer on the administrative law course at the Université libre de Bruxelles. He has also published numerous articles on public law matters.

OLGA VASILYEVA  
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Olga Vasilyeva is a Russian-qualified lawyer. She specialises in advising private investors, public authorities, state-owned companies and financial organisations on infrastructure and private-public partnership projects in Russia. Olga graduated from the Moscow State Institute of International Relations (University) in 2015 with honours. Olga joined Herbert Smith Freehills in 2015.

GEOFF WOOD  
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Geoff Wood leads the construction team at Baker McKenzie, Sydney. He has over 30 years’ experience in the design and construction and operations and maintenance aspects of major projects. His areas of expertise include all legal aspects of construction, infrastructure, public-private partnerships, water, alliancing and defence material procurement. He is recognised as one of Australia’s leading projects lawyers and has extensive experience in all aspects of the tendering for, and the negotiation, documentation and administration of, major construction, civil engineering, resources, defence, power and privately funded infrastructure projects. He is experienced in alliancing and outsourcing of maintenance and other functions, and in dispute resolution techniques for construction and engineering and operation and maintenance disputes.

CHRISTOPH ZINGER  
Allen & Overy LLP  
Christoph Zinger’s main practice areas are administrative law and public procurement law. He advises authorities on how to shape their public procurement proceedings to comply with German and European law.
Appendix 2

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