Public Procurement

A Global Practice Guide prepared by the
Lex Mundi Construction and Infrastructure Practice Group

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About this Guide

This Global Practice Guide is designed to give readers a better understanding of the overview and legal framework of public procurement contracts around the globe. Each Lex Mundi member firm was asked to respond to a series of questions regarding public procurement contracts in their jurisdiction.

The descriptions set forth below are intended only as a general overview of the law as of October 2012. No summary can be complete, and the following is not intended to constitute legal advice as to any specific case or factual circumstance. Readers requiring legal advice on any specific case or circumstance should consult with counsel admitted in the relevant jurisdiction.

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Public Procurement Guide

Austria

Prepared by Lex Mundi member firm CHSH Cerha Hempel Spiegelfeld Hlawati

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

The Austrian regulations on Public procurement regulate the formal procedures to be followed by public authorities when procuring goods and services. They do further regulate legal remedies specific to public procurement.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The basic principles for public procurement procedures in Austria are free and fair competition as well as equal treatment of all candidates and tenders with due regard to Community rules on the fundamental freedoms and the principle of non-discrimination. The contracts shall be awarded to authorized, efficient and reliable entrepreneurs at adequate prices.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

The main source of law for Public Procurement in Austria is the Public Procurement Act (Bundesvergabegesetz, BVerG). Besides this Act there are regional laws.

3. What public agencies are subjected to the general Public Procurement regime?

According to Sec 3 para 1 BVerG, public agencies are
a. the Republic of Austria, its federal states, its municipalities and associations of municipalities;

b. certain bodies set up specifically to meet needs in the general interest which are not of commercial character, have (at least partly) legal personality, and whose business is for the most part financed by public agencies as described under a. or other bodies as described under b., or whose operations are subject to supervision by the latter, or whose administrative, management or supervisory body is made up of members of whom more than one half are appointed by public agencies or other bodies;

c. associations consisting of one or more contracting authorities as mentioned under a. or b.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

Generally speaking, the BVerG is applicable to public agencies as defined above. However, the law provides for certain (partial) exemptions from its scope of application, depending on the object of the contract.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

Non-public entities exercising so-called sectoral activities (activities such as gas, heat, electricity and water matters; transport service; postal service; exploration for or
extraction of oil, gas coal or other solid fuels; sea and air ports) are subject to most parts of the BVerG.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

Generally speaking, foreign companies residing in the EEA or Switzerland are not obliged to set up branches or subsidiaries. In case a decision of public authorities regarding professional qualifications is required, proceedings for obtaining such decision have to be initiated before expiry of the time limit for tender submission.

2. Are there any reciprocity regulations?

No, there are no reciprocity regulations. Natural or legal persons residing in the EEA or Switzerland are only obliged to commence proceedings regarding the obtainment of an administrative admission for the exercise of such activity in Austria before the expiration of the offer deadline.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

Not per se. Prerequisites in the specific tender may, however, have similar effects.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

Bids have to be registered with the so-called incoming directory (Eingangsverzeichnis). Upon expiry of the offer period, bids have to be opened in the order of registration.

2. Is electronic procurement fully implemented?

If permitted in the tender documents and unless stated otherwise by law, information exchange via fax or other electronic means is permitted. The law sets up requirements for documents transmitted electronically as well as quality requirements on the system of transmission itself.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

Presenting a bid in electronic procurement procedure requires observance of the general rules set up for presenting a bid as well as compliance with the additional regulations set up for electronic bids. These regulations include, inter alia, encryption and electronic signature of electronic documents. In case electronic tenders are permitted, bidders should therefore make sure that they meet the special technical requirements as defined per law.

4. What are the possible ways of association for participating in public procurement proceedings?

Bidder consortiums may participate in procurement proceedings unless stipulated otherwise in the public tender. The contracting authority may set further requirements regarding number of memberships or composition of such consortiums.
5. What type of procurement procedures exist?

The Austrian Procurement Act distinguishes between open procedure (offenes Verfahren), restricted procedure (nicht offenes Verfahren), negotiated procedure (Verhandlungsverfahren), dynamic purchasing system (dynamisches Beschaffungssystem), competitive dialogue procedure (wettbewerblicher Dialog), direct award (Direktvergabe) and direct award with prior notification (Direktvergabe mit vorheriger Bekanntmachung). Awarding authorities are free to choose between open procedure and restricted procedure with prior notification. Apart from that, the law sets forth criteria for the choice of other procedures. Additional possibilities (e.g. restricted procedure without prior notification, contracts awarded on the basis of a framework agreement, direct award with/without prior notification) exist for so-called under-limit public procurements (Vergaben im Unterschwellenbereich).

6. What are the modes of selection processes and when are they applicable?

Generally speaking, contracting authorities are free to choose between open procedure and restricted procedure with prior notification. Certain (additional) types of procedures, however, are only permitted for under-limit public procurements.

7. Is the bidding company required to post any bond or insurance?

The contracting authority may request adequate security. The law names possible securities (Vadium, deposit, guarantee and cover retentions).

8. What are the criteria for evaluation and comparison of bid proposals?

The contract is awarded to the bidder presenting the technically and economically most advantageous offer or on the basis of the lowest price tendered.

9. What are the requisites for execution of contracts after awarding?

There are no requisites for execution of contracts after awarding. The contracting authority is obliged to exclude bidders in case of lacking powers, financial, economic or technical capacity or reliability.

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

Private companies performing sectoral activities are considered sectoral contracting entities (Sektorenauftraggeber) when exercising these activities based on special or exclusive rights granted to them. In such case, private companies are subject to the major part of BVergG.

2. Does the private company proposing the project have any advantage for purposes of bidding?

No

F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

Under certain circumstances, entrepreneurs may seek review of independently contestable decisions until acceptance of the tender or declaration of revocation. As a consequence, the Federal Procurement Authority (Bundesvergabeamt) may declare the decision to be void. Furthermore, issuance of an interim injunction to prevent pending damages or filing an application for a declaratory judgment is possible.
2. Are there any judicial review procedures applicable when the contract has been executed?

An entrepreneur having had an interest in obtaining a public contract subject to BVerfG and who has been or risks being harmed as a consequence of the alleged infringement of BVerfG is entitled to submit an application for a declaratory judgment.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

According to Sec 78 et seq BVerfG, the details of the contract have to be laid down in the tender documents.

2. Are there any guarantees that have to be posted for the performance of the contract?

The contracting authority may demand security. Forms of securities are Vadium, security deposit, guarantee and cover retentions.

3. Are there any special powers upon the State?

No

4. Can fines or penalty clauses be agreed upon?

Yes

5. Can the contract be assigned?

Subcontracting of the contract as a whole is not permitted, except for contracts of purchase and passing on to connected companies in a group. Further specifications may be made in the tender documents.

6. Can advance payments be established?

Yes

7. How is dispute resolution regulated?

The BVerfG does not provide for special regulations regarding dispute resolution. Therefore the general principles and rules apply.

8. Can international arbitration be agreed upon?

Yes

9. Is there any procedure for liquidation of the contract?

The BVerfG itself does not provide for special regulations regarding the liquidation of the contract. Therefore the general principles and rules apply.
H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Austrian Public Procurement Act-Bundesvergabegesetz The following is the link to the Austrian Public Procurement Act on the law information Homepage maintained by the office of the Austrian chancellor:
http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004547

Contact Information

Georg Konrad  
georg.konrad@chsh.at

CHSH Cerha Hempel Spiegelfeld Hlawati  
Parkring 2  
1010 Vienna, Austria

Tel 43.1.514.35.0 Fax 43.1.514.35.35  
www.chsh.com

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www.lexmundi.com/GlobalPracticeGuides
A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

Belgian economics are governed by the system of the free market and contractual freedom. A special act of August 1980 sets out the framework for the Belgian federal structure and imposes on the regions to guarantee the principles of the free movement of persons, goods, services and capital, the freedom of trade and industry and of the economical and monetary union. In order to preserve this general framework, public procurement has predominantly remained a federal competence. The development of Belgian public procurement regulations has to a large extent always followed the European directives. Thus, public procurement in Belgium is governed both by the Belgian and the European rules.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The general principles of ‘good governance’ and the fundamental principles of the EC treaty apply to any decision on public procurement. Especially important are the principles of equality and non-discrimination, legal certainty, free competition, transparency, and proportionality and the principle of an adequate motivation and justification of decisions by the public authority.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

Following regulations are at the centre of Belgian public procurement regulation: - The Act of 24 December 1993 (hereinafter: ‘the Act’). - Royal Decree of 8 January1996 concerning the award of public procurement contracts for works, supplies and services and for the concessions for public works in the ‘ordinary sectors’; - Royal Decree of 10 January 1996 concerning the award of public procurement contracts in the “Utilities Sector”; - Royal Decree of 26 September 1996 and its annexes containing the General Contracting Conditions for the execution of public procurement contracts for the undertaking of works, supplies and services and for concessions of public works; - Act of 13 August 2011 on defense and security related public procurement - Royal Decree of 23 January 2012 on defense and security related public procurement The Act of 24 December 1993, which actually is the basis of Belgian public procurement law, will (normally: in the near future) be replaced by the Act of 15 June 2006 concerning the award of public procurement contracts for works, supplies and services. This new act will be executed by the Royal Decree of 15 July 2011 concerning the placing of public procurement contracts in the ordinary sectors (only a few provisions have entered into force) and different other Royal Decrees which are still to be published. The new act has been conceived to implement the 2004 Directives. Due to the extremely long period between its publication (2006) and its entering into force (2013 (?)), the Act of 24 December 1993 has been modified on several occasions, in order to (more or less) timely implement the ‘new’ directives.
3. What public agencies are subjected to the general Public Procurement regime?

Early Belgian legislation only involved contracts with the state. As soon as the European framework for public procurement was established, such a limited approach was no longer tenable. Therefore, the field of application of Belgian procurement legislation, which is currently defined in article 4 of the Public Contract Act, is much wider. The Belgian legislator has opted for a double approach: Firstly, 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 etc.). Secondly - in line with the European directives – public procurement rules are applicable on a category of bodies “governed by public law”, which are defined based on a set of cumulative criteria in the Act. It concerns bodies: (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) having legal personality; and (c) financed, for the most part, by the public bodies mentioned in the list of art. 4 of the Act; or who on managerial level are supervised by these bodies, or who have an administrative, managerial or supervisory board, more than half of whose members are appointed by the bodies mentioned in article 4. 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.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

The aforementioned conditions, especially the condition that a public body is established for meeting needs in the general interest, have been subject of debate. In this respect, Belgian jurisprudence is in line with the elaborate jurisprudence of the European Court of Justice. In order to prevent endless discussion, a non-exhaustive list of public bodies which fulfil all these criteria has been set out in the Royal Decree of 8 January 1996.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

In general, private entities are not subjected to the application of the Belgian public procurement regime. However, in the utilities sector, the rules of the public procurement regime do apply to some private entities, some of who operate on the basis of so called ‘special or exclusive’ rights. These rights, granted by an authority by legislative, regulatory or administrative provision, limit the exercise of activities in the field of water, energy, transport services and postal services to one or more entities. Also, in the classical sectors, the question has been asked whether universities governed by private law ought to be considered as ‘contracting authorities’ under the Act. This question has been a popular subject of discussion in Belgian doctrine. A majority of doctrine has supported this opinion. However, an Act of 14 January 2002 has complicated the matter by setting out – albeit only for supply and service contracts – that public hospitals (including university hospitals) are only subject to the public procurement rules above the European thresholds. A Royal Decree of 27 November 2007 has put an end to the controversy. This Royal Decree establishes that universities which are governed by private law which fulfil the criteria of article 4, § 2, 8° are in any case subject to public procurement regulations, if the European thresholds are exceeded.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

No. Until recently, offsets could (under strict conditions) be an evaluation criterion in defense procurement. However, it remains unclear whether this practice will persist
under the new Belgian defense and security public procurement law of 13 August 2011 which has recently entered into force.

2. **Are there any reciprocity regulations?**

   No.

3. **Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?**

   No. The European Directive 2009/81/EG concerning public procurement and certain contracts related to defense and security has been fully implemented into Belgian law.

D. **Procedures for awarding public procurement contracts**

1. **Is there a Bidders’ Registry?**

   No.

2. **Is electronic procurement fully implemented?**

   There is one official channel for Belgian public procurement contracts: the application e-Notification (https://enot.publicprocurement.be). Enterprises can find all the Belgian public procurement notices on this platform. As from January 1st, 2011, the Belgian Public Tender bulletin (BDA) (an annex to the Belgian State Gazette) has been integrated with the Federal Public Service Personnel and Organisation (FPS P&O). However, it is still possible to retrieve contract notices published before 1 January 1st, 2011 on the Belgian State Gazette website (http://www.ejustice.just.fgov.be/cgi/welcome.pl). Also as from January 1st, 2011, the public contract notices published on e-Notification will count as the official publication in the BDA. The practical modalities for both companies and contracting authorities can be consulted in official notice 2010/02053 published on September 6, 2010 in the Belgian State Gazette (http://www.ejustice.just.fgov.be/cgi/api2.pl?pd=2010-09-06&numac=2010002053&lg=nl). The official announcements can be found on the e-Notification site (https://enot.publicprocurement.be). The site also contains a link to the official announcements published prior to January 1st, 2011. To present or award a bid, the use of e-Tendering is permitted, required or prohibited depending on the public body that procures (State, Flemish Region, Walloon Region, Capital Region, local authorities). The federal authorities have developed IT tools to process public contracts electronically. A first tool, e-Notification, is used to publish and look up public contracts. A second tool, e-Tendering, can be used by companies to electronically submit their applications or bids. These and other future tools are made available to the other levels of government by the federal authorities, so companies can make use of one and the same environment. The Flemish authorities concluded a cooperation agreement on e-Procurement with the federal level. All notices are sent to e-Notification for publication. The electronic submission of bids for public contracts is now obligatory. The Walloon Region and the French-speaking Community have developed a tool (IAM) which provides support in drawing up public procurement notices. Since 2009, these notices are sent to e-Notification for publication. Any documents regarding public contracts can be consulted via a link to the common public procurement portal of the Walloon Region (http://marchespublics.wallonie.be) and the French-speaking Community (http://marchespublics.cfwb.be). The Brussels Capital Region concluded a cooperation protocol on e-procurement with the federal level. The Brussels authorities publish all public invitations to tender via e-Notification. Further information on e-Procurement on different levels: Federal authorities www.publicprocurement.be - Contact: e.proc@publicprocurement.be (mention e-Procurement policy as subject) Flemish authorities www.vlaanderen.be/kanno - Contact: lore.hollevoet@bz.vlaanderen.be (mention e-Procurement policy as subject); Walloon Region and French-speaking Community: www.marchespublics.wallonie.be – www.marchespublics.cfwb.be – Contact: edimestre-marchespublics@wallonie.be (mention e-Procurement policy as subject);
3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?


4. What are the possible ways of association for participating in public procurement proceedings?

There are no strict rules. The most common way of association is the ‘temporary partnership’ (tijdelijke vennootschap/société momentanée).

5. What type of procurement procedures exist?

The ways in which a government contract can be awarded, and the rules governing the selection of the granting procedure in Belgian law, is largely identical with the European directives. Just like these guidelines, the Belgian legislation makes one basic classification on the basis of the access to the market (open and restricted procedures) and another based on the selection criteria of the contracting party. There are four main types of procurement procedures: - Adjudication (aanbesteding/adjudication) (award on the basis of lowest price only) - Quote request (offerteaanvraag/appel d'offres) (award on the basis of specific award criteria, not only the price) - Negotiated procedures (onderhandelingsprocedure/la procedure négociée) - Competitive dialogue (concurrentiediaoloog/dialogue compétitif) The procedures of adjudication and quote request may be awarded by means of an open or restricted procedure. In an open procedure all interested contractors may submit tenders. In a restricted procedure, only those contractors who have been selected by the contracting authority may submit a tender. The design contest and concession for public works have also been implemented in Belgian law. A specific ‘Belgian’ procedure which does not find a direct legal basis in the directives is the ‘contest for works’ for contracts for both the design and execution of public works.

6. What are the modes of selection processes and when are they applicable?

In case of adjudication, the price is the only criterion: the contract is granted to the tenderer who has submitted the lowest regular tender. An adjudication procedure may be considered if: - the conditions and technical specifications can be determined in the contract in an adequate manner, so that there is no more room for an appreciation of the quality of the performance; - the conditions and the technical specifications of the contract are sufficiently clear and complete, so that suggestions of the bidders would prove unnecessary. The initiative of the bidders is as such almost non-existent, since the tender documents describe in full detail what is expected from the tenderer. In principle, all contracts awarded through open or restricted adjudication are published on a national level. Contracts whith an estimated value (ex. VAT) reaching or exceeding the EU thresholds are published in the European Journal as well. The publication of a public adjudication opens a one-step procedure: the contract is announced, after which the tenders must be submitted at the latest before the date and hour which has been set out for the start of the opening of the tenders. A limited adjudication procedure, on the other hand, leads to a two-step procedure: after the call to tenderers, the contracting
authority selects the tenderers, who will be invited to submit their tender by the date of the opening session. In case of a quote request, where criteria other than or in addition to the price are taken into account as well, the contract is granted to the regular and most advantageous tenderer. Unless expressly prohibited in the tender documents, contracting authorities may take ‘free variants’ in consideration. For a quote request, the same publication requirements apply as for an adjudication procedure. For the public request, this again leads to a one-step procedure. The publication of the limited quote request gives rise to a two-step procedure, similar to that of the limited adjudication. In case of a negotiated procedure, the contracting authority consults the economic operators of its choice and negotiates the terms of the contract with (one or more) of them. The allocation of public contracts after a negotiation process is only allowed in the cases listed in the Act. Following the jurisprudence of the European Court of Justice, these cases should be interpreted restrictively. Therefore, the burden of proof rests on the contracting authority. Belgian legislation distinguishes between contracts to be awarded on the basis of negotiation without announcement of the contract (however, a notice of the outcome of the negotiation must still be published), and cases where special rules of disclosure should be taken into account. There is no publication requirement, neither in the European Official Journal, nor in the Bulletin of Procurement for non-European public works contracts, supplies or services that remain under the EU thresholds. For some service contracts (i.e. legal and financial services, services in the field of research and development), publication is only necessary once the threshold has been reached. But even if no disclosure is required, the competent authority “if possible” is to consult different contractors, suppliers or service providers. Only in case that it can be proven that no other qualified contractors were available, no competition is to be organized. For contracts reaching the EU thresholds, the usual disclosure requirements are applied. This means prior publication in the Official Journal of the European Communities and in the Bulletin of Procurement, the announcement of the contract and the publication of the results of the negotiation. Below the EU thresholds, only a publication in the Bulletin is required. In a negotiated procedure without publication, at least three tenderers should be consulted (of course insofar that enough tenderers can be found). In some cases however, there is a legal presumption that no three contractors can be found. This is, amongst others, the case in awarding contracts to lawyers. The competitive dialogue was introduced by the EU Directives of 2004, and has recently been implemented in the Belgian procurement legislation. The contracting authority can use this process in the procurement of complex contracts, when it is unable to describe the required technical means by itself, or when it is unable to objectively assess the solutions that the market has to offer both technically as financially or legally. All interested contractors or service providers can participate in this process. However, the competitive dialogue can only be used in the classical sectors and on contracts concerning defense and security.

7. **Is the bidding company required to post any bond or insurance?**

Depending on the type of contract, the contracting authority may require the bidding company to post a bond or contract for an insurance.

8. **What are the criteria for evaluation and comparison of bid proposals?**

Basic rules of evaluation of the proposals: The contract is awarded either to the economically most advantageous tender or to the tender with the lowest price offer. The (general or limited) adjudication procedure is characterized by the commitment that the contract should be awarded to the tenderer submitting the lowest regular tender. The compensation for the lowest regular bidder who is wrongfully rejected has been fixed at an amount of 10 percent of the tender. This procedure generally leaves the contracting authority little room for appreciation. The contracting authority still may leave the tenderers the opportunity to propose variants as to the technical achievement of the contract. The tender documents should expressly impose or permit these variants and indicate their object, nature and scope. In contrast to the adjudication procedure, price is not the only criterion for the award of the contract as a result of a (general or limited) quote request. In case of a quote request, the contract is awarded to the economically
most advantageous tender based on a range of predetermined economic and quality evaluation criteria which must be set out in the invitation to tender and make it possible to determine the economically most advantageous tender for the contracting authority. These criteria may refer to the quality or performance of the products, technical value, the aesthetic and functional character, environmental features, social and ethical considerations, the cost of use, profitability, after-sales service and technical assistance, the delivery date and the terms of delivery and implementation. (Only) for contracts above the EU thresholds, the relative weighting of the criteria is to be mentioned in the tender documents. If no weightings are mentioned, the criteria are considered to have been listed in order of decreasing importance. In recent years, there seems to have been a preference among the contracting authorities for the quote request procedure. Unlike the standard rate damages of 10% in the adjudication procedure, the rejected bidder is to prove the damage he has suffered. Therefore, Belgian jurisprudence strictly sees to it that an ‘adjudication’ was not falsely qualified as a ‘quote request’. Basic rules of comparison: Apart from the legal provisions, the general principles of good governance apply to any award decision. Especially the principle of an adequate justification of the administrative decisions and, obviously, the principle of equality are of utmost importance in Belgian jurisprudence. The proposals of the tenderers therefore must be compared and assessed in a transparent and objective manner. The award criteria that are used by the contracting authority must be mentioned in the contract itself or in the tender notice. The contracting authority also has to provide reasons for its selection and award decisions. However, it should be noted that the competent authority, after following a procedure of adjudication, quote request or negotiation, remains completely free to decide whether or not it eventually will assign the contract.

9. What are the requisites for execution of contracts after awarding?

The requisites for execution of contracts with an estimated amount, without VAT, below or equal to € 22,000, are provided by the General Contracting Conditions for public procurement contracts for the undertaking of works, supplies and services and for concessions of public works (below: ‘General Contracting Conditions’). For other contracts, the requisites for execution are stated in the contract specifications.

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

Belgian public procurement law as such does not provide a regulation for Public Procurement of projects proposed by private companies. However, Belgium law provides some rules which aim to facilitate the use of different types of so called ‘Public-private partnerships’ or PPP. PPP is defined as a joint venture in which the public and the private sector realise a joint project to achieve an added value, while each retaining their own identity and responsibility. PPP should be distinguished from traditional public procurement. A ‘traditional’ public contract concerns a project that is developed by the government, of which the implementation is entrusted to a third party. In case of PPP however, both public and private parties cooperate to achieve the proposed results. Central for PPP is the idea of creating a win-win situation, between both contracting parties. There are several situations in which the government may rely on a PPP structure. PPP’s can cover a range of sectors and projects, including i.a.:

- infrastructure projects such as building roads, bridges, and tunnels
- the development of an urban area
- the construction and operation of residential care centers
- the construction of a hospital
- construction and operation of a business complex
2. Does the private company proposing the project have any advantage for purposes of bidding?

N.A.

F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

Book Ibis in the Act of 24 December 1993 (that implemented the review procedures provided by Directive 2007/66 into Belgian legislation) provides various forms of (judicial) protection for public contracts above the threshold for European publication and for some contracts for the procurement of public work under the European threshold values. For these contracts, the Act indicates before which body and within which time limits the applicable review procedures have to be introduced. For contracts above the European thresholds, and for public work contracts with a value above half of the European threshold value, the Act provides a standstill obligation on the basis of which, within a time frame of 15 days between the notification of the award decision and the contract conclusion with the chosen tenderer, a suspending procedure of extreme urgency can be brought before the Belgian Council of State or a summary procedure before the civil court. For contracts above the European thresholds different ‘alternative penalties’ may be imposed by the civil courts, namely fines of up to 15% of the contract value and the shortening of the duration of the contract. In the past, many courts (reluctantly) accepted the possibility to obtain the suspension or annulment of a contract which was awarded in breach of the principle of equality. The Act now foresees the possibility to obtain ineffectiveness of the public contract (i.e.: the contract is declared void retroactively or only for the future) for contracts above the European thresholds. However, this can only be requested in case that the obligations regarding the (European) publication of the contract notice or the standstill obligations should have not been fulfilled. And even in these cases, the civil judge may decide not to declare the contract ‘ineffective’ due to reasons of public interest. If the publication requirements and the standstill period have been respected, it will in principle no longer be possible to obtain the suspension or annulment of the contract. A demand to obtain the ineffectiveness of the contract should, in principle, be filed within 30 days following the date on which the contracting authority informed the candidates of the conclusion of the contract, and in any case within a term of six months following the contract date. In Belgium, compensatory damages can only be claimed before the ordinary civil courts, and not before the Council of State. The claim can be introduced even if no request to suspend or annul the award decision has been filed. Proceedings should in principle be filed within a period of five years after the allegedly unlawful award decision has been notified to the aggrieved contractor or supplier. In the adjudication procedure, where the contract must be awarded to the contractor/supplier who has submitted the lowest regular tender (see above), the compensation for the lowest regular bidder has been fixed at an amount of 10 percent of the tender. In the other procedures, the general rules for liability in Belgian tort law apply. This implies that the plaintiff will have to prove the damages that have been caused by the wrongful award decision. The damages are to put the plaintiff in the position in which he would have been had the wrongful act not occurred. Therefore, the plaintiff should be compensated both for all costs in participating in the award procedure (damnum emergens) and for the loss of the chance to win the contract (lucrum cessans). The courts have a large margin of discretion to estimate the likeliness of this loss, taking into account the uncertainties. In practice, damages will only be awarded if the claimant can prove would have had at least a reasonable chance to win the contract. The amount of the damages should in principle be fixed on the basis of the economic value of the contract. However, in many cases courts simply estimate this value ex aequo et bono at an amount of 10 percent of the tender, instead of ordering an inquiry into the precise circumstances.
Are there any judicial review procedures applicable when the contract has been executed?

See the answer to question F.1. above.

Overview of Public Procurement Contracts

What are the regulations applicable to contract terms and its extension?

If the contract has an estimated amount, without VAT, below or equal to € 22,000, the General Contracting Conditions for public procurement contracts for the undertaking of works, supplies and services and for concessions of public works apply (= annex to royal decree of 26 September 1996). As to the extension to the contract, the contractor is bound to apply all additions, deletions and modifications to the contract, that are ordered by the contracting authority during the course of the implementation and that relate to the subject of the contract and are kept within reasonable limits. The contractor is no longer required to implement aforementioned extensions to the contract once their total value constitutes more than 50 percent of the initial value of the contract.

Are there any guarantees that have to be posted for the performance of the contract?

In general, the contractor has to post a bond that serves as a security for the fulfillment of his obligations under the public contract. The bond is normally set at 5 percent of the original contract price. If the public contract for supplies and services does not indicate a total price, a bond will be specified in the documents relating to the public contract. Otherwise, the basis of calculation of the bond corresponds to the estimated monthly amount of the public contract, multiplied by six.

Are there any special powers upon the State?

If the contractor fails to (timely) implement the public contract, the contracting authority can impose different types of fines and penalties, as described by the General Contracting Conditions, and this without previous intervention by a judge. In addition, the contracting authority can take a number of measures in case of default in the performance of the contract: 1° the contracting authority can decide to unilaterally terminate the contract; in this case the contracting authority acquires, by law, the whole of the bond as a standard damage fee; this measure excludes the application of any other penalty for delayed performance; 2° the contracting authority itself can forcedly execute (all or part of) the unexecuted contract, at the expense and risk of the defaulting contractor; 3° the contracting authority can close of one or more contracts with one or more third parties, for the whole or a part of the public contract still to be executed, at the expense and risk of the defaulting contractor.

Can fines or penalty clauses be agreed upon?

Besides the fines and penalties as described by the General Contracting Conditions, contracting parties can agree to implement specific penalty clauses into the public contract.

Can the contract be assigned?

Yes.

Can advance payments be established?

Yes.
How is dispute resolution regulated?
See answer sub. F.1.

Can international arbitration be agreed upon?
No specific legislation exists in this regard.

Is there any procedure for liquidation of the contract?
See answers sub. F.1.

Applicable Regulation
Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

The Act of 24 December 1993

Royal Decree of 8 January 1996

Annexes:

Royal Decree of 10 January 1996

Annexes:

Royal Decree of 26 September 1996

General Contracting Conditions:
Act of 15 June 2006

Royal Decree of 15 July 2011

Contact Information

Frank Judo
f.judo@liedekerke.com

Liedekerke Wolters Waelbroeck Kirkpatrick
Boulevard de l'Empereur 3 Keizerslaan
B-1000 Brussels, Belgium

Tel 32.2.551.15.15 Fax 32.2.551.14.14
www.liedekerke.com
Public Procurement Guide

Bulgaria

Prepared by Penkov, Markov & Partners Attorneys at law

Overview of Public Procurement

What are the principal elements of Public Procurement regulation in your jurisdiction?

The regime in Bulgaria for the awarding and execution of public procurements is regulated mainly with the Public Procurement Act (PPA). It consists of basic principles, criteria, rules and procedures related to conducting of public procurements. Within the last year several legislative changes have been made in the field of public procurement, mainly imposed by the need to synchronize the Bulgarian legislation with the European one, incl. for implementation of Directive 2009/81/EC. From February 2012 the Ordinance for assigning of small public procurements, which governed the conditions and procedures for procurement under the minimum financial thresholds set out in the PPA, has been canceled. As a result of that the PPA currently remains the main legal instrument governing the procedures in this area. When it comes to some specific tenders (concerning the state security and defense), it should be advised that the procedures for their announcement, awarding and performance is explicitly regulated in an Ordinance for assigning of special public procurements. The state policy on public procurement is carried out by the Minister of Economy, Energy and Tourism. The Minister is supported in this area by a permanent state body - the Public Procurement Agency. It is the body that effectively monitors and controls the procedures for awarding and execution of public procurement contracts. One of the material competencies of the Agency is to carry out a preliminary control over procedures for assigning a public procurements fully or partially financed with funds of the European Funds (provided that such contracts exceed the financial thresholds of the tenders exhaustively specified in the PPA). The authorities which are competent in case of appeals against actions and decisions concerning the public procurement procedure are (i) the Commission on Protection of Competition (CPC), which is a specialized administrative body empowered to enforce the Protection of Competition Act, the Public Procurement Act and the Concessions Act and (ii) the Supreme Administrative Court which is the highest instance for solving public procurement disputes.

Legal Framework for Public Procurement

What are the basic principles applicable to Public Procurement?

There are several basic principles provided in the Bulgarian Public Procurement Act, which are public openness and transparency, free and fair competition, equality and non-discrimination.

What are the main regulations applicable to Public Procurement in your jurisdiction?

Public Procurement Act and the Regulations for Application of the Public Procurement Act Act on the Liability for Damage Incurred by the State and the Municipalities Ordinance on the Award of Special Public Contracts (OASPC) Ordinance on records of the Public Procurements Statutes of the Public Procurement Agency Procedure codes: Administrative Procedure Code Code of Civil Procedure
What public agencies are subjected to the general Public Procurement regime?

According to the Bulgarian legislation the following public entities are subjected to the public procurement regime in their capacity of contracting authority: 

3.1. the bodies of State power, the President of Republic of Bulgaria, the Ombudsman of Republic of Bulgaria, the Bulgarian National Bank, as well as other state institutions established by a statutory instrument; 

3.2. the diplomatic missions and the consulsips of the Republic of Bulgaria abroad, as well as the permanent missions of the Republic of Bulgaria to the international organizations; 

3.3. the bodies governed by public law (any legal person which, regardless of its commercial or industrial character, is established for the specific purpose of meeting needs in the public interest and which fulfills any of the following conditions: (a) it is more than 50 per cent financed by the State budget, by the budgets of public social insurance or of the National Health Insurance Fund, by the municipal budgets, or by any contracting authorities under p. 3.1 or p. 3.3. above; (b) more than half of the members of the management or supervisory body thereof are appointed by any contracting authorities covered under p. 3.1 or p. 3.3. above; (c) which is subject to management supervision by side of any contracting authorities under p. 3.1 or p. 3.3 above. Any medical-treatment facility, which is a commercial corporation and more than 30 per cent of the income whereof for the preceding year is for the account of the State budget and/or municipal budget, and/or the budget of the National Health Insurance Fund, shall likewise be a body governed by public law); 

3.4. a union formed by parties referred to in p. 3.1 or p. 3.3 above; 

3.5. the public enterprises and any combinations thereof, where carrying out one or several of the activities relating to (i) natural gas, heat or electricity, (ii) drinking water, (iii) provision or operation of networks providing a service to the public in the field of transport by railway, tramway, trolley bus or bus, as well as of automated transport systems or cableway, (iv) provision of a universal postal service and (v) exploitation of a geographical area (thoroughly described in the PPA); 

3.6. the merchants and other persons which are not public enterprises, where carrying out one or several of the activities covered under p. 3.5 above herein on the basis of special or exclusive rights.

What public agencies are not subjected to the application of the general Public Procurement regime?

The PPA does not provide exceptions for the application of the public procurement regime with regard to specific public agencies, i.e. each public agency having some of the characteristics, specified in p.3 above, shall be a subject of this regime. There is another criteria, which determines whether and which one of the public procurement procedures shall be applicable. The decisive criteria is the value of the tender (which varies and depends on the object of the public procurement, i.e. on the kind of activity to be awarded for execution - supply of goods, provision of services, construction works, etc.). According to the applicable legal requirements when the value of the tender exceeds a specific amount (specified in the PPA) the public procurement regime must be applied in any case. In other legally determined cases concerning specific object activities, the public procurement regime shall not be considered obligatory to the extent that the value of such activities does not exceed the respective value, explicitly provided in the PPA. Along with that the PPA provides that some specific activities (as awarding of a construction concession, contracts awarded according to specific procedural rules of an international organization, etc.) could not be a subject of the public procurement regime, but must be regulated by other legal acts or specific procedural rules. However, in each specific case the contracting authority shall be obliged to specify the type and the value of the activities to be carried out in order to determine the adequate public procurement regime, if applicable.

Are there any non-public entities subjected to the application of the general Public Procurement regime?

Please, refer to p. 3.6 above.

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Requirements for Foreign Companies to Participate in Public Procurement Processes

Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

The PPA explicitly provides that any Bulgarian or foreign natural or legal person, as well as any union of such persons, may participate in a public procurement procedure. Therefore foreign companies are not required to set up branches or subsidiaries in Bulgaria. They shall have the same rights and obligations with the Bulgarian companies when participating in public procurement procedures, otherwise the main principles provided in the PPA (and specified in p. 8 above) shall be breached. Of course, the foreign company may take part in such procedures through its subsidiary in Bulgaria, but it such cases the whole documentation and mainly past experience should be provided from and proved for the Bulgarian company (the latter is a separate legal entity, has separate legal personality and shall be responsible for the tender performance with its own property). When it comes to participation with branches of foreign companies, it should be noted that according to the law the branch is not considered as a separate legal entity (although being registered in the Bulgarian Registry Agency). This circumstance leads to different interpretations regarding the branch’s capability to participate in public procurement procedures and in particular leads to the question who shall be responsible for its obligations, how is it going to prove and comply with the tender requirements (i.e. by using the foreign company capacity and past experience, etc.).

Are there any reciprocity regulations?

Refer to the previous p. 1.

Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

As it was specified in the previous p. 1 above the foreign companies have the same rights and obligations with the Bulgarian participants in tender procedures, otherwise the basic principles for equality and non-discrimination shall be breached. This condition, however, does not exclude the explicit requirements in the OASPC according to which the tender participant (Bulgarian or foreign one) should be eligible for access to classified information, respectively to comply with the requirements for application of special security measures or for the manufacture or trade in weapons, munitions and military equipment. It should be also noted that, in case of special-purpose public procurement (concerning defense, military equipment and state security) which (i) is going to be awarded to a contractor - foreign person (or if the main subcontractor is a foreign person) and (ii) the value of the procurement exceeds BGN 10 million exclusive of value added tax (VAT), then this public procurement should be awarded under the condition of signing of an Offset (compensatory) arrangement. According to the OASPC imperative conditions the value of the offset arrangement shall be equal to the value of the special-purpose public procurement award contract.

Procedures for Awarding Public Procurement Contracts

Is there a Bidders’ Registry?

The Executive Director of the Public Procurement Agency keeps a Public procurement register which is a public one. There have been inserted and maintained (i) decisions, taken by the contracting authorities, for initiation, modification and termination of public procurement procedures, (ii) notices envisaged for entry into the Register, (iii) an information on public procurement awards, (iv) an information on the performed public procurement contracts, (v) an information on the progress of the procedure in an appeal proceeding and some additional information related.

Is electronic procurement fully implemented?
The applicable public procurement acts provide the option of electronic procurement. However, the electronic procurement procedure is not fully implemented in Bulgaria and practically it occurs that the procedures and the document exchange are still carried out mainly on paper.

What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

The PPA provides that the offer together with the documents attached could be submitted in an electronic format under the conditions of using of electronic signature, if this option is given by the contracting authority (stated in the notice for opening of the public tender or in the tender documentation). Usually the information exchange is carried out by post, by telefax, by electronic means or by a combination of those means, according to the choice of the contracting authority. However, the means of communication chosen must be generally available. In case of electronic procurement procedure the electronically submitted offers or applications shall be considered received by the contracting authority, after confirmed by e-mail to the sender that they are registered in its electronic system. The electronically submitted documents for initial selection, the proposal for performance of the public procurement and the price offer (all of them being a separate part of the offer) must be sent in order and in accordance with the general legal requirements, i.e. by sending of three separate e-mails that contain an indication of belonging to each specific part of the of the tender documentation. The examination, evaluation and ranking of the offers submitted electronically shall be performed in accordance with the general rules envisaged in the PPA.

What are the possible ways of association for participating in public procurement proceedings?

The Public Procurement Act provides that two or more persons can participate together in the public procurement in the form of union. The union could be formed as a consortium (which requires an establishment of a legal entity) or a partnership under the Obligations and Contracts Act (OCA). The contracting authority may limit such participation only in the form of consortium (but not as a partnership), but it shall be possible only at the stage of initial notification for the opening of the tender. In such case, if the consortium has been selected as a contractor, it could be awarded with the contract provided that it has been meanwhile registered as a legal entity. If the contracting authority has not limited the form of union, the latter could be a partnership existing only for the purposes of the public tender (but in any case the partnership should be registered as a tax subject and registered in the Bulgarian register Bulstat). In both cases, however, the consortium or the partnership should submit (together with the offer) a treaty for establishing the union, signed by all of its members. As for the documents to be submitted along with the offer, it should be noted that most of the required documents shall be submitted for each one of the union-members, and some of the documents (incl. proof of past experience) shall represent and serve in favour of the whole union.

What type of procurement procedures exist?

The public procurements could be awarded by means of conduct of an open procedure, a restricted procedure, a competitive dialogue and negotiated procedures. The open procedure is a procedure whereby all interested parties may submit an offer. The restricted procedure is a procedure whereby only preselected candidates, invited by the contracting authority, may submit a tender. The competitive dialogue is a procedure in which any interested party may request to participate and whereby the contracting authority conducts a dialogue with the qualified candidates admitted to that procedure, with the aim of developing one or more suitable proposals capable of meeting the requirements of the contracting authority, and on the basis of which the contracting authority invites the candidates with suitable proposals to submit an offer. The negotiated procedures are: (i) a negotiated procedure with publication of a contract notice, whereby the contracting authority conducts negotiation for determination of the terms of the contract with one or more qualified participants selected by the contracting authority; (ii) a negotiated procedure without publication of a contract notice, whereby the contracting authority conducts negotiations for determination of the terms of the contract with one or more specific persons. A design contest shall be a procedure whereby the contracting authority acquires a
What are the modes of selection processes and when are they applicable?

The PPA explicitly provides that the contracting authority shall make a decision on the form of the public procedure according to an open and restricted procedure wherever the conditions for conduct of a competitive dialogue or negotiated procedures do not exist. Therefore, the contracting authority may award a contract through competitive dialog, negotiating and contracting with an announcement without notice when one of the exemplary hypotheses below is available: (i) for competitive dialogue – if the procurement is particularly complex, which precludes award of the said procurement applying an open or restricted procedure; (ii) for negotiated procedure with publication of a contract notice solely where: - the open or restricted procedure or the competitive dialogue procedure has been terminated because of lack of sufficient offers and the terms and conditions as initially announced have not been substantially changed; - in exceptional cases, when the nature of the supply, service or works, or the risks attaching thereto, do not permit prior overall pricing; - when the nature of the service to be procured is such that the technical specifications cannot be established with sufficient precision to permit the award of the procurement according to the rules governing open or restricted procedures, etc. (iii) for negotiated procedure without publication of a contract notice solely where: - the open or restricted procedure has been terminated (because any offers have been submitted or no one of the offers is sufficient) and the conditions as initially announced are not substantially changed; - a need has arisen to take urgent action, brought about by the occurrence of an event of an extraordinary nature which the contracting authority, while exercising due care, was unable or was not obligated to foresee or to avoid and for the mitigation of which the time limits for conduct of an open or a negotiated procedure or a negotiated procedure with publication of a contract notice cannot be complied with; - additional deliveries by the initial contractor are required, which are intended either as a partial replacement of normal supplies or as the extension of existing supplies, where a change of the contractor would oblige the contracting authority to acquire goods having different technical characteristics which would result in incompatibility or technical difficulties in operation and maintenance, etc. Along with that, contracting authorities carrying out activities in energy, transport and postal services (sector contracting authorities) are entitled to hold directly negotiated procedures without notice.

Is the bidding company required to post any bond or insurance?

Each candidate or tenderer shall provide a guarantee for participation in the public procurement award procedure. The contracting authority shall determine the terms and the amount of the participation guarantee as a fixed sum of money, which may not exceed 1 per cent of the value of the procurement. The contracting authority need not require a participation guarantee where (i) the contracting authority conducts a negotiated procedure without publication of a contract notice, or (ii) the procurement is of a value under specific amounts determined in the PPA. The Guarantee shall be provided (as per the discretion of the participant) in one of the following forms: (i) a cash deposit or (ii) a bank guarantee. Where the participant is a union (not being a legal person), each of the partners therein may be an originator under the bank guarantee and, respectively, a payer of the cash deposit under the guarantee. The contracting authority shall have the right to retain possession of the participation guarantee until settlement of the dispute, when the participant appeals against the decision of the contracting authority. The contracting authority shall have the right to call the participation guarantee regardless of the form of the said guarantee where the participant (i) withdraws its offer after the expiry of the deadline for its submission or (ii) is selected as a contractor, but fails to fulfill the obligation thereof to conclude a public procurement contract. Upon termination of the public procurement procedure, the guarantee provided should be released (without owing interest) within five working days after expiry of the time limit for lodging an appeal against the decision on termination.

What are the criteria for evaluation and comparison of bid proposals?

The criteria for evaluation of the offer is either “the lowest price” or “the most economically advantageous offer”. In the first case the participants should have passed the first two levels of
evaluation - (i) Selection Documents (incl. corporate, administrative documents, past experience evidences, etc.) and (ii) Procurement Performance Proposal (incl. technical and other relevant documents). And after that the final assessment shall be made on the basis of the lowest price proposed. If the criteria is “the most economically advantageous offer”, the determinant criteria could be different and it shall depend on the requirements of each specific case.

What are the requisites for execution of contracts after awarding?

The main requisites of the public procurement contract are: subject, quality of the activities/deliveries to be performed under the tender, price, manner of payment, place and term of the contract’s performance, rights and obligations of both parties, a performance guarantee, conditions for termination of the contract, force-major circumstances, confidentiality, sanctions, acceptance of the executed works/deliveries under the contract, warranty terms and warranty support, inspections and audits by the authorities of the European Community, additional provisions.

Private Initiative Projects

Are there any regulations for Public Procurement of projects proposed by private companies?

There are no additional regulations concerning rights of private companies to act as a contracting authorities under public procurements. Such authorities are exhaustively described in the PPA.

Does the private company proposing the project have any advantage for purposes of bidding?

Please, refer to the previous p. 1.

Review Procedures

Are there any judicial review procedures applicable to the bidding processes?

The Public Procurement Agency, through its Managing Director, carries out a preliminary control over procedures for assigning a public procurements fully or partially financed with funds of the European Funds (provided that such contracts exceed the financial thresholds of the tenders exhaustively specified in the PPA), as well as over decisions for initiating of a negotiated procedures without publication of a contract notice (in specific cases determined in the PPA).

Are there any judicial review procedures applicable when the contract has been executed?

The Public Procurement Agency is also been permanently informed by the contracting authorities about the main course of performance of already executed contracts (refer to section D, p. 1). As it was mentioned in section D p. 9 above the authorities of the European Community have the right to inspect and audit the accurate performance of the contract.

Overview of Public Procurement Contracts

What are the regulations applicable to contract terms and its extension?

The public procurements (with some exceptions) shall be awarded for a period of up to five years. As an exception, the period may be set at up to ten years for services of extending bank loans for the financing of development-project designs or of projects and programs of the European Union, with the contracting authority stating the reasons for this in the decision for initiation of the procedure or in the notice for opening of the procedure. Therefore, it shall be inadmissible to conclude public procurement contracts of indefinite duration. The term of the contact could not be changed, except in rare exceptional cases due to unforeseen circumstances. As a whole the amendment of the public procurement contract shall be
admissible on an exceptional basis, as follows: 1. where, for reasons brought about through unforeseen circumstances (i.e. circumstances of an extraordinary nature, which have occurred after conclusion of the contract, regardless of the will of the parties, and which could not have been foreseen and render impossible compliance with the terms agreed): - the time limits of the contract cannot be complied with, or - the activities within the subject matter of a procurement of works or service have to be partially replaced, where this is in the interest of the contracting authority and does not lead to an increase of the value of the contract, or - the total value of the contract has to be reduced in the interest of the contracting authority owing to a reduction of the agreed prices or of agreed quantities or abandonment of activities, or; 2. upon change of State-regulated prices, where an activity whereof the price is subject to State regulation is a principal subject matter of the public procurement contract and the period of performance of the said contract exceeds twelve months, or; 3. where the price has to be increased owing to the adoption of a statutory instrument: up to the amount arising as a direct and immediate consequence from the said instrument, or 4. upon extension of the duration of a supply contract or service contract requiring periodic or continuous performance, in case the following conditions are simultaneously fulfilled: - not later than six months before the end of the duration of the contract the contracting authority has initiated a procedure with the same subject matter for a subsequent period which has not been completed by the selection of a supplier, contractor or service provider; - the duration of the contract is extended until the selection of a contractor but for not more than six months and - an interruption of the supply or service would lead to substantial difficulties for the contracting authority. The contracting authority may terminate a public procurement contract if appears not to be in a position to perform the obligations thereof as a result of any circumstances which have occurred after the conclusion of the said contract. In such a case, the contracting authority shall be liable to the contractor for compensation for the damages sustained by signature of the contract.

The contracting authority shall be obligated to terminate any contract concluded on the basis of a framework agreement which has been declared ineffective.

Are there any guarantees that have to be posted for the performance of the contract?

The contractor awarded with the public tender is obliged to provide the contracting authority a performance guarantee upon signature of the contract. The contracting authority shall determine the terms and the amount of the contract performance guarantee as a percentage of the value of the public procurement, which may not exceed 3 per cent of the value of the said procurement. The contracting authority shall also require other performance guarantees in the cases specified by a statute. The contracting authority need not require a participation guarantee where (i) the contracting authority conducts a negotiated procedure without publication of a contract notice, or (ii) the procurement is of a value under specific amounts determined in the PPA. The Guarantee shall be provided (as per the discretion of the participant) in one of the following forms: (i) a cash deposit or (ii) a bank guarantee. Where the participant is a union (not being a legal person), each of the partners therein may be an originator under the bank guarantee and, respectively, a payer of the cash deposit under the guarantee. The terms and time limits for retention or release of the performance guarantee shall be regulated in the public procurement contract. Where the public procurement contract is performed in stages, the contracting authority may include in the draft of a contract a clause on partial release of the guarantee in proportion to the performed part of the subject matter of the public procurement.

Are there any special powers upon the State?

The contracting authority (being usually a state body) exercises the state rights in the field of public procurements. Acting on a motion by the Minister of Economy, Energy and Tourism, the Council of Ministers may establish a central public procurement body for the needs of the executive authorities. The central public procurement body shall be a contracting authority which shall conduct procedures for conclusion of public procurement contracts or framework agreements instead of other contracting authorities. The latters may receive supplies or services from or through a central public procurement body. However, as of the present moment such central body has not been established. The state powers are also vested to the Public Procurement Agency and to the Bulgarian National Audit Office and by the authorities of
the Public Financial Inspection Agency, as well, which authorities control over the compliance of the public tender procedures with the legal requirements.

Can fines or penalty clauses be agreed upon?

The public procurement contract provides the conditions under which fines and penalties shall cause an effect. However, such issues usually are not subject to a negotiation with the contractor and are generally consistent with the value of the public tender, with its term and additional relevant issues.

Can the contract be assigned?

The Public procurement act exhaustively provides the possible options for amendment of the contract. To the extent that the replacement of the contractor with third party is a kind of an amendment of the contract (which option is not provided in the PPA) it should be considered that the contract could not be assigned. In case of nonperformance of the contract or objective impossibility for performance of the contract by the contractor, the contract shall be terminated.

Can advance payments be established?

The Contracting authority might provide in the contract an option for advance payments. In such cases the contractor shall usually be obliged to provide a bank guarantee for repayment of the advance payments.

How is dispute resolution regulated?

The authorities which are competent in case of appeals against actions and decisions concerning the public procurement procedure (until awarding the contract or termination of the procedure) are (i) the Commission on Protection of Competition (CPC), which is a specialized administrative body empowered to enforce the Protection of Competition Act, the Public Procurement Act and the Concessions Act and (ii) the Supreme Administrative Court which is the highest instance for solving public procurement disputes. The argues arising with regard to the contract performance (incl. with regard to the validity of the contract) shall be related to the competent Bulgarian court and the applicable legal act shall be the Code of Civil Procedure. When it comes to claims of the interested parties for compensation for damages sustained as a result of breaches upon conducting the procedure or the conclusion of the public procurement contract, the Administrative Procedure Code and the Act on the Liability for Damage Incurred by the State and the Municipalities shall be applicable.

Can international arbitration be agreed upon?

An international arbitration could be agreed with regard to the contract performance. The relations that arise between the parties for implementation of the contract are subject to the general contractual rules, therefore it should have no reason for restriction on international arbitration agreement.

Is there any procedure for liquidation of the contract?

The public procurement contract could be terminated on the general legal grounds governing contractual relations, and along with that the PPA provides some specific hypotheses, leading to termination of the contract, as: (i) the option of the contracting authority to terminate the contract if it is not in a position to perform the obligations thereof as a result of any circumstances which have occurred after the conclusion of the said contract (in such a case the contracting authority shall be liable to the contractor for compensation for the damages sustained by signature of the contract), (ii) the obligation of the contracting authority to terminate any contract concluded on the basis of a framework agreement which has been declared ineffective, etc.

Applicable Regulation
Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Public Procurement Act,
Regulations for Application of the Public Procurement Act,
Ordinance on the Award of Special-Purpose Public Procurements
http://rop3app1.aop.bg:7778/portal/page?_pageid=173,1106253&_dad=portal&_schema=PORT AL
Note: Please, refer to this link only with regard to the three acts, specified above.
Please, also note that the published version of the Public Procurement Act is not the current one, i.e. there is one additional amendment of the act, which is in force from 01.07.2012)
Administrative Procedure Code
National Audit Office Act

Contact Information

Mariya Pashalieva
maria.pashalieva@penkov-markov.eu

Penkov, Markov & Partners Attorneys at law
13B Tintyava Str., Floor 6
1113 Sofia, Bulgaria
Tel 359.2.971.3935 Fax 359.2.971.1191
www.penkov-markov.eu

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Public Procurement Guide

Chile
Prepared by Lex Mundi member firm Claro y Cía., Abogados

Overview of Public Procurement

What are the principal elements of Public Procurement regulation in your jurisdiction?

In terms of infrastructure, the Public Works Concessions Law which has allowed a strong development of public infrastructure in the last 15 years, attracting an important flow of foreign investment, thus permitting an dramatic upgrade of highways, airports and other type of public infrastructure by way of granting concession rights for the construction, refurbishment, maintenance and operation of public works

Legal Framework for Public Procurement

What are the basic principles applicable to Public Procurement?

Mainly: both public and private initiatives, transparent bidding processes, transparent mechanisms for investment in additional works, flexible ways of compensation, a concession right that can be pledged, a special tribunal for resolution of controversies, and except in certain specific cases, a mechanism for fair compensation for additional costs incurred by the developer of the project.

What are the main regulations applicable to Public Procurement in your jurisdiction?

The Public Works Concessions Law, contained in Supreme Decree No. 900 (as amended) and the Public Works Concessions Regulations, contained in Supreme Decree No. 956 (as amended).

What public agencies are subjected to the general Public Procurement regime?

No public agency is mandatorily subjected to the regime mentioned above, but they can voluntarily use it. Some agencies that have used it so far are: Ministry of Public Works, Ministry of Health, Ministry of Justice, Airport Authority, Ministry of Transportation, Customs Authority.

What public agencies are not subjected to the application of the general Public Procurement regime?

See answer above. No public agency is mandatorily subjected to the regime.

Are there any non-public entities subjected to the application of the general Public Procurement regime?

No.
Requirements for Foreign Companies to Participate in Public Procurement Processes

Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

Foreign companies must necessarily incorporate a special purpose vehicle according to the Public Concessions Law. No local partner is required.

Are there any reciprocity regulations?

No.

Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

Not in principle. As this is a voluntary system, sensitive matters will not be included in Public Procurement processes.

Procedures for Awarding Public Procurement Contracts

Is there a Bidders’ Registry?

For each specific project a Bidder's Registry is open. There is no general registry.

Is electronic procurement fully implemented?

No.

What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

See above.

What are the possible ways of association for participating in public procurement proceedings?

The awarded bidder has to incorporate a corporation that will be subject to the rules of publicly held corporations. During construction, it has to be the controller of such corporation; therefore it can include other partners or shareholders, but only to the extent it retains control.

What type of procurement procedures exist?

The ones resulting from private initiative and the ones resulting from public initiative, always in public bids.

What are the modes of selection processes and when are they applicable?

Public bid, as the general rule. In case an awardee does not execute the relevant agreement with the authority within the statutory term, then the authority can call for a new public bid or make a private re-bid with the bidders that were not awarded the first time.

Is the bidding company required to post any bond or insurance?

Yes, usually (i) one to guarantee the seriousness of the offer, (ii) one for construction stage, (iii) one for operation stage and (iv) one to guarantee the adequate return of the infrastructure to the State.

What are the criteria for evaluation and comparison of bid proposals?
A mix of technical and economic.

**What are the requisites for execution of contracts after awarding?**

The awarded bidder has to countersign a copy of the awarding decree and incorporate a corporation. Then the Bidding Documents become the actual agreement.

**Private Initiative Projects**

**Are there any regulations for Public Procurement of projects proposed by private companies?**

Yes.

**Does the private company proposing the project have any advantage for purposes of bidding?**

Yes. That advantage is determined in the relevant Bidding Conditions, so it may vary from one project to another.

**Review Procedures**

**Are there any judicial review procedures applicable to the bidding processes?**

Not a specific one. General rule of law may apply if necessary.

**Are there any judicial review procedures applicable when the contract has been executed?**

No.

**Overview of Public Procurement Contracts**

**What are the regulations applicable to contract terms and its extension?**

The term is regulated in the Bidding Documents. it may be a fix term or the term can be subject to obtaining a certain maximum income, thus making the term variable. The maximum term by law is, in any case, 50 years.

**Are there any guarantees that have to be posted for the performance of the contract?**

Yes.

**Are there any special powers upon the State?**

The State can oblige the project company to maintain the levels of service set forth in the Bidding Documents, with no compensation. - Only during the construction stage, the State can unilaterally terminate the project, and shall compensate the project company.

**Can fines or penalty clauses be agreed upon?**

The fines are specifically set in the Bidding Documents for each type of breach.

**Can the contract be assigned?**

Yes, but always with the previous approval of the State and only to a qualified successor.

**Can advance payments be established?**

Yes, but it is not usual.
How is dispute resolution regulated?

There is a Technical Board in charge of the settlement of technical matters. If the matter is not solved by the Technical Board (or if the controversy is not technical) it can be sent to a special Arbitral Tribunal, in charge of matters related to the Public Works Concessions Law only. The parties can also submit the controversy to the Santiago Court of Appeals.

Can international arbitration be agreed upon?

No

Is there any procedure for liquidation of the contract?

Yes, in case of early unilateral termination by the State.

Applicable Regulation

Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Public Works Concessions law and Public Works Concessions Regulations

Contact Information

Jorge Martín
jmartin@claro.cl
Claro y Cía., Abogados
Av. Apoquindo 3721, 14th Floor
Las Condes
755 0177 Santiago, Chile
Tel 56.2.367.3000 Fax 56.2.367.3003
www.claro.cl

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Overview of Public Procurement

What are the principal elements of Public Procurement regulation in your jurisdiction?

The following are the most important elements that relate to public procurement in Colombia:

We have one general public procurement statute consisting of two laws (Law 80 of 1993 and Law 1150 de 2007) and one presidential decree (PD 734 of 2012).

As part of the Continental-Civil Law Legal Family, our adherence to the legality principle is strict for public entities, meaning that the causes, the procedures, the types of selection and the prerogatives must be performed strictly based upon the regulations.

The following are the most important institutions in Public Procurement Procedures that a Contractor must recognize in order to participate in Public Procurement Procedures:

- **Feasibility Studies**: through these studies, tendering state entities indicate the technical, economic, social and legal reasons why they need a certain good or service and why they have chosen a certain public procurement procedure in order to acquire such good or service.
- **Request for Proposals ("Pliego de Condiciones")**: through this document, the tendering state entities establish the requirements that interested bidders must comply with in order to participate in such public procurement procedures. Also, through this document, the tendering state entities establish the evaluation procedures in order to guarantee an objective selection of the contractor which is going to perform the agreement.
- **Agreement**: In order to execute an agreement and for it to be valid under Colombian regulations, it must include the purpose of the contract and the price to be paid for the particular goods and/or services. However, these agreements are subject to other formalities. For instance, the agreement, in order to exist—(in legal terms)—must be in writing and the registry of its value must be assigned on the public entity’s budget.
- **SECOP (public procurement electronic procedures and information)** through the following webpage: www.contratos.gov.co, the tendering state entities must publish all the information and announce the initiation of the public procurement process. Through this web page, foreign bidders may review the requests submitted by tendering state entities.

The most important state entities regarding oversight of the public procurement procedures are as follows:

- **Office of the Comptroller General of the Republic ("Contraloría General de la Nación")**, this authority’s function is to control public expenses (fiscal control) basing its monitoring upon post review of the agreements executed by the tendering state entities and
Attorney General's Office ("Procuraduría General de la Nación"), this authority's function is to control and monitor the sanctions imposed on contractors in public procurement agreements. There is a possibility for citizens to monitor, review and participate in the public procurement procedures through citizen overview figures ("Veedurías Ciudadanas"). Under public procurement procedures, bidders may particip

Legal Framework for Public Procurement

What are the basic principles applicable to Public Procurement?

The basic principles that apply to the public procurement procedures are as follows:
- Public procurement statute: transparency, economic efficiency, objective selection, planning, economic equilibrium of the contract, reciprocity and responsibility.

What are the main regulations applicable to Public Procurement in your jurisdiction?

The public procurement statute is set forth in Law 80/1993 and Law 1150/2007. Additionally, there is the National Decree 734/2012 that regulates both of these laws.

What public agencies are subjected to the general Public Procurement regime?

According to our public procurement statute, all public entities are supposed to apply and adhere to the general public procurement regime, including the following:
- Nation
- Regions
- Departments
- Provinces
- District Capital (Bogotá)
- Special Districts
- Metropolitan Areas
- Town Association
- Native Colombian Territories
- Towns
- Public Establishments
- Industrial and Commercial State-owned Corporations (when they are not in direct competition with the private sector)
- Companies majority-owned by the Nation or any public entities
- Indirect decentralized corporations

What public agencies are not subjected to the application of the general Public Procurement regime?

The following public entities are not subjected to the application of the general public procurement regime:
- Public Utility Corporations
- Industrial and Commercial Corporations when they are in direct competition with the private sector
- Public Universities
- Inter-administrative Contracts
- Social State Enterprises
- Internet and Communication Technologies.
- Public entities entering into contracts with a non-profit organizations for execution of social programs
- Colombian Republic Bank
- Finance Sector Enterprises

Are there any non-public entities subjected to the application of the general Public Procurement regime?
Yes. Non-public entities that undertake monopolistic activity are subject to the public procurement regime. There is a possibility, in regulated markets, that the regulation commission that regulates the corresponding market authorizes the use of Exceptional Clauses (such as Unilateral Liquidation, Unilateral Modification, Unilateral Termination, Unilateral Expiration) in agreements executed by companies that undertake such regulated activities. In order to perform such powers, the companies must comply strictly with the regulation established in the public procurement procedures.

Requirements for Foreign Companies to Participate in Public Procurement Processes

Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

In the event a foreign company with no domicile in Colombia is awarded a contract which will be carried out in our country on permanent basis, such foreign entity will be under the obligation to set up a branch. Article 474 of the Code of Commerce states some iure de iure presumptions as follows:

- Open within the territory of Colombia commercial establishments or business offices, even if those commercial establishments or business offices have a technical or advisory character.
- Participate as contractors in the execution of works or provision of services.
- Participate in any way in activities aimed for the management, use or investment of Private Funds that comes from Private Savings.
- Engage in extractive industries or any of its branches or services.
- Obtain from a Public Entity a Concession Agreement or having it ceded by the means of any title or in any way, participates in the operating of the Concession Agreement.
- Its Board of Directors, Board of Associates, Management or administration is performed in the national territory. In case such Holding is not performing permanent business activity according to what we just established, the Foreign Company will be required to have a duly established attorney in fact, with domicile in Colombia and with ample capacity to represent them in and out of court.

Are there any reciprocity regulations?

The reciprocity principle permits the participation of foreign persons and companies as bidders, applying equal treatment of foreign bidders vis-à-vis Colombian bidders participating in a public procurement process. Pursuant to Law 816 of 2003, foreign entities are allowed to participate in government bidding proceedings on equal basis with Colombian nationals whenever (i) a free trade agreement so provides for it or (ii) Colombian nationals are treated equally (reciprocity) in the foreign entity’s home jurisdictions. To take advantage of this reciprocity benefit, the bidder is required to certify the existence of such agreement or national reciprocity treatment. Under Article 4.2.6 of PD 734 of 2012, the certificate required for the application of the Reciprocity Principle for National Treatment is given by the International Matters Director of the Ministry of International Relations and published in SECOP.

Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

Yes, on the following matters.

Media: there is a restriction on the limit of total foreign ownership in any business that involves broadcasting television channels. The restriction is 40% of the total foreign ownership.

National Security/Defense: INDUMIL (which is a state-owned company) is the only company in Colombia that may produce, import, and supply the Colombian armed forces and the national police with weapons, ammunition, explosives, equipment and complementary elements. Since INDUMIL is a state-owned company, neither foreign investors nor national investors may invest in it.

Nuclear power/atomic energy: The nuclear industry is highly regulated in Colombia and there is an absolute prohibition for foreign companies to invest in this particular sector.
Procedures for Awarding Public Procurement Contracts

Is there a Bidders’ Registry?

Yes. Any national or foreign individual or company, domiciled or having a branch of a foreign company in Colombia desiring to participate in public procurement procedures is required to register with the Single Proponents Registry (Registro Único de Proponentes or RUP). Any Foreign individual or company not domiciled or not having a branch of a foreign company is not required to register with the RUP.

Is electronic procurement fully implemented?

No. However, in Colombia, there is a public intention to implement electronic procurement. It is called “SECOP” (for its Spanish Acronym). There are two (2) phases for implementation of electronic procurement procedures. (1) Informative Phase (2) Transactional Phase Currently, Colombia is in the informative phase which relates to the publicity principles that govern the public procurement procedures. This means that the public entities must publish all the information required by law of the different selection processes they are conducting, with the purpose that the public in general has knowledge thereof and may present any observations or objections. If the contracting entity does not have the necessary technical resources to handle the logistics and publish all the information on its own web portal, the publication will be made through the Electronic System for the Public Contracting –SECOP. After the informative phase, the next phase will be the transactional phase. During this phase, contractors will be required to adhere to certain rules for the notification and the presentation of the various documents and communications with the public entity. This transactional phase is currently being designed by the authorities. This phase will be implemented gradually in close coordination with the Ministry of Information, Technologies and Communications which is providing technical assistance for such purpose.

What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

Due to the transition from an informative to a transactional electronic submission system, at the moment only certain information is required to be publicly disclosed. This phase will be implemented gradually together with the Ministry of Information, Technologies and Communications.

What are the possible ways of association for participating in public procurement proceedings?

The following types of associations may participate in procurement proceedings: (a) Consortiums, (b) Temporary Unions (“Uniones Temporales”), (c) Special Purpose Vehicles through so-called Future Association Promises, and (d) any other kind of association permissible under Colombian law.

What type of procurement procedures exist?

There are five different public procurement procedures. Each one of them depends on the different criteria the regulation establishes: (1) Public tender (2) Merits contest (3) Brief selection (4) Direct recruitment (5) Recruitment for small claims

What are the modes of selection processes and when are they applicable?

For each of the previous procurement procedures, there are different modes of selection applicable:

Public Tender
The public tender is a procedure by means of which a public invitation is extended by the tendering public entity so that those interested in entering into a contract with such public entity submit their proposals, from which the most favorable will be selected, subject to certain terms and conditions established by the tendering public entity.
Abbreviated selection
This mechanism of selection is quicker than the public tender, and is permitted in the following instances:
for those cases in which the object to be contracted has uniform technical characteristics;
for the purchase of agricultural destination products;
for minor amount contracts (determined based on the amount of the annual budget of the [tendering public entity]);
contracts for the rendering of health services;
the sale of government property (with the exception of what is regulated on Law 226 of 1995);
contracts which have as their object certain activities inherent to the industrial and commercial state entities;
the contracting of goods and services for defense and national security; and
when a public tender has been declared deserted ("desierto") due to the absence of qualified bidders.

Merits-based selection
The merits-based selection is a procedure for the selection of consultants, for the performance of projects in which the work to be undertaken is mostly intellectual. Accordingly, in a merits-based selection, the public entity will primarily consider the bidders' technical expertise and professional qualities and attribute lesser significance to the economic criteria to participate in the project.

Direct Contracting
Direct contracting is an exceptional selection mechanism, by virtue of which public entities can enter into contracts without previously carrying out a competitive selection process. The only instances in which such direct contracting mode of selection are allowed include the following:
contracting of loans;
inter-administrative contracts (those executed between public agencies);
manifest urgency (there exists manifest urgency when the continuity of the service demands the supply of goods, or the rendering of services, or the performance of works in the immediate future, when situations related to the exception states are presented; when there is a need to solve exceptional situations regarding calamity or facts constitutive of force majeure or disaster that demand immediate acts and, in general, when dealing with similar situations that make impossible the recourse to selection procedures or public contests);
rendering of professional services and support of management for the execution of artistic works that can only be entrusted to certain individuals;
goods and services for the defense sector and the Colombian Administrative Security Department ("Departamento Admi

Is the bidding company required to post any bond or insurance?

Yes. According to the PPS, the bidders must comply to constitute a Guarantee of Bid (Garantía de Seriedad de la Oferta)

What are the criteria for evaluation and comparison of bid proposals?

The criteria for evaluation and comparison of the different proposals depend on the terms of reference which establish what constitutes the so-called "best possible proposal." Article 32 of Law 80 states that the "most favorable option" is the one that "taking into consideration the evaluating factors such as compliance, experience, organization, equipment and price" turns out to be the most favorable selection for the tendering public entity. There is a prohibition to state price as the only selection factor in the public procurement procedures (however, there are exceptions when the public entity is offering to acquire goods or services that have uniform technical characteristics. In such case, price is the only relevant element to be addressed to evaluate the submitted bids). Once the proposals are submitted, the tender is closed and the tendering public entity initiates the evaluation period, which consists of the following steps: ?
First, the tendering public entity evaluates the qualification criteria of each of the proposals, that is, the compliance of the proposals with the legal and financial requisites of the terms of reference, as well as any other requisites referring to the capacity of the proponents to participate in the tender. The tendering public entity verifies whether there are any incomplete documents or any failure to abide by the requirements set forth in the terms of reference. The aforementioned requisites are habilitating and do not award any points in the final qualification of the proposal. The results of the first evaluation are published by the contracting entity in the
SECOP webpage through an evaluation report which contains a first analysis of which proponents comply with all the requisites and which do not (the “Evaluation Report”). Once the Evaluation Report is available, the proponents have the opportunity to controvert it in two ways: They are entitled to argue against the observations made by the contracting entity to their own proposal. The proponents also have the opportunity to analyze the proposals submitted by their competitors and to controvert or reinforce the observations made by the public entity against those proposals, as well as to add new arguments to determine the disqualification of the proponents from the tender based on the lack of compliance with the habilitating criteria set forth in the terms of reference. The observations to the Evaluation Report are submitted by each proponent to the state agency and they have the obligation to publish those observations in the SECOP web page. In a next stage, and once these observations are published, the PPS gives the opportunity for the proponents to controvert the observations made by their competitors. These observations are also submitted to the tendering public entity for it to publish them on the SECOP web page. Once all the observations have been made, the state entity analyses all the arguments presented by the proponents.

**What are the requisites for execution of contracts after awarding?**

The requisites for execution of contracts are as follows: (1) The posting of a sole performance bond ("Garantía Única de Cumplimiento"). This bond is usually a general insurance title which will depend on the object of the particular contract. (2) The sole performance bond must be approved by the tendering public entity. (3) The tendering public entity must confirm budget availability through the inscription of the registry, prior to execution of the contract. (4) The budget availability must be recorded by the Spending Director of the public entity. (5) The contract, in writing, must be executed by the tendering public entity and the contractor.
Private Initiative Projects

Are there any regulations for Public Procurement of projects proposed by private companies?

There has been a recent law approved by the Colombian Congress in which some private companies could and should propose projects to the public authorities. The name of the Institution is “Public-Private Associations”. The Public Private Associations are often used for the design and construction of infrastructure and public services related. These are similar to “Build Own Operate Maintain and Transfer Agreements” with the difference that it can be from private initiative or public initiative. In the private initiative, we can find two kinds of proposals for projects. One in which the project will need public resources (understanding these as money the public entity has to provide to the contractor in order to make the project viable) and the other in which the private funding is the only source for the investment to be made. There is also some special regulation that applies to the proposals of Port Concessions. Since 1991, the Port Concession agreements were opened to private equity investors in order to generate interest on the private sector to construct, operate and maintain Ports. Law 1 of 1991 is the General Port’s Statute. In it, a Portuary company that is already constituted is able to submit a proposal to the National Infrastructure Agency (ANI for its Spanish acronym) or Cormagdalena (Regional Autonomous Corporation) when the port is under its jurisdiction.

Does the private company proposing the project have any advantage for purposes of bidding?

If the private partnership is proposing an APP (“Public-Private Association” for its Spanish acronym), consisting only of private funding, the private company has an advantage when the public entity is willing to award the project. In this case, the private sector proposes a project presenting it in different phases (I, II or III) for the public entity’s review. Once the public entity approves it, the public entity must perform a public procurement procedure in order to award the project. For this, the public entity extends a public invitation to all interested bidders to bid for the project. Before the initiation of the public procurement procedure, the private company and the public entity must reach a settlement referring to the value of the feasibility studies done by the initiating company. Once this happens, other bidders may submit a proposal to the public entity as long as they provide the guarantees and bonds generally required for their participation. However—and here is where the advantage is present—once the evaluation process is done and, if the initiating private company is not awarded the project, the initiating private company has 10 business days to submit an improved bid. If, however, the initiating private company is not willing to improve its bid, it has the right to be reimbursed for all of its costs and expenses incurred for the structuring of the proposal. The value of the phase I, II or III studies is, as it was stated before, established before the public procurement procedure is initiated.

Review Procedures

Are there any judicial review procedures applicable to the bidding processes?

Proponents and third parties are entitled to initiate nullity actions (“acciones de nulidad y nulidad y restablecimiento del derecho”) against the administrative acts issued by the tendering public entity, which are (a) the resolution by means of which the tendering public entity opens the tender procedure, and (b) the resolution by means of which it awards the tender. These actions are of general application for all administrative acts issued by the State, and not only those referred to in tender procedures. However, its applicability is directly referred to in Article 77 of the PPS. However, the remainder of communications and documents issued by the tendering public entity during the tender process (such as the evaluation report, the observations to proponents’ offers or the definitive evaluation report) are not subject to the aforementioned actions, given that they are considered to be procedural acts of the state and not administrative acts. In addition to the aforementioned actions, both proponents and third interested parties have the right to initiate constitutional actions to defend their fundamental rights whenever they consider their rights are being violated by any action or proceeding of the State. In addition, in the event any person considers there are irregularities in a tender proceeding, such person can
contact the Attorney General’s Office in order to initiate a review of the tender process in question.

Are there any judicial review procedures applicable when the contract has been executed?

With the expedition of Law 80 of 1993, there is no automatic judicial review for the execution of agreements. However, the bidders who did not win the tender may sue if they feel that the public procurement procedure did not satisfy the guarantees established in the Request for Proposals (“RFP”) or if they think, based on the rules established in the RFP, they should have been awarded with the contract. Also, any interested citizen may require a legal court to declare the agreement invalid.

Overview of Public Procurement Contracts
What are the regulations applicable to contract terms and its extension?

The extension of a contract is not subject to restraints; however one exception applies to concession agreements which cannot be extended for more than 60% of their initial term. In reference to any additional terms, contracts cannot be amended for more than 50% of their initial budget estimation; this is established in the Request for Proposals (“Pliego de Condiciones”). For Public Private Associations, the amendments may not exceed 20% of the initial value established in the executed agreement. Also, in order to amend a certain agreement, the additional activities/terms must have a direct relation with the initial contract signed by the public entity and the contractor.

Are there any guarantees that have to be posted for the performance of the contract?

Whoever enters into any contracts with state entities is required to post a sole performance bond (“Garantía única de cumplimiento”) to ensure compliance with the obligations that arise from the performance of the contract, with the exception of loan contracts, inter-administrative contracts, insurance contracts, and those in which its value is below the 10% of the “minor amount” threshold established for the respective state entity. During the governmental contracting process, contractors may submit the following guarantees as a mechanism for risk coverage: (i) insurance policies (ii) Trust as a guaranty (iii) Demanded guaranty issued by a bank (iv) Securities endorsement as a guaranty (v) Cash Deposit. In addition, for the tendering process, foreign individuals or legal persons without domicile or branch in Colombia may submit stand-by letters of credit issued abroad as valid guarantees. The risks to be covered by the guarantee are the ones that derive from the breach of the offering or of the contract. The coverage amounts of the required guarantees are determined by law.

Are there any special powers upon the State?

Yes, in Colombia, they are known as exceptional clauses, which are powers bestowed on the tendering public entities to give them greater control over the contract and to preserve the general public interest. These clauses contain the following powers bestowed upon the tendering public entity: (i) unilateral interpretation of the contract provisions, (ii) unilateral modification of the contract, (iii) unilateral termination of the contract, (iv) unilateral early termination of the contract; and (v) its future expiry ordering the contract’s immediate liquidation. These powers can only be exercised by the tendering public entity upon the occurrence of events determined by law with the intention of avoiding the suspension or grave endangerment of the public service and to ensure the public interest. There are some contracts in which it is mandatory to establish exceptional clauses: (i) the contracts which have as their purpose the exercise of an activity that constitutes a state monopoly; (ii) the rendering of public services; (iii) the exploitation and concession of state goods; and (iv) public work contracts. On the other hand, state contracts in which exceptional clauses are prohibited include the following: (i) contracts with international public persons, or with cooperation aid or assistance persons; (ii) inter-administrative contracts; (iii) loan, donation or lease contracts; (iv) contracts which have as their purpose the commercial and industrial activities of state entities that do not correspond to those for which these clauses are listed as mandatory; and (v) insurance contracts entered into
by state entities. For services contracts, the tendering state entity may in its discretion establish certain exceptional clauses.

**Can fines or penalty clauses be agreed upon?**

Tendering public entities have the power to impose fines that have been contractually negotiated, with the intention of creating incentives for the contractor to comply with its obligations. Accordingly, a tendering state entity may declare a breach of contract with the aim of triggering the pecuniary penalty clause set forth in the underlying contract. In the public call for bidders there is a document entitled “Articles and Conditions” (“Pliego de Condiciones”) which regulates the entire public procurement procedure and the execution of the obligations contained in the agreement. There are some phases in the public procurement procedure in which the potential bidders can call upon the public entity so it would reconsider the penalty clauses (and any other consideration they consider it should be reformulated by the public entity). It is not very common that this situation actually happen, but as long as the potential bidder delivers a communication where it contains the proposal and the technical or law reasons as for why they should comply to the proposal, the public entity shall give an answer to it explaining the reasons why they do not agree or why they do agree.

**Can the contract be assigned?**

Public procurement contracts take into account the qualities of the contractor and acknowledging this, once executed they cannot be assigned without prior written authorization of the tendering state entity. Accordingly, in the event of a disbarment or other incompatibility reason affecting the contractor, which must then assign the contract with the prior written authorization of the tendering contracting entity, and if this is not possible, it shall terminate the contract. In the event of disbarment or other incompatibility reason affecting the contractor or one of the members of a consortium or temporary union, this shall assign the contract with the prior written authorization of the contracting state entity. However, no assignment of the contract is permissible between any persons or companies belonging to same consortium or temporary union. For the tendering state entity to approve the assignment of the contract, the proposed assignee must comply with all the requirements set forth in the terms of reference for the awarded contract.

**Can advance payments be established?**

In contracts entered into with tendering state entities, parties can agree on advance payments and the further handing over of anticipated payments. However, their amount cannot exceed 50% of the contract’s corresponding value.

**How is dispute resolution regulated?**

According to the PPS, there is a legal habilitation for public entities in order to use alternative mechanisms for dispute resolution. In the public procurement statute, there is a direct habilitation for public entities to execute agreements by which the following alternative dispute resolution mechanisms are established: Arbitration Clause, Conciliation, Transaction, and Amicable Composition.
Can international arbitration be agreed upon?

No. In the relevant contract, the parties may include arbitration clauses to resolve any disputes that may arise in connection with the relevant contract. However the arbitration proceeding must be subject to Colombian arbitration rules and proceedings. However, according to the Special Arbitration Law, international arbitration may be agreed upon by public entities when the following requirements are met (established in Article 4th of Law 315 of 1996) (i) the other party to the contract is a foreign company; (ii) when there is a long-term financing mechanism involved; and (iii) when the Public Procurement Agreement involves the operation and maintenance of a public service. Additionally, Article 80 of Law 80 of 1993 establishes that it is possible to agree upon international arbitration when the requirements established before are applicable to the agreement executed by the public entity.

Is there any procedure for liquidation of the contract?

Yes. The liquidation of public procurement contracts is a legal obligation, with the exception of the contracts to be performed in an instant manner. For such reason, the public procurement statute establishes different ways by which the parties may perform the liquidation of the agreement. This is performed in a timeline, starting with the mutual liquidation, followed by the unilateral liquidation by the public contracting entity and finally, the request for a judicial court for the liquidation of the agreement. In the following lines, we will explain how does this process works:

First, the parties must try to liquidate the agreement by consent. The term established for the performing of the mutual consent liquidation is either established in the contract or, if such term is not established in the agreement, then the legal default term of four (4) months shall apply. Second, if the mutual consent liquidation is not performed or there are some unresolved issues in the liquidation, the contracting public entity has the power to unilaterally liquidate the remaining not-liquidated events. The term by which the public entity may use this power is for two (2) months. However, if the contractor does not agree with the unilateral liquidation, the contractor may require a court to review the unilateral liquidation performed by the public contracting entity. Third, after this two-month period has expired and the public entity still has not performed the liquidation, the contractor may require a court to order the liquidation of the agreement. The contractor has this right for a period of two years. Finally, if the two-years term has expired and neither the public entity nor the private company have requested that a court liquidate the contract, the parties are required to perform the mutual consent liquidation to comply with the legal obligation to liquidate the agreement to which the public entities is a party.
Applicable Regulation
Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

SECOP (https://www.contratos.gov.co/puc/)
National Decree 734/2012 (http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=46940)

Contact Information

Carlos Umaña Trujillo
cumana@bu.com.co
Brigard & Urrutia Abogados
Calle 70 A # 4 - 41
Bogota, Colombia
Tel 57.1.346.20.11 Fax 57.1.310.06.09
www.bu.com.co

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A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

Public Procurement is regulated by the Egyptian Tenders and Auctions Law No. 89 for the year 1998 ("the Law"), the Law’s Executive Regulations as well as Ministerial Decrees related thereto and Circulars issued by the Ministry of Finance.

All contracts to be entered into by Government agencies must be referred to a competitive bidding process in accordance with the Law, except in certain exceptional situations, in which a contract may be entered into by means of a “direct order” by the competent official.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

According to Article (2) of the Egyptian Tenders and Auctions Law, Public Procurement shall be published, subject to equality of opportunities, equity and freedom of competition.

The abovementioned principles shall be applied whether the Public Procurement is taking place inside or outside Egypt.

Therefore, the publication of Public Procurements shall take place in daily newspapers, and other print media.

Further, a procurement shall, generally, be public. However, by way of exception, a procurement may be limited in case the procurement’s nature requires specific and reputable contractors, suppliers, consultants, experts or technicians.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

Public Procurement is regulated by the Egyptian Tenders and Auctions Law No. 89 for the year 1998 ("the Law"), the Law’s Executive Regulations as well as Ministerial Decrees related thereto. Periodical circulars issued by the Ministry of Finance also regulate Public Procurement in Egypt.

3. What public agencies are subjected to the general Public Procurement regime?

According to Article 1 of the Law promulgating the Tender and Auctions Law, Administrative units, including Ministries, Authorities, Authorities having their own budgets, Municipal Administrative units, any Public Authorities, whether economic or service providers, shall be subject to the Law.
Further, According to Article (2) of the said promulgation Law, the competent authority ("the Authority") shall be defined as the Minister as well as any officer having similar authorities, the Governor, or the chairman of the Board of Directors of a Public Authority. The competence of each one of the above persons shall be determined depending on their authorities.

It is also to be noted that the abovementioned Law applies to agreements concluded with the aforementioned Authorities regarding the purchase of movables, construction projects, transportation, receiving services, consultancy studies or technical works.

Prior to the conclusion of such agreements, generally, a public procurement shall take place.

The agreement to be concluded shall be in accordance with and within the limits of the provisions of the Law as well as its Executive Regulations.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

Based on the above, the Law applies to most public agencies. Any public agency to which the Law is not applicable shall be determined by virtue of a Law (e.g. the Egyptian Central Bank shall be excluded from the Law by virtue of Law No. 88 for the year 2003).

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

No.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

According to Article (61) of the Law’s Executive Regulations, the bidder shall be a resident in Egypt, or shall have an agreement with an Egyptian agent.

Therefore, in case of a foreign bidder, the bidder shall indicate his agent in Egypt, and shall submit the contact details of his agent in Egypt along with the bid documents.

Further, in case the aforementioned agent submits his principal’s bid documents, he shall add to them a certified Power of Attorney issued by his principal authorizing the said agent to act in the name and on the principal’s behalf.

2. Are there any reciprocity regulations?

No.
3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

According to Article (4) of the Law, an agreement shall be concluded with local suppliers and local contractors, if the value of the tender does not exceed L.E. 400,000. In that case, only local suppliers and local contractors are entitled to participate in the tender.

Local contractors and suppliers are defined as suppliers and contractors who engage in their activities in the Governorate in which the execution of the agreement shall take place.

Further, in certain cases, a limited procurement shall take place. In the latter case, all companies shall be restricted from participating except for companies to whom the invitation is sent.

A limited procurement shall take place in the following cases:

1. In case the products are produced or imported only by certain entities or persons.
2. In case the products’ nature or the purpose for obtaining them requires obtaining, purchasing or selecting them from their area of production.
3. In case the required works are technical and having a nature requiring specific experts, specialists or technicians.
4. In case the agreement is concluded clandestinely for security reasons.

It is to be noted that the above limited procurement does not exclude foreign companies and does not grant any exclusivity to Egyptian companies or entities.

Moreover, in urgent cases, where the public procurement procedures cannot be undertaken, the agreement shall be entered into with a person/entity chosen by direct order issued from the competent authority and by virtue of a license from authorized officials, depending on the value of the procurement.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

According to Article (6) of the Law’s Executive Regulations, the purchase administration existing in each competent authority shall have a registry of suppliers, contractors, consultants, technicians and experts located inside and outside Egypt.

Furthermore, the abovementioned administration shall register local suppliers, contractors, consultants, technicians and experts with which the aforementioned authority shall be dealing.

A registry is also maintained in the same aforesaid administration determining bidders restricted from participating in procurements.

The said registry determines the authority issuing the decision of a participant’s restriction and the reasons for the restriction.

2. Is electronic procurement fully implemented?

No.
3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

N/A.

4. What are the possible ways of association for participating in public procurement proceedings?

Pursuant to Article 62 of the Law’s Executive Regulations, it is possible for a consortium to enter into a Public Procurement. Said Article requires that each one of the companies forming the aforementioned consortium submit the following documents along with the bid documents:

1- An official extract of each company’s Article of Incorporation,
2- An official extract of each company’s bylaws,
3- An official copy of each the Consortium Agreement signed by each one of the companies forming the said consortium.

Further, in addition to the abovementioned required documents, a statement including the authorized persons to enter into agreements in the name and on behalf of the aforementioned companies, the limits of the latter’s powers, the names of the persons directly responsible for the execution of the Agreement’s conditions, signing receipts, issuing final quitances in the name of the company and a model of their signatures shall be provided. It is to be noted that the said signatures shall be identical to the ones on the Power of Attorney issued in favor of the said persons as well as the Consortium Agreement.

It is also to be noted that in case one of the persons forming the consortium is a natural person, the latter shall submit an official extract of his Tax Card and a certificate of his registration at the Sales Tax Authority.

5. What type of procurement procedures exist?

The types are: public tender, limited tender and direct order, as explained in section C.3 above.

Public procurement shall be published in a daily newspaper. Further, the publication of procurements may take place by other methods of media (e.g. websites, television, etc). The method of publication shall depend on the importance of the procurement as well as its value.

The publication of the procurement shall determine the period during which the competent Authority receives the bids, the required works, the bid guarantee, the performance guarantee, the price of the tender documents and their attachments, the conditions to be fulfilled by the participating bidders, the date of holding the inquiries session and any other data that the competent Authority deems necessary for the works to be undertaken.

In light of the above, in case a company or a person fulfills the above conditions, he may participate in the bid. The said participation takes place by the submission of the bid documents.

According to Article (10) of the Law, a bidder shall submit two envelopes; one including the technical proposal, and the other including the financial proposal.
In case of acceptance of a bidder's technical proposal, the other envelope shall be opened and taken into consideration, while comparing the bids of the different bidders.

The bid fulfilling the technical conditions and proposing the lowest price shall be awarded the project.

Further, according to Article (53) of the Law, in order for a bidder to participate in a public procurement, the bidder shall submit his bid signed by him. The submitted bid shall be stamped by the competent Authority. The submitted documents shall be sent against receipt. The bidder shall pay the price of the tender documents and the bid guarantee.

Furthermore, if the bidder is a company, an official copy of its Articles of Incorporation shall be submitted along with the bid documents.
In case the bidder is a consortium, the Consortium Agreement shall also be submitted along with the bid documents.

In any of the above cases, a statement of the persons authorized to enter into a contract in the name and on behalf of the company shall be also submitted. In addition, the powers of the said persons shall be determined in the said statement. Additionally, the bidding company shall submit its recent certified Tax Card. Said certification shall be obtained from the competent Tax Authority offices.

6. What are the modes of selection processes and when are they applicable?

Primarily, according to Article (11) of the Law, two envelopes shall be submitted by the bidder: one envelope including the technical proposal and the other for the financial proposal.

Two committees shall be formed: one shall have the role of opening the bidders’ envelopes and the second shall have the role of selecting the winning bid.

Initially, the first committee shall examine the technical proposal and the latter’s compliance with the conditions as well as the required standards. In the event of acceptance of the technical proposal, the envelope including the financial proposal shall be opened.

In all cases, all bids not complying with the conditions and standards shall be excluded. Further, the bid providing the best technical proposal and proposing the lowest price shall be awarded the project.

The competent Authority shall determine the date on which the envelopes shall be opened as well as the selection of the winning bid.

7. Is the bidding company required to post any bond or insurance?

Yes, pursuant to Article (17) of the Law, each submitted bid shall include a bid guarantee. The said sum shall be determined by the Authority but shall not exceed 2% of the value of the contract.

Any bid not including the abovementioned sum shall be rejected. The said sum shall be refunded to losing bids.
With respect to winning bids, the bidder shall pay the remaining sum requested for a performance guarantee of 5% of the value of the contract, to the Authority. Such payment shall take place within 10 days from the date of notifying the bidder that he has won the bid, in case the bidder resides in Egypt. If the bidder resides outside Egypt, the payment of the aforementioned sum shall take place within 20 days from the date of his notification.

In case of entering into a Supply Agreement, the required guarantee shall not be payable if the Supplier supplies the required products within the period required for paying the guarantee.

In the event of non-payment of the performance guarantee by the winning bidder within the abovementioned periods, the Authority is entitled to terminate the Agreement and to enter into an agreement with one of the following bidders based on their priority. Further, in this event, the bid guarantee shall not be refunded to the original awarded bidder.

Please note that no interest shall accrue on the performance guarantee. Also, cheques as well as letters of guarantee issued from any certified local bank are accepted.

The performance guarantee shall not be refunded to the winning bidder until the completion of the Agreement’s execution and after the termination of the warranty period. Subsequently, the entire sum or the remaining sum, if any, shall be refunded to the said bidder.

8. **What are the criteria for evaluation and comparison of bid proposals?**

   Pursuant to Article (13) of the Law, the committee deciding the winning bid shall compare the bids based on the following criteria:

   1- The technical proposal;
   2- The financial proposal;
   3- The compliance of the proposals with the standards and conditions stated in the tender documents and determined by the competent authority;
   4- The bidder’s reputation.

   In light of the above, any bids not complying with the conditions and standards shall be excluded. It is to be noted that the decision of rejection of a bid shall include the reasons of its rejection. The bidder providing the best technical proposal as well as the lowest price shall be awarded the tender.

9. **What are the requisites for execution of contracts after awarding?**

   Please be advised that the Law provides certain general provisions that shall be applied to all types of Agreements [I], as well as other provisions that shall be applied to specific types of Agreements [II], as follows:

   [I] **General Provisions to be applied to all types of Agreements:**

   Pursuant to Article (57) of the Law’s Executive Regulations, the contracting Authority shall be entitled to terminate the Agreement or execute the latter at the other party’s expense, in case the said party breaches any of his obligation stated in the Agreement. Upon the decision of termination, a notification shall be sent, against receipt, to the contracting party.
Further, Article (76) of the Executive Regulations stipulates that the contracting party is not entitled to waive his right to any or all of his entitlements. Further, the contracting party is not entitled to assign the execution of the Agreement to any third party.

In the event of death of the contracting party, the contracting Authority shall be entitled to terminate the contract. In this event, the Authority shall be obliged to reimburse any remaining sum paid on account of the performance guarantee. However, the Authority is also entitled to assign the execution of the Agreement to any of the decedent’s heirs, provided that the heirs appoint him as their agent and he is accepted by the contracting Authority.

In case the Agreement is concluded with a consortium and one of the persons forming the said consortium dies, the Authority shall be entitled to terminate the Agreement and reimburse any remaining sums paid on account of the performance guarantee or to require from the outstanding consortium member(s) to continue the execution of the Agreement.

In all cases, termination shall take place by virtue of a letter to be sent against receipt, and the contracting Authority shall not be obliged to undertake any additional procedures or file any lawsuits.

Furthermore, pursuant to Article 78 of the Law’s Executive Regulations, the contracting Authority shall be entitled to amend the quantity and scope of the Agreement, whether by increase or decrease, within the limit of 25% of the value of each portion of the Agreement. However, the conditions as well as the unit prices shall remain unchanged, and the contracting party shall not be entitled to claim any compensation for such amendment. In urgent cases and in cases of necessity, the Authority may exceed the abovementioned percentage.

[II] Provisions to be applied to specific types of Agreements:

A- With respect to Construction Agreements:

The period determined for the Agreement’s execution shall commence starting from the date the contractor is given access to the site.

In certain cases requiring technical necessity, the contracting Authority is entitled to add new clauses to the contract. The price of the execution shall correspond to market prices.

On a different note, pursuant to Article (79) of the Law’s Executive Regulations, the Contractor is obliged to act in accordance with Egyptian Laws and governmental and local regulations related to the Agreement’s subject.

Further, the Contractor shall be liable to retain order on the site and to execute any of the Authority’ administrative orders, such as excluding any sub-contractor neglecting or refusing to act in accordance with instructions.

The Contractor shall undertake all the necessary measures to prevent any damage or lethal accidents of workers, third parties or third party property. If the Contractor does not undertake the necessary safety measures, the Authority shall undertake the measures at the expense of the Contractor.
Pursuant to Article 80 of the Executive Regulations, the Contractor shall investigate the works’ nature and undertake all necessary measures to ensure the quality and conformity of the works to the prescribed and certified standards, designs and drawings. The Contractor shall also report his comments on the works to the Authority.

According to Article 81 of the Executive Regulations, all machines, equipment, and other tools needed to undertake the works shall remain on site during the period of the Agreement’s execution. Further, the Contractor shall not move or dispose of the said machines and equipment without the prior approval of the contracting Authority.

In addition, the guarding of the said machines and equipment shall be undertaken by the Contractor. The Authority shall not be responsible for any damage, theft or any type of loss thereto.

In addition, the Contractor shall be obliged to finalize the works subject of the Agreement on the due date. In case of the Contractor’s delay, the contracting Authority is entitled to grant the Contractor an additional grace period. However, after the expiry of the grace period, the Contractor shall be subject to a delay penalty at a rate of 1% per each week of delay. However, the entire sum of the penalty shall not exceed 10% of the entire value of the Agreement.

Notwithstanding the above provision, the Contractor shall be exempt from the aforementioned penalty if he establishes that the delay is due to force majeure. The exemption shall take place based on an advisory opinion issued by the competent administration in the State Council.

In the event of breach of any of the Agreement’s conditions or clauses or negligence of the Contractor in fulfilling his obligations, the Authority shall send a warning to the Contractor. The latter shall cure the said breach or negligence within 15 days from the date of receiving the warning. Otherwise, the contracting Authority shall be entitled to undertake any of the following procedures:

1- Termination of the contract.
2- Withdrawal of works from the Contractor and executing the Agreement with another contractor on the same terms, standards and conditions, at the Contractor’s expense.

Moreover, in this event, the Authority shall be entitled to retain all or parts of the materials, equipment, machines and tools belonging to the Contractor on account of payment of compensation. The Authority shall be entitled to sell the said equipment without any responsibility towards the Contractor.

The Authority shall not be liable before the Contractor in case of occurrence of any damage or losses.

The Authority shall also be entitled to keep any amount paid on account of the performance guarantee. Further, it shall have the right to deduct the due sums, fines, delay penalties, estimated value of losses, including price and expense differentials, owing to the Authority, from such guarantee. In case of insufficiency of the guarantee, the abovementioned entitlements shall be deducted from any sums payable to the Contractor under the Agreement. Furthermore, the Authority is entitled to obtain the due sums from any other administrative entity to which the Contractor is a creditor.
The Authority is entitled to do all of the above without the need to undertake any additional procedures or a file a lawsuit before the courts, and without prejudice to its right to claim any remaining due sums from the Contractor, in case of insufficiency of the abovementioned sums.

Pursuant to Article 85 of the Executive Regulations, the Authority shall be obliged to pay to the Contractor the agreed installments, in accordance with the development of the works. Payment shall take place within 60 days from the date of submission of the works summary to the Authority by the Contractor. The method of payment of the installments is determined in the Law’s Executive Regulations.

According to Article 87 of the Law, upon completion of the works, the Contractor shall remove the equipment from the site. In case of delay, the Authority shall be entitled to remove such equipment at the Contractor’s expense.

Further, after finalizing the work, the Contractor shall notify the Authority of the delivery date. On such date an inspection by the Authority’s representatives shall take place. Once the Authority confirms that the works have been completed in accordance with the agreed specifications, the warranty period shall commence.

If the Authority indicates that the works do not correspond to the specifications, then the delivery of the works shall be delayed in order for the Contractor to repair the works to be in accordance with the agreed specifications. According to Article 88 of the Executive Regulations, the Contractor shall warrant the final works subject of the Agreement, for a period of one year starting from the date of delivery of the works to the Authority.

In the event of appearance of any defect in the delivered works, such defect shall be repaired by the Contractor. Otherwise, the Authority is entitled to repair the defect at the Contractor’s expense.

At the end of the warranty period, any remaining sums paid on account of the performance guarantee shall be reimbursed to the Contractor.

B- With respect to Supply Agreements:

The period of supply shall commence from the date of notification of the supplier of the supply order issued by the Authority, unless the parties agree otherwise.

Pursuant to Article 90 of the Executive Regulations, the contracting supplier (the “Supplier”) shall be obliged to deliver the goods subject of the Agreement, on the due dates. The delivered goods shall be in accordance with the supply order, the standards agreed and the certified samples.

Further, the Supplier shall be obliged to submit the invoice for the purchased goods.

A committee for examination of the supplied goods shall be formed. In case the said committee discovers that the supplied goods do not confirm to the standards, terms, conditions and certified samples, the committee is entitled to reject the supplied goods. The Supplier shall be notified of such rejection and the reasons of refusal by virtue of a letter sent to him against receipt. Further, in the said letter, the Committee shall oblige the Supplier to remove the rejected goods and to supply different goods complying with the standards prescribed in the Agreement.
If the Supplier does not remove the rejected goods, the Authority shall be entitled to store the said goods in its warehouses. The cost of such storage shall be paid by the Supplier. Such cost shall be 2% of the good's value for each week of delay in removing the goods, with a maximum of four weeks of storage. After the expiry of such period, the Authority shall be entitled to contract with a different supplier for supply of the goods, at the Supplier's expense.

Pursuant to Article 94 of the Executive Regulations, in case of delay of the Supplier in supplying all of the required goods, the contracting Authority shall be entitled to grant the Supplier a grace period. However, the Supplier shall be subject to a fine of 1% of the goods' value for each week of delay, with a maximum of 3% of the said value.

In case of failure to supply the required goods, the Authority is entitled to undertake any of the following measures:

1- Purchase the required goods, at the expense of the Supplier, and in accordance with the terms and conditions provided in the Agreement.
2- Terminate the Agreement.

In the above cases, the sums paid on account of the performance guarantee shall be forfeited to the Authority. The latter shall be entitled to deduct any fines and any sums covering any damage or losses, from such guarantee. In the event the guarantee is insufficient to cover such sums, the Authority may deduct the said sums from any sums payable to the Supplier under the Agreement. Furthermore, the Authority is entitled to obtain the due sums from any other Administrative Authority to which the Supplier is a creditor.

The Authority is entitled to undertake the above without the need for any additional procedures or filing a lawsuit before the courts, and without prejudice to its right to claim any remaining due sums from the Supplier.

C- With respect to Agreements for the Sale of Movables:

In case of concluding a contract for the sale of movables by the contracting Authority with the winning bidder ("the Purchaser"), pursuant to Article 118 of the Law’s Executive Regulations, the Purchaser is obliged to deposit 30% of the contract’s value at the time of submitting the bid. Failure to do so shall entitle the Authority to confiscate the bid guarantee.

Further, the Purchaser shall pay the remaining 70% within 15 days from the day of winning the bid.

In case of delay in payment, the Authority is entitled to grant the Purchaser a grace period of ten days. Upon expiry of the said period, any sums paid to the Authority shall be confiscated by the latter, and the Agreement shall be terminated, without undertaking any governmental or judicial procedures.

In certain cases, and upon the Authority’s sole discretion, it may grant the Purchaser an additional grace period to pay the due sums.

However, in this event, the Purchaser shall be subject to delay fines. The value of the latter shall be in accordance with the interest rates published by the Central Bank of Egypt. The said fine shall be paid without prejudice to the Authority’s right to demand any due compensation from the Purchaser.
Furthermore, the Purchaser shall be obliged to take delivery of the purchased goods within 20 days from the date determined in the Agreement. In case of delay, the Authority shall be entitled to collect storage expenses from the Purchaser.

After five weeks of storage, the Authority shall be entitled to sell the movables subject of the Agreement to a third party for the account of the Purchaser. In that event, the Purchaser shall not be entitled to any margin of profit, and the price of sale shall be subject to a deduction of 10% by the Authority.

It shall be noted that only certain movables may be sold by the Authority. Said movables are determined by the Law’s Executive Regulations.

D- With respect to Agreements for the Sale or Lease of Movables and Licensing the Use or Exploitation of Real Property:

In case of concluding a sale or lease agreement, granting a license of use or of exploitation of real property, the bidder shall deposit a sum determined by the competent Authority as a bid guarantee.

The winning bidder shall deposit 10% of the entire value of the Agreement, as a performance guarantee.

E- With respect to Agreements for Purchase and Lease of Real Property:

Pursuant to Article 106 of the Law’s Executive Regulations, a bid guarantee whose value shall be determined by the Administrative Authority, shall be paid by the bidders prior to the conclusion of the Agreement. The value of the said guarantee shall not exceed 1% of the value of the Real Property subject of the Agreement.

In case of entering into a Purchase Agreement (i.e. the Administrative Authority purchases Real Property), as a guarantee, 5% of the value of the Real Property is to be retained by the Administrative Authority. Said value shall be reimbursed to the Seller upon registration of the Real Property Agreement before the competent Notary Public Office or after one year from the date of purchase, whichever is later. The purpose of said sum is to guarantee any defects that may appear in the purchased Property.

In case it is necessary to make certain modifications or additions to the Property subject of the Agreement, the Administrative Authority is entitled to require the Seller to execute such works.

Once the abovementioned works are finalized, the Administrative Authority shall certify the works and undertake the procedures for the Agreement to be signed.

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

   No.

2. Does the private company proposing the project have any advantage for purposes of bidding?

   No.
F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

The Law does not provide any judicial review procedures to the bidding process. In case of dispute, the parties may resort to the administrative courts.

2. Are there any judicial review procedures applicable when the contract has been executed?

The Law does not provide any judicial review procedures applicable during the execution of Agreements.

However, pursuant to Article (41) of the Law, an office shall be established in the Ministry of Finance. The said office shall have the role of overseeing government contracts and receiving any complaints regarding the breach of any provisions of the Law. The said complaints may be submitted by either of the Agreement’s parties against the other.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

Please see item No. D-9 above.

2. Are there any guarantees that have to be posted for the performance of the contract?

Please see item No. D-9 above.

3. Are there any special powers upon the State?

Please see item No. D-9 above. In addition, pursuant to Article 55 of the Law’s Executive Regulations, with respect to Construction Agreements, the contracting Authority shall be obliged to adjust the Agreement’s value, either by decrease or by increase of the said value. However, such adjustment shall take place only if the Agreement’s term exceeds one year, and is based on a set formula which takes into account certain criteria such as inflation and market prices for raw materials.

4. Can fines or penalty clauses be agreed upon?

Fines and penalties must conform to the guidelines established in the Law, as explained in section D-9 above.

5. Can the contract be assigned?

No, as Article 76 of the Law’s Executive Regulations provides that the contracting party is not entitled to assign the Agreement to any third parties.

6. Can advance payments be established?

Pursuant to Article (22) of the Law, the contracting Authority is entitled to pay certain sums to the contracting party in advance. However, such payment shall take place against a certified bank letter of guarantee.
7. How is dispute resolution regulated?

Disputes regarding Government contracts are subject to the jurisdiction of the administrative courts. However, according to Article 42 of the Law, the contracting parties may agree to resolve any dispute arising from the Agreement’s execution by Arbitration. However, such clause may only be included by virtue of an approval issued by the competent Minister.

In all cases, the contracting Parties shall continue the execution of the Agreement during the dispute resolution period.

8. Can international arbitration be agreed upon?

Yes. However, such agreement shall take place only by virtue of approval by the competent Minister.

9. Is there any procedure for liquidation of the contract?

No.

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Tenders and Auctions Law No. 89 for 1998, and its Executive Regulations.

Contact Information

Farah El Nahas  
farah.elnahas@shalakany.com

Shalakany Law Office
12 El Maraashly St., El Zamalek
Cairo, Egypt

Tel: 202.272.88.888
www.shalakany.com

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Public Procurement Guide

France

Gide Loyrette Nouel A.A.R.P.I.

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

Public procurements are contracts for pecuniary interest concluded by one or more public contracting authority with one or more economic operator (that can be either a public or a private legal person) for the provision of works, goods or services. A public procurement is different from a public service delegation contract in two aspects. A public service is delegated when a public legal person delegates the management and/or operation of a public interest service to a public or private operator, whose compensation depends substantially on the profits incurred by the operation of the public service by the operator.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The basic principles applicable to Public Procurement are freedom of access to public procurement, equal treatment between the candidates and transparency of procedures and are stated in Article 1 of the CMP (French Public Procurement Code), article 6 of the Ordinance of 6 June 2005, article 3 of the Ordinance of 17 June 2004 (PPPs) and article 5 of the Ordinance of 15 July 2009 (public works concessions).

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

The main regulation applicable to Public Procurement is for the most part found in the CMP adopted on 1 August 2006 and, for such contracting authorities that are excluded from the scope of the CMP in Ordinance No. 2005-649 of 6 June 2005 (partly replacing Law No. 91-3 of 3 January 1991 and Law No. 92-1282 of 11 December 1992). This regulation is supplemented by a large number of decrees and ministerial orders.

3. What public agencies are subjected to the general Public Procurement regime?

The State and its administrative public bodies (or EPA, opposite to industrial and commercial public bodies or EPIC), the local governments and local public bodies ("établissements publics locaux") are subjected to the CMP (Article 2).

Public bodies excluded from the scope of the CMP (such as certain national EPICs), however, are considered as ‘bodies governed by public law’ under the EU directives and therefore have to comply with EU procurement law. It is for this reason that specific legislation, in addition to the CMP, was enacted. This legislation, the Ordinance of 6 June 2005, applies to public law entities excluded from the scope of the CMP (such as certain EPICs) that were established for the specific purpose of meeting public interest needs, other than those which are industrial or commercial, and that fulfill one of the following requirements:

- their activity financed, for the most part, by a contracting authority subject to the CMP or to the Ordinance of 2005;
- being subject to management supervision by one of those bodies; or
having an administrative, managerial or supervisory board, of which more than half of the members are appointed by bodies mentioned in the first point above.

The Ordinance of 2005 also applies to administrative public bodies (EPA) with research activities and it designates some specific entities as contracting authorities, such as the Banque de France and the Caisse des dépôts et consignations.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

Some public entities like State industrial and commercial public bodies (établissements publics industriels et commerciaux de l'Etat, national EPICs) are excluded from the scope of the CMP, but are subjected to the Ordinance of 6 June 2005.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

In principle, bodies governed by private law do not constitute contracting authorities (provided that they do not act on behalf of a contracting authority).

Certain private law bodies and public bodies excluded from the scope of the CMP, however, are considered as "bodies governed by public law" under the EU directives and therefore have to comply with EU procurement law. It is for this reason that specific legislation, in addition to the CMP, was enacted. This legislation, the Ordinance of 6 June 2005, applies to private law bodies and public law entities excluded from the scope of the CMP that were established for the specific purpose of meeting public interest needs, other than those which are industrial or commercial, and that fulfill one of the following requirements:

- their activity financed, for the most part, by a contracting authority subject to the CMP or to the Ordinance of 2005;
- being subject to management supervision by one of those bodies; or
- having an administrative, managerial or supervisory board, of which more than half of the members are appointed by bodies mentioned in the first point above.

The Ordinance of 2005 also applies to private legal persons that are associations of contracting authorities.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

The introduction of a local preference criterion in a Public Procurement process is prohibited, as it would constitute a breach of European Union rules on Public Procurements. Indeed, the European Court of Justice held that the Treaty prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

Therefore, a Member State which reserves any public works to companies which have their registered offices in the region where the works are to be carried out is in breach of its obligations (ECJ, June 3, 1992, Commission of the European Communities v Italian Republic, Case C-360/89).

However, further to a decision of the French Administrative Supreme Court ("Conseil d'Etat"), an obligation to establish a local subsidiary, if it is justified by the object of the contract or its execution conditions, may nevertheless constitute a condition for its award.
contract shall be considered to meet this requirement, in the same way that a candidate already established (CE, 14 January 1998, Société Martin-Fourquin, No. 168688).

2. **Are there any reciprocity regulations?**

There is currently no reciprocity regulation in France and in the European Union. However the EU has decided to set up a response instrument to apply the “reciprocity principle” more positively.

The WTO’s Agreement on Government Procurement (GPA) signed in 1994 is the only binding WTO agreement on public procurement. Yet, participation in the agreement is optional and it does not cover all areas of government procurement. Moreover, exemptions are still set out, allowing parties to the agreement to reduce its scope. Therefore, on March 21 2012, the European Commission published a draft Regulation which seeks to clarify the rules governing the access of third countries to the public procurement procedures of EU Member States.

New powers for the Commission to restrict access to the EU market where third countries do not offer reciprocal access to their own markets are set to be created. These powers include: excluding tenders which have more than 50% third country content and imposing a mandatory price penalty on the tender value of the third country content.

3. **Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?**

The criterium of nationality is not relevant here. The CMP provides some sectors in which the opening to competition is limited, depending on the nature of the market. For national defense and security, the CMP provides specific measures (articles 180 to 184 of the CMP). Article 3 of the CMP lists the contracts of the public authorities that are excluded from the application of the Public Procurement rules. This concerns for instance the activities of research and development when the contracting authority doesn’t get the exclusive right of property on the results or doesn’t finance entirely the performance; arbitration and conciliation; employment contracts; purchase of existing art works; public electronic communication networks or when military confidentiality or the protection of the fundamental interests of State security requires it.

Sector-specific laws and decrees exist mainly in the fields of defense, justice, police and public health.

A sector-specific procurement legislation applies to contracts awarded in the field of defense. Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC was mainly implemented through the adoption of:

- Decree No. 2011-1104 of 14 September 2011, which has created a third part dedicated to defense and security contracts in the CMP; and
- Law No. 2011-702 of 22 June 2011, which applies to contracting authorities, like state industrial and commercial public bodies (EPIC) that are excluded from the scope of the CMP.

However, the procurement rules shall not apply to contracts where the essential interests of security of the French state are at stake under the meaning of article 346 of the Treaty on the Functioning of the European Union, or where they would impose a disclosure of information contrary to the essential interests of state security.

The award of contracts entered into by the State on its public domain, the object of which is the construction of buildings for the needs of justice, the national police forces, forces or the Defense Ministry services and which grants to the state the
possibility to purchase the buildings is subject to articles L. 2122-15 and R. 2122-28 et seq of the General Code on Public Property (and not to the CMP).

For the same needs and until 31 December 2013, emphyteutic leases (%u00e7a baux emphyt%u00e9otiques”) can be concluded on assets belonging to local governments (article L. 1311-2 of the General Code of Local Governments).

Lastly, there is sector-specific legislation in respect of real estate investment for public health-care institutions. Pursuant to articles L. 6148-2 et seq of the Public Health Code, specific emphyteutic leases on immovable assets that are entered into between public health-care institutions and their leaseholders and pursuant to which the latter are in charge of performing either a mission contributing to the performance of the health public service or to a general interest mission, are subject to competition procedures.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

A bidder’s registry exists for operators in the following webpage: http://www.e-marchespublics.com/presence_annuaire.html

There are two ways of registering: one is free and the other is not and ensures a priority referencing.

2. Is electronic procurement fully implemented?

Regardless of the value and type of procurement, the contracting authority can impose the transmission of applications and tenders electronically via its buyer profile, provided that the chosen sector of activity will not contain obstacles to the companies concerned by the scope of the contract.

For any purchase over €90,000, the contracting authority must publish a notice and tender instructions on its buyer profile.

Plus, for purchases of computer hardware and IT services for an amount exceeding 90,000 Euros, companies must submit candidatures and tenders via the buyer profile.

Since 1 January 2012, the contracting authority shall accept applications and tenders transmitted electronically (article 56 of the CMP).

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

The bidder has first to register on the website for electronic public procurements in order to get in his private space in order to select the procurements related to its activity, see the progress of the procurements to which it has participated, download files, bid electronically.

The advertising notices of procurement proceedings and the tender notice are in free access, but to get the tender documents, the bidder has to register online. Then the bidder shall file an application online and may submit a bid in response to the call for tenders online. The only requirement for the bidder is to have an electronic certificate that guarantees the reliability of its electronic signature, the certification authority that issues the electronic certificate must be in the list established in the following webpage: http://www.entreprises.minefi.gouv.fr/certificats/

4. What are the possible ways of association for participating in public procurement proceedings?

Different operators interested in bidding for a public procurement can associate to improve their chances of being successful. There are two ways of association for participating in public procurement proceedings: bidders may bid as joint and several
liability consortia or as several liability consortia. When bidders are severally liable in a consortium, each one of the bidders commits itself to execute one specific obligation for which he is more likely to be selected, whereas when bidders are jointly and severally liable in a consortium, each one commits itself to execute all the obligations of the contract. In both cases, one of the bidders shall be designated as the authorized representative of the other bidders in their relations with the contracting authority.

5. **What type of procurement procedures exist?**

The application of procurement procedures depends on the public contracts’ thresholds and, sometimes, on the type of public contracts (for instance, there are specific provisions related to the award of public works contracts including both design and building).

All the existing procurement procedures are listed in article 26 of the CMP:
- The ordinary law procedure is the **call for tenders**, that can be either open or restricted;
- The **negotiated procedures**, only in the limitative cases listed in article 35 of the CMP;
- The procedure of **competitive dialogue**, only when a public contract is considered as "complex", according to article 36 of the CMP;
- The procedure of competition, defined in article 38 of the CMP;
- The dynamic purchasing system, defined in article 78 of the Code.

Since the adoption of Decree No. 2011-1853 of 9 December 2011, the award of contracts **below €15,000** (excluding VAT) requires neither the publication of a contract notice nor the application of competition rules (article 28-II of the CMP). Previously only the award of contracts below €4,000 (excluding VAT) required neither the publication of a contract notice nor the application of competition rules. Nevertheless, these contracts are subject to the principles applicable to Public Procurement (freedom of access, equal treatment between the candidates and transparency of procedures).

Contracting authorities subjected to the CMP are free to choose the methods of publication **between €15,000 and €90,000** (article 40 of the CMP). Moreover, contracting authorities can freely determine the procurement procedures governing service and supply contracts **below €130,000** (for the State and its administrative public bodies) and **€200,000** (for local governments and, although they are considered as national public bodies, public health-care institutions); and works contracts **below €5 million**.

In the utilities sectors under the CMP, the award of contracts below €20,000 (excluding VAT) requires neither the publication of a contract notice nor the application of competition rules (article 146 of the CMP). Nevertheless, these contracts are subject to the principles applicable to Public Procurement. Contracting authorities are free to choose the methods of publication **between €20,000 and €400,000**; and for works contracts **below €5 million**.

In respect of contracts which are subject to the Ordinance of 6 June 2005, contracting authorities are free to choose the methods of publication for supply and service contracts **below €200,000** (or €130,000 for supply and service contracts of some central contracting authorities like the Caisse des Dépôts et Consignations) and for works contracts **below €5 million**. Similarly, they can freely determine the procurement procedures governing service and supply contracts **below €200,000** (or €130,000 for supply and service contracts of some central contracting authorities like the Caisse des Dépôts et Consignations) and for works contracts **below €5 million**.

In the utilities sector under the Ordinance, contracting authorities are free to choose the methods of publication for supply and service contracts **below €400,000** and for works contracts **below €5 million**.
contracts below €5 million. Similarly, they can freely determine the procurement procedures governing service and supply contracts below €400,000 and for works contracts below €5 million.

Above the EU thresholds aforementioned, however, the call for tenders applies in principle to contracts (other procedures apply in specific circumstances only), except in the utilities sectors, where contracting entities can freely use a negotiated procedure with the application of competition rules or, in specific cases, without the application of competition rules (article 144 of the CMP). A call for tenders can be open or restricted, at the free choice of the contracting authority.

Concerning contracting authorities, article 35 of the CMP distinguishes two kinds of negotiated procedure that can be used in specific cases above the EU thresholds (below these thresholds, negotiation can be used in any situation):
- The first procedure requires the publication of a contract notice and the application of competition rules.
- The second procedure neither requires the publication of a contract notice nor the application of competition rules. However, according to the CMP, the fundamental principles of freedom of access to public procurement, equal treatment between the candidates and transparency of procedures apply to all procurement procedures including the negotiated procedure.

As for PPPs, the prevailing type of procedure used is the competitive dialogue. A negotiated procedure can also be used under specific thresholds and be freely determined by the contracting authority, provided that some general requirements are fulfilled (article 7 of Ordinance of 17 June 2004).

The competitive dialogue (articles 36 and 67 of the CMP implementing article 29 of EU Directive 2004/18 and article 5 of Ordinance of 17 June 2004 on PPPs) can be used where the contract is considered as complex in two situations:
- when the contracting authority is objectively not able to define alone and in advance the technical means capable of meeting its needs; or
- when it is objectively not able to draw up the legal or financial structure of a project.

To start the competitive dialogue procedure, the contracting authority publishes a contract notice where it defines the results to be reached and the needs to be satisfied. After the selection of candidates, it opens a dialogue with each of the chosen candidates.

The aim of this dialogue is to identify and define the methods best able to satisfy the contracting authority’s needs.

The contracting authority must ensure equality of treatment among candidates and may not reveal confidential information to other candidates without the respective candidate’s agreement.

Having decided that the discussion is concluded and having so informed the participants, the contracting authority then asks the participants to submit their final tenders. The contract is awarded to the most economically advantageous tender.

6. What are the modes of selection processes and when are they applicable?

The contracting authority assesses the qualification of tenderers according to the candidates’ experience and professional, technical and financial abilities. Only minimum levels of capabilities connected and proportionate to the contract can be required. The CMP, Decree No. 2005-1742 and a ministerial Order of 28 August 2006 detail the information that can be required and taken into account by the contracting authority.

Such information is also provided by Decrees No. 2009-243 and No. 2009-244 for...
PPPs. For instance, the contracting authority is entitled to ask the candidate to provide quality certificates based on European standards.

If the documents required are missing or incomplete, the contracting authority can ask the candidate to provide such documents or to complete any incomplete forms. If these documents are still missing following a request from the contracting authority, the candidate is not allowed to submit its tender (article 52 of the CMP).

Furthermore, the contracting authority assesses the personal situation of tenderers (for example, their social and fiscal situation). Indeed, in specific cases listed in particular in Article 8 of the Ordinance of 6 June 2005, tenderers shall be excluded from participation in a public contract.

7. **Is the bidding company required to post any bond or insurance?**

Contracting authorities may require bidding companies to post some guarantees if justified by the subject-matter of the contract.

To determine whether to impose any warranty, except in cases where it is legally required, the administration takes into account various factors. On one hand the technical and financial guarantees of candidates, but also, on the other hand, the amount of the contract and its execution time, especially when a public works contract is awarded.

8. **What are the criteria for evaluation and comparison of bid proposals?**

The contracting authority awards the contract to the candidate that offers the most economically advantageous tender (article 53 of the CMP, article 14 of Ordinance of 6 June 2005 and article 8 of Ordinance of 17 June 2004).

The contracting authority assesses which offer is the most economically advantageous by reference to either one criterion (which must be the price) or several criteria connected to the object of the contract such as quality, price, running costs, technical merit, innovative characteristics, performance in environmental protection, the projected time of completion, aesthetic and functional qualities, after-sales service and technical assistance and delivery date (article 53 of the CMP).

Other criteria may be taken into account if the object of the contract justifies them.

As regards PPPs, several award criteria are compulsory: the price, performance objectives relating to the contract’s subject (especially as regards sustainable development) and the proportion of the contract that the candidate undertakes to award to small and medium enterprises (article 8 of the Ordinance of 17 June 2004).

9. **What are the requisites for execution of contracts after awarding?**

In works contracts and certain service contracts, contract documents may provide that the contractor shall make a periodic reporting on its commitment or the advanced of work.

E. **Private Initiative Projects**

1. **Are there any regulations for Public Procurement of projects proposed by private companies?**

   According to the Ministerial Circular of February 14 2012, some private companies may send to a public entity an unsolicited tender to submit a project that meets a need that would not have been identified yet.
However, unsolicited offers do not allow the public entity to contract directly with these companies. If the public entity wishes to pursue such a project, it must organize a call for tenders in order to provide all guarantees of impartiality, transparency and non-discrimination. Then, the contracting authority must be careful to avoid undermining the equality between candidates taking up the specifications and the technical of the initial unsolicited offer, and disseminating commercial or technical information protected by professional secrecy.

2. **Does the private company proposing the project have any advantage for purposes of bidding?**

   No. Once the public entity makes the project his own, it has to launch a call for tenders. Whatever the origin of the project, the public entity is bound to comply with the regulations on Public Procurement.

### F. Review Procedures

1. **Are there any judicial review procedures applicable to the bidding processes?**

   The administrative tribunals, the administrative courts of appeal and the French Administrative Supreme Court are competent for disputes in which public authorities or public bodies are concerned. In addition, civil tribunals or courts are competent to review the private law contracts signed by a contracting public body.

   There are the **normal proceedings**: the administrative tribunals are competent in the first instance and their decisions may be challenged in principle before the administrative courts of appeal.

   The French Administrative Supreme Court ("Conseil d'Etat") is competent to review the judgments of the courts of appeal. It is also competent for appeals in certain proceedings where time is of the essence.

   In normal proceedings, applications for review have no suspensive effect. Concerning admissibility, the plaintiff must show an interest in acting. Undertakings show an interest in acting when they have participated in a procurement procedure or show that they have been illegally prevented from submitting a candidature or a tender when they had actually intended to participate in the procedure. This judicial review procedure called "recours pour excès de pouvoir" can be lodged against the decision to award the contract. However, this judicial review cannot be used by unsuccessful bidders after contract signing.

   There are also two proceedings where time is of the essence: the **référé précontractuel and the référé contractuel**.

   In order to implement the Remedies Directive 2007/66/EC, France has recently adopted a great number of measures to improve the effectiveness of review procedures on the award of public procurement contracts (Ordinance No. 2009-515 of 7 May 2009 and its implementing Decree No. 2009-1456 of 27 November 2009).

   The **référé précontractuel** (article L. 551-1 et seq of the Administrative Justice Code) is applicable before the signature of a contract where breaches of the advertising and competition rules occur.

   The plaintiffs must show that they have an interest in signing the contract and that they could suffer a prejudice due to the breach of advertising and competition rules. Further to a decision of the French Administrative Supreme Court of 3 October 2008 (CE, 3 October 2008, SMIRGEOMES), the administrative judge must check that the breach of these rules could be detrimental to the plaintiff.

   Since the adoption of the above-mentioned measures in 2009, the plaintiff’s application for a référé précontractuel automatically suspends the procurement process until the
president of the competent administrative tribunal notifies its decision to the contracting body. The judge must then make his decision within a 20-day time limit, but not before the expiry of the 'standstill' period (so that the court makes its decision only when all challenges have been lodged). The 'standstill' period has itself been extended from 10 to 16 days following the notification of the awarding decision to unsuccessful bidders, reduced to 11 days when the contracting body has notified such decision electronically. The same time periods apply before the civil tribunals to private law contracts signed by contracting public bodies. On appeal, there is no time limit within which the French Administrative Supreme Court must give its decision.

The new legislation of 2009 has also created the référé contractuel, which is applicable after the signature of a contract where breaches of the advertising and competition rules occurred. The plaintiffs must show that they have an interest in signing the contract and that they could suffer a prejudice due to the breach of advertising and competition rules.

This new procedure allows unsuccessful bidders to obtain the cancellation of a public procurement contract in the most serious cases (article L. 551-13 et seq of the Administrative Justice Code).

The president of the competent administrative tribunal must give his decision within one month. On appeal, there is no time limit within which the French Administrative Supreme Court must give its decision. The same time period applies, before the civil tribunals, to private law contracts signed by contracting public bodies.

Plaintiffs are not entitled to bring a référé contractuel when they have already lodged a référé précontractuel and the contracting body has complied with the suspension of the tendering procedure and the ruling given by the administrative tribunal following the référé précontractuel.

In addition, a référé contractuel is not applicable to:

• contracts that are not subject to a prior advertising when the contracting body has made public its intention to conclude it (and has complied with a standstill period of 11 days running from the advertising notice);
• contracts that are subject to a preliminary advertising but for which the awarding decision must not be notified to unsuccessful bidders, when the contracting body has made public its intention to conclude it (and has complied with a standstill period of 11 days running from the advertising notice); and
• contracts based on framework agreements when the contracting body has notified the successful bidders (and has complied with a standstill period of 16 days or 11 days running from the advertising notice).

Finally, a recent decision of the Council of State has granted additional rights of review to unsuccessful bidders (Council of State, 16 July 2007, Tropic Travaux Signalisation, req. n°291545). Any unsuccessful bidder can contest before the contractual judge the validity of the awarded contract or of some of its clauses, and claim compensation in the same appeal or separately, where applicable. This judicial review procedure, called recours en contestation de la validité must be lodged in a two-month delay after contract signing. However, as the judge’s decision is not enclosed by any time constraints, unsuccessful bidders can lodge a referé suspension at the same time, in order to suspend the execution of the contract.

2. Are there any judicial review procedures applicable when the contract has been executed?

Once the contract has been fully executed, no appeal is possible against the contract. Nevertheless, an action for damages can be lodged against the Authority for any breach during the procurement process.
G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

Public contracts are subject to French public law which is not codified and public procurement contracts are subject to the CMP.

The extension of an existing contract requires an amendment to the existing contract or, if provided for in the contract, a unilateral decision taken by the contracting authority to continue the performance of the contract (article 118 of the CMP). Neither option requires a new procurement procedure, provided that the parties neither drastically change the conditions of the contract nor modify its object or provided that the parties face unforeseen technical constraints that are not attributable to the parties (article 20 of the CMP, see question C.3).

2. Are there any guarantees that have to be posted for the performance of the contract?

The constitution of a retention fund by the successful bidder may be required in the contract. Its amount cannot exceed 5% of the initial amount of the contract. Its purpose is to cover the reservations made by the contracting authority at the reception of the works, goods and services and the reservations it may make during the warranty period. The retention fund may be replaced by the operator by a first demand bank guarantee or by a joint and several guarantee acceptable to the contracting authority.

3. Are there any special powers upon the State?

The general rules of the administrative contracts provide the State with some exorbitant powers from ordinary law.

The State has the right to terminate unilaterally the contract for public policy reasons, subject to the total indemnification of the operator for the damage suffered (which is composed of the loss incurred and the lost profit). The State has such power even if there is no contractual clause stipulating it and any provision stipulating the contrary shall be deemed null and void.

The State has also an exorbitant power to implement unilaterally a variation of the contract for public policy reasons. The State has such power even if there is no contractual clause stipulating it and any provision stipulating the contrary shall be deemed null and void. The changes of the services provided by the operator that can be required by the State are defined in the General Conditions of Public Contracts (Cahier des clauses administratives générales or CCAG) for each type of procurement. The possibility for the State to change the scope of the services has however qualitative and quantitative limits. The price of the contract cannot be modified unilaterally by the State and shall be agreed by both parties. The unilateral modification of the contract by the State shall not lead to the economic disruption of the contract nor change its destination (article 20 of the CMP), otherwise it could lead to the termination of the contract resulting from the sole fault of the State.

According to the “théorie de l'imprévision”, in case an event that is unpredictable by the parties, independent from their will and that leads to an economic disruption of the public contract, the operator cannot be excused from performance, but the contracting authority has the obligation to indemnify the operator for such more expensive performance of the contract.

4. Can fines or penalty clauses be agreed upon?

Penalties for delay in the execution of the contract by the operator must be specified in the specifications. In the case contractual penalties would not be agreed, the contracting authority is entitled to claim damages for the repair of the loss caused by the
delay in the execution of the contract. The penalties will apply only after the prior formal notice of the operator remained without effect.

5. Can the contract be assigned?

An existing contract may be transferred to another supplier or provider without a new procurement procedure, because the transfer does not imply the award of a new contract (provided that the essential provisions of the contract are maintained, such as the duration, the price or the nature of the obligations performed). The transfer requires an amendment to the existing contract and the consent of the contracting authority (at least when the transferee is an actual third party, following for instance a merger or division by acquisition resulting in the creation of a new company, or a transfer of assets).

However, it must be noted that this principle is questioned by a European Court of Justice (ECJ) decision dated 19 June 2008 (C-454/06 Pressetext Nachrichtenagentur v Republik Österreich). According to the ECJ, ‘a change in the contractual partner’ must be regarded as ‘a change to one of the essential terms of the initial contract’ and constitutes a new ‘award of contract’ within the meaning of the EU procurement rules. Therefore, a new competition procedure is requested. However, the ECJ specifies that this does not apply in two cases: (i) if the change in the contractual partner is provided for in the terms of the initial contract or (ii) if the change in the contractual partner results from an organizational change of a purely internal nature’. As a result of this decision, contracting parties are advised to include, ab initio, a provision authorizing the assignment of the contract.

6. Can advance payments be established?

The operator is entitled to ask for advanced payments when the total price of the contract is above 50,000 € and the term of the contract is at least of 2 months (for defense and security contracts, it is above 250,000 € and for a term at least of 3 months). The advanced payments amount to 5% of the initial price if the contract’s term is less or equal to 12 months and they amount to 5% of an amount equivalent to 12 times the initial contract price divided the number of months for the term of the contract. The contract can provide however that the advanced payments can be superior to 5%, and rise up to maximum 60% of the contract price, in which case the operator shall provide a first demand bank guarantee.

7. How is dispute resolution regulated?

Article 127 of the CMP provides that the contracting authority and the operator can resort to advisory committees for amicable settlement of disputes, before taking proceedings before the administrative court (see answer to question no. 27). These committees have power to decide according to equity for the settlement of disputes. The Committees are neither courts, nor arbitration tribunals They only give a recommendation that the contracting authority may decide to follow or not.

8. Can international arbitration be agreed upon?

Article 128 of the CMP stipulates that the State, the local governments and the local public bodies can use arbitration procedure for the liquidation of their works and goods expenses as regulated in section IV of the French Civil Procedure Code (which includes international arbitration).

9. Is there any procedure for liquidation of the contract?

General Conditions of Public Contracts (“Cahier des clauses administratives générales” or “CCAG”) provide, for each type of public procurement, liquidation procedures.
In any case, the maximum time limit for payment is set at thirty days (except for public health-care institutions, for which it is set at fifty days).

H. Applicable Regulation
   1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Contact Information

Stephane Vernay
vernay@gide.com

Laurent Deruy
deruy@gide.com

Gide Loyrette Nouel
26, Cours Albert 1er
75008 Paris, France
Tel 33.1.40.75.60.00 Fax 33.1.43.59.37.79
www.gide.com

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Public Procurement Guide

Greece
Prepared by Lex Mundi Zepos & Yannopoulos

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

The legal regime of public procurement in Greece is based on the fundamental principles and procedures of EU public procurement legislation, as the latter has been interpreted by the EU Court of Justice and the European Commission. More specifically, Greece has fully implemented the Directives 2004/18/EC and 2004/17/EC as well as the Directive 2009/81/EC (“Defense Procurement”) and the Directive 89/665/EEC (“Remedies Directive”), as the latter has been amended by Directive 2007/66/EC. Besides, as regards public procurement which does not fall under the aforementioned Directives, Greek legislation does not dramatically differ from the main provisions of EU legislation. In its biggest part, domestic legislation stands nowadays codified. Moreover, Greece has established a detailed legal framework as regards the selection of private investors in Public Private Partnerships (PPP). Apart from these, extra care has been taken to incorporate into the public procurement legislation environmental concerns, by making for instance obligatory the conclusion of an Environmental Impact Assessment (EIA). Finally, it should be mentioned that a whole section of the public procurement law is specifically devoted to transparency and fighting of corruption.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

- the principle of publicity & transparency
- the principle of equal treatment and non-discrimination
- the principle of proportionality
- the principle of justification any adverse decision
- the principle of mutual recognition
- the principle of objectivity in assessing bids
- the principle of impartiality
- the principle of legal certainty and foreseeability
- the principle of efficiency of EU law

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

- Public procurement falling under Directives 2004/18/EC and 2004/17/EC is regulated by Presidential Decrees (P.D.) 60/2007 and 59/2007 (implementing the above Directives) respectively.
- Judicial review of the assignment procedures as well as disputes arising from the relevant public contracts is regulated by Law 3886/2010 (transposing into the Greek legal order the “Remedies Directive”).
- Public procurement for the assignment of public works contracts is regulated by the codifying Law 3669/2008.
- Public procurement for the assignment of public work studies and other relevant services provided by engineers is regulated by Law 3316/2005.
• Public procurement as regards PPP contracts is regulated by Law 3389/2005.

3. What public agencies are subjected to the general Public Procurement regime?

a) Public enterprises and public entities governed by public law and fulfilling duties relevant with public or general interest.

b) Legal persons governed by private law which are State-owned or which regularly receive at least 50% of their annual budget in the form of State subsidies, pursuant to the applicable rules, or in which the State has a capital holding of at least 51%.

c) Legal persons governed by private law which are owned by legal persons governed by public law, by local authorities of any level, by local associations of "communes", (local administrative areas) or by public enterprises or entities, or by legal persons as referred to in b) or which regularly receive at least 50% of their annual budget in the form of subsidies from such legal persons, pursuant to the applicable rules or to their own articles of association, or legal persons as referred to above which have a capital holding of at least 51% in such legal persons governed by public law.

d) Legal persons of private law that exert public authority.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

There are certain but limited exceptions as regards cultural agencies such as the National Opera.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

Many legal entities governed by private law but owned or being controlled by the State (see above under question No. 3) are either subjected to the general Public Procurement regime or have their own regulation which follow (more or less) the provisions of the general regime.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

Foreign companies are not required to set up branches or subsidiaries in Greece, but they must be located within an EU Member State, or within a Member State of the European Economic Area (EEA), or within a Member State to the Plurilateral Agreement on Government Procurement (GPA) of the World Trade Organization, or within a third State that has signed a relevant agreement with the EU. Participation in public procurement processes is also permitted to companies which have been established in accordance with the legislation of a Member State of the E.U., or the E.E.A., or a signatory to the GPA, provided that their central administration or their place of registry or their real centre of interests lies within such a Member State. In any event, pursuant to Article 80, para 2, in fin, of Law 3669/2008, foreign companies may be accepted irrespectively of their place of incorporation/registry in case of “special” or “special” types” of public procurements, that however are approved by the Minister of Environment, Physical Planning and Public Works. With respect to defense and security public contracts, Law 3978/2011 prescribes in Article 9 para. 3, that offshore companies
may not be lawfully engaged as sub-contractors, suppliers of goods or services, with respect to defense public procurements.

2. Are there any reciprocity regulations?

Despite the calls of the European Economic and Social Committee (EESC) for swift adoption of the announced Market Access Scheme for Procurement – MASP, with clear, transparent, tried and tested mechanisms for reciprocal opening-up of markets to ensure symmetrical access to public markets, this has yet to be adopted. However bilateral public procurement agreements are in place between Greece and third States, apart from those mentioned under question 13 above.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

Non applicable

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

There is a Contracting Companies’ Registry (“M.E.E?”) in the Ministry of Public Works and a Registry of Constructors’ Experience (“M.E.K”). This Registry is kept for the purposes of observing the technical experience of the constructors working for the contracting Companies, as listed in “M.E.E?”. Moreover there is the Public Procurement Agency that is established by Law 4013/2011 as well as a Central Electronic Public Procurement Registry set up in the Ministry of Development. Finally, there is a special Unit, namely the Public Procurement Monitoring Unit, whose purpose is to monitor the implementation of the European public procurement rules by the Greek procuring authorities.

2. Is electronic procurement fully implemented?

Although steps have been made, not many things have changed since the Final Report on Compliance Verification in Electronic Public Procurement in the EU/EEA Member States. This Report mentioned that the structure of e-procurement in Greece was at a very initial stage. The situation remains the same today, since the public procurement process for awarding the “E-Procurement project” was concluded in 2006, but the tender was only announced in 2009. The respective contract was only signed under the Troika pressure in 2011 and it is not expected to run until January 1st, 2013.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

It is without merit the attempt of any comments towards ameliorating e-procurement at this point, since the project of e-procurement has yet to be implemented and tested so as to identify any possible features to be altered.

4. What are the possible ways of association for participating in public procurement proceedings?

The most usual types of associations which are formed in order to participate in a public procurement process are those of association (union) of entities or joint ventures. The Greek legislation allows such associations to participate in tenders even if they do not have the form of a legal entity which is provided by law. However, it is very possible that such associations will be requested or even required to form a recognized legal entity once they have been selected and have been awarded the relevant public contract.
5. **What type of procurement procedures exist?**

Four types of procurement procedures exist, namely (a) the open procedure, (b) the restricted procedure, (c) the negotiated procedure and (d) the competitive dialogue procedure.

In an open procedure, any interested economic operator may submit a tender.

In the case of restricted procedures, any economic operator may request to participate and only candidates invited to do so may submit a tender.

In a negotiated procedure, the contracting authority consults the economic operators of its choice and negotiates the terms of the contract with them. The negotiated procedures are further divided into procedures with prior publication and procedures without prior publication of a tender notice. In the former case, once the contracting authority has received the requests for participation, it invites the selected candidates (a minimum of three) to negotiate.

Last but not least, another available procedure is the competitive dialogue. This procedure is used for the assignment of complex contracts. The contracting authority invites the selected candidates to conduct a dialogue until the (technical and/or economic and legal) solutions have been defined. At the end of the dialogue the tenders submit their final offers.

6. **What are the modes of selection processes and when are they applicable?**

In the case of projects of great importance, which require a high level of technical capacity and a sound financial standing, the candidates are called to participate in a pre-qualification process, in order to prove that their standing and capacities are above certain thresholds. Then, the main selection process for the ones which passed the first stage may take part in one of the ways that were presented above, under question No. 5. Direct award of a public contract is applicable to limited cases, such as those affecting State secrets, small value contracts, supplementary works, government to government contracts in defense sector etc.

7. **Is the bidding company required to post any bond or insurance?**

A participation bond issued by a bank, amounting usually to 5% of the budgeted price is required by all participating tenders. The contractor submits a good performance bond amounting to 10% of the contract value. As to public service contracts, the contractor is requested to submit a performance bond amounting to 5% of the budgeted value. Performance bonds on concession contracts are concluded on an ad hoc basis. In some tenders depending on milestones of payments (schedule) there may be requirement for bank letter for advance payment.

8. **What are the criteria for evaluation and comparison of bid proposals?**

Pursuant to the relevant provisions of the Directives 2004/18/EC and 2004/17/EC, which are fully applicable in Greece, the award is made either (a) to the tenderer with the most economically advantageous offer, based on criteria such as 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, or (b) to the tenderer offering the lowest price.

9. **What are the requisites for execution of contracts after awarding?**

Draft award contract annexed to the tender document in advance in knowledge of all participants Not subject to amendments/negotiation No tender procedure is completed before the contracting authority ratifies the outcome of the procedure. In case of a
contract for a construction of a public work, which is awarded through an open tender procedure, the contracting authority, after the award of the contract, notifies the selected contractor respectively. The contractual terms are included in this notification, as well as in the booklets, studies, plans and drawings that accompany it. The actual contract that is signed between the contracting authority and the contractor serves only as proof and it cannot alter the contractual terms, which are incorporated in the abovementioned documents. In any other event, the contract is concluded by the signing of the respective contract. Before the conclusion of any public contract and provided that the value of the contract exceeds the amount of 1,000,000 Euro without VAT, the Court of Audit runs a legality audit. Then, the contracting authority requests that the contractor submits anew all documentation and certificates whose period of validity has expired, as well as certificates of non-insolvency or liquidation.

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

Non applicable

2. Does the private company proposing the project have any advantage for purposes of bidding?

Non applicable

F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

In accordance with Directive 89/665/EEC, as amended by Directive 2007/66/EC, the Law 3886/2010 sets a series of detailed provisions as regards judicial review of the bidding processes. Such judicial review includes interim relief measures, annulment of the acts of the contracting authority and award of damages in certain cases. A requisite before initiating judicial proceedings for interim relief measures is that the candidates must file a pre-judicial objection/appeal before the competent organs of the contracting authority. The authority is then obliged to answer within a very short period of 15 days (Article 4 Law 3886/2010), and after that period the candidate may take recourse to applying for interim relief measures. Then, if the relevant application is accepted, the candidate is obliged to file an application for the annulment of any term or decision of the tender that is contrary to national/community law or even for the annulment of the contract, if the latter has been signed. Last but not least, pursuant to Article 9 of Law 3886/2010, the candidate may raise claims for damages, if the awarding authority proceeds to signing the contract despite the interim relief measures which may have been decided by the Court. Adequate judicial review procedures are also provided for the candidates of tenders who fall outside the scope of EU legislation. Such procedures may take the form of administrative courts’ review or civil law proceedings, depending on the legal nature of the contracting authority (whether it is governed by public or private law respectively).

2. Are there any judicial review procedures applicable when the contract has been executed?

Yes, any contractor can take recourse to the courts (in most cases, to the Administrative Court of Appeals) in order to claim the execution of the contract on part of the awarding authority, to request damages, to request payment or to defend against some decision of the same authority provoking damages to him/her. In particular with respect to public works, the relevant legislation provides that, before the initiation of judicial proceedings, the contractor must necessarily file an objection before the competent organ of the awarding authority and, in case of a negative answer; the contractor must lodge an administrative appeal before the Minister of Public Works.
Similar provisions apply as to the defense of a public supply contractor against damaging decisions (e.g. imposition of sanctions) of the awarding authority. Of course, the awarding authority can also initiate judicial proceedings against the contractor, in case the latter does not abide by the terms of the contract or the guidelines of the awarding authority.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

See answer under question 8 above. In any event Law 3669/2008 (Code on Public Procurements, applying mainly to public works contracts) has detailed provisions as regards any issues relevant with the execution of the contract, the specification of the contract terms, the contract’s conclusion, termination, extension, etc. However general principles and relevant parts of Greek Legislation (i.e. contract law) may also be deemed applicable, as subsidiary means of interpretation.

2. Are there any guarantees that have to be posted for the performance of the contract?

A letter of guarantee, usually amounting to 5% of the budgeted price, is required by all participants in tenders. When selected, the participant – contractor is called to replace the aforementioned guarantee letter with a performance guarantee letter, usually amounting to 10% of the contract value. As to public service contracts, the contractor is asked to submit a performance bond amounting to 5% of the budgeted fees. Performance bonds on concession contracts are concluded ad hoc.

3. Are there any special powers upon the State?

In general, when awarding a public contract, public authorities are placed in a superiority position with regard to certain features of the contractual relationship. However, there are also remedies for the contractor, in order to protect the overall equilibrium between the parties. Of course, general clauses relevant with state supervision of certain activities remain applicable.

4. Can fines or penalty clauses be agreed upon?

Indeed, penalty clauses can be agreed upon for any undue delay, which starts at a rate of 15% of the average value per day of the Work (Article 49, Law 3669/2008). Penalty clauses imposed for the non-observance of the final deadline cannot however exceed the amount of 6% of the total contract value (excluding V.A.T.). Also, all fees submitted as guarantees for the proper execution of the contract could be withheld, being considered as a fine imposed upon the contractor, in case of irregularities or defects in the performance of the contract on his/her/part (Articles 61 and 35, Law 3669/2008).

5. Can the contract be assigned?

Generally the contract cannot be assigned. In specific, with respect to public works this general prohibition is enshrined in Article 65 of Law 3669/2008 and can only be approved under the conditions of the said Article and Article 68 of Law 3669/2008. However, the Law on defense supplies provides for the assignment of contracts as per the procedure and according to the criteria of Articles 69-72 of Law 3978/2011. Moreover, according to Article 53 para 11 of Law 3669/2008, future receivables may not be assigned in general, although this is possible with regard to bank institutions or legal entities of public law or suppliers that maintain a credit relation with the tender with respect to a certain public work. (This is also prescribed by Article 10 of Law 3263/2004 and Article 106 para 2 of Law 3978/2011 re: defense and security public contracts)
6. Can advance payments be established?

In accordance with Article 51 of Law 3669/2008 (applicable to public works contracts), advance payments can be agreed upon, if it so provided for by the invitation for bidders. Such payment can go up to 15% of the total contract value. The advance payment can take part pursuant to a petition by the contractor only after he/she has settled his/her construction site. In this case, the contractor must provide the contracting authority with a letter of guarantee up to the amount of the advanced payment.

7. How is dispute resolution regulated?

Dispute Resolution is regulated predominantly through recourse to the jurisdiction of courts, although arbitration is an option also provided for public works. (Article 78 Law 3669/2008)

8. Can international arbitration be agreed upon?

Pursuant to Article 78 of Law 3669/2008 (public works contracts), arbitration can be agreed upon, if it is so provided for either in the call for bidders or in the contract itself.

9. Is there any procedure for liquidation of the contract?

Yes, the public procurement legislation contains provisions relevant with liquidation and the procedures to be followed in such a case (e.g. Article 61 of Law 3669/2008, Article 34 of P.D. 118/2007).

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Predominantly:
- PD 60/2007 (Directive 2004/18/EC)
- Law 3669/2008 (public works domestic legislation)
- Law 3316/2005 (public work studies and other relevant services)
- Law 3886/2010 (judicial review legislation)
Also:

- Law 3978/2011 (defense and security public contracts)
- Law 3433/2006, (supplies of defense materials)
- Law 3918/2011, (supplies in the health sector)
- Law 3580/2007, (supplies of organizations under the Ministry of Public Health)
- Law 2955/2001, (supplies of public hospitals etc.)
- Law 3389/2005, (on public private partnerships)
- Law 2362/1995 (Public Accounts Code)

Contact Information

Artemisia Papadaki  
a.papadaki@zeya.com

Zepos & Yannopoulos  
75 Katehaki & Kifissias Ave.  
115 25 Athens, Greece

www.zeya.com
Public Procurement Guide

Honduras
Prepared by Lex Mundi member firm Bufete Gutiérrez Falla

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

   National and Municipal Laws.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

   - Public Interest Principle
   - Efficiency Principle
   - Publicity and Transparency Principles
   - Free Competition Principle
   - Equality Principle
   - Freedom of Contract

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

   Public Procurement Law and Law for the Promotion of Public-Private Partnerships.

3. What public agencies are subjected to the general Public Procurement regime?

   - Government centralized entities
   - Government decentralized entities
   - Municipalities
   - Judicial Power, National Congress and any other public institution that finances its projects with public funds.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

   All public agencies must apply the Public Procurement Regime. Except in case that the funds to finance a determined project come from International Finance Organizations or International Donors and these Institutions establish a different regime.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

   No.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

   Yes. Branches, Subsidiaries or Agencies.
2. **Are there any reciprocity regulations?**

There is a Margin of Domestic Preference that prefers Honduran Companies over foreign. However, Bilateral or Multilateral agreements between Honduran and Foreign Countries may consider foreign companies as national for bidding processes.

3. **Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?**

Only National Companies (this is with Equity of 51% of Honduran Citizens or Honduran Companies) can contract in Honduras for Security Services and National Defense.

D. **Procedures for Awarding Public Procurement Contracts**

1. **Is there a Bidders’ Registry?**

Yes. The Bidders’ Registry is called ONCAE (Oficina Normativa de Contratación y Adquisiciones del Estado).

2. **Is electronic procurement fully implemented?**

The fully implementation of electronic procurement is in process. Actually in Honduras we only have Electronic Bidders’ Registry and a website for current bidding rules and documentation.

3. **What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?**

The presentation of bids is not electronic in Honduras. Bids must be presented personally at the accorded time and in the signaled place to the respective authority by all the bidders who want to participate.

4. **What are the possible ways of association for participating in public procurement proceedings?**

Bidders can associate as Joint Ventures, or participate individually.

5. **What type of procurement procedures exist?**

- International Public Bidding (Licitación Pública Internacional)
- National Public Bidding (Licitación Pública Nacional)
- Private Bidding (Licitación Privada)
- International Public Tender (Concurso Público Internacional)
- National Public Tender (Concurso Público Nacional)
- Private Tender (Concurso Privado)
- Single Source o Direct Tendergin (Contratación Directa)

6. **What are the modes of selection processes and when are they applicable?**

Selection Process is applicable for Public Procurement related to Construction of Public Works.

For selection processes the following criteria must be taken in consideration:

- Experience and expertise of the company
- Administrative and Technical capacity of the company
- Financial capacity of the company
- Company’s Compliance of Previous Contracts
- Legal Capacity to Contract with the Government or Governmental Institutions.

Selection Processes may vary depending on each Public Procurement Process.
7. **Is the bidding company required to post any bond or insurance?**

   Yes. Bidding companies must present bond or insurance for Maintenance of the Bid.

8. **What are the criteria for evaluation and comparison of bid proposals?**

   The first criterion is the fulfillment of technical, legal and financial conditions established in the Bidding Documents.

   Once the first assessment is made, the most important criterion is the Lowest Price Offered. This criterion is decisive to determine to which Company the contract is awarded.

9. **What are the requisites for execution of contracts after awarding?**

   The Signature of the Contract and post of the bonds and insurance in place and on time.

E. **Private Initiative Projects**

1. **Are there any regulations for Public Procurement of projects proposed by private companies?**

   Yes, by Public-Private Partnerships.

2. **Does the private company proposing the project have any advantage for purposes of bidding?**

   Yes. If the Authority studies the project and approves it the Proposing Company may be awarded with the contract for that project.

F. **Review Procedures**

1. **Are there any judicial review procedures applicable to the bidding processes?**

   It depends on the bidding process.

2. **Are there any judicial review procedures applicable when the contract has been executed?**

   Yes.

G. **Overview of Public Procurement Contracts**

1. **What are the regulations applicable to contract terms and its extension?**

   It depends on the type of Contract.

   One of the most important regulations is that if the term of the contract includes more than one Presidential Period or if it conveys any exemption, incentive or tax concession this must be approved by the National Congress.

2. **Are there any guarantees that have to be posted for the performance of the contract?**

   The company that wins the Bid must post a bond or insurance for the performance of the contract and to warranty the quality of the goods or services provided. Also, if stated in the Bidding Documents, a bond for any advanced payment may be required.
3. Are there any special powers upon the State?
   Normally annual price review. Any other depends on each bidding process.

4. Can fines or penalty clauses be agreed upon?
   Yes

5. Can the contract be assigned?
   This must be approved by the Authority.

6. Can advance payments be established?
   Yes. They are generally established for construction contracts.

7. How is dispute resolution regulated?
   Dispute Resolution is normally granted to the National Courts.

8. Can international arbitration be agreed upon?
   Yes, normally for Public-Private Partnerships.

9. Is there any procedure for liquidation of the contract?
   Yes.
H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

   National Constitution
   Public Procurement Law
   Regulation of the Public Procurement Law
   Administrative Process Law
   Law on Administrative Litigation
   Law for the Promotion of Public-Private Partnerships
   Law for the Promotion and Protection of Investments
   General Regulation to the Law for the Promotion of Public-Private Partnerships

   Weblinks:
   http://www.honducompras.gob.hn
   http://www.oncae.gob.hn
   http://coalianza.gob.hn/

Contact Information

Julio Pohl
julio.pohl@gufalaw.com

Bufete Gutiérrez Falla
Avenida La Paz, No. 2702
P.O. Box 2735
Tegucigalpa, MDC, Honduras

Tel 504.2238.5595 Fax 504.2238.6109
www.gufalaw.com
Public Procurement Guide

India
Prepared by Lex Mundi member firm Amarchand & Mangaldas & Suresh A. Shroff & Co.

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

The basic constituents of the public procurement regime in India can be classified as under:

1. The provisions of the Constitution of India, and its interpretation pursuant to judicial precedents;
2. The rules and guidelines issued by the Central Government/ State Government/ relevant governmental authorities/ governmental agencies, as applicable to such procurement;
3. The terms of the procurement regime of the applicable procuring entity (where the same is not a entity covered under (2) above), including illustratively, government owned companies and other public sector enterprises; and
4. Additionally the public procurement may be subject to terms and conditions of the sector specific legislation governing, illustratively, the end-use of the goods and services procured pursuant to the public procurement.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

As discussed in our response under question A.1 above, the foundation of public procurement legislation in India can be traced to the Constitution of India, and specifically the right to equality and non-discrimination mandated under Article 14 thereof. Pursuant to judicial review, this fundamental right, has been deemed to inter alia incorporate a consequent obligation on all state entities to undertake all contractual arrangements by state entities and distributions of state largesse (which include within their ambit, all public procurements) through the means of non-arbitrary, and reasonable procedures and practices. Any contractual arrangements/ public procurements that are in violation of the above, may, where challenged by any aggrieved party, potentially be invalidated by subsequent judicial review.

While presently there does not subsist any over-arching legislation specifically on public procurements, procurement of goods and services by the Central government in India are undertaken pursuant to the General Financial Rules, 2005, and the Delegation of Financial Powers Rules, 1978, as issued by the Ministry of Finance Government of India, which outline certain basic principles of procurement by the Central Government. Further public procurements are also subject to review (where deemed necessary) by the Central Vigilance Commission, and the procuring entities in all public procurements are required to adhere to the guidelines issued by the said commission in relation to all such procurements.

Additionally, there also subsist sector specific guidelines and regulations on public procurement, including illustratively:

(i) Defence Procurements are undertaken pursuant to the Manual on the Defence Procurement Procedure (“DPP”), as issued by the Ministry of Defence from time to time, with the presently applicable iteration, being DPP, 2011.
(ii) The procurement of stores for the Central Government is undertaken pursuant to the manual of the Directorate General of Supplies & Disposals, which is the relevant authority in respect of such procurements.

It is pertinent to note that the Government of India is presently in the process of legislating a public procurement bill, which shall encompass procurements undertaken by the Central Government, all bodies owned/controlled by the Central Government or established by an act of the Parliament, or otherwise specified by the Central Government (subject to these being entities that receive substantial financial assistance from the Central Government in so far as the utilization of such assistance towards procurement is concerned). Further, the proposed enactment envisages within its ambit, procurements towards goods, works, services, procurements for purposes of national security and on strategic considerations, entering into public private partnerships, and such other procurements as may notification be specified by the Central Government. It is pertinent to note that this draft bill does not presently contemplate the cessation of the applicability of other legislation presently in this domain, and is envisaged as operating concurrently with all such legislation. The draft of the bill can be obtained from the requisite authority at the following web address: <http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/58_2012_LS_EN.pdf> and corrigendum thereto at <http://164.100.24.219/BillsTexts/LSBillTexts/Errata/Cor_EN_58_2012_LS.pdf>

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 attracted in the case of bids where bidders undertake such practices to influence the bid process.

We may also note that various state and local governments and other governmental authorities, may also have separate financial rules and procedures applicable to procurements.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

Kindly refer to our response under paragraph B.1 above.

3. What public agencies are subjected to the general Public Procurement regime?

The provisions of the Constitution of India are applicable to all procurement by the government and government agencies, or entities otherwise deemed to be ‘state entities’ for the purposes of the Constitution of India. The concept of ‘state entities’, has been expanded through judicial review, to include within its purview, all departments and ministries of the Central and State Governments, all public authorities exercising statutory powers, every authority created under statute and even a non-statutory authority exercising public functions, or otherwise under the direct or indirect control of the aforesaid ‘state entities’. Therefore, all such entities, would be required to adhere to the over-arching provisions of the Constitution of India, in their public procurements.

Further, the scope of the proposed Public Procurement Bill is also similarly wide, and covers:

i. any Ministry or Department of the Central Government;

ii. any Central Public Sector Enterprise or undertaking owned or controlled by the Central Government;

iii. any company in which more than fifty per cent of the paid-up share capital is held
(a) by the Central Government; or
(b) by one or more companies in which the Central Government holds more than fifty per cent. of the paid-up share capital; or
(c) by the Central Government and one or more companies in which the Central Government holds more than fifty per cent. of the paid-up share capital.
iv. anybody established or constituted under the Constitution whose expenditure is met from the Consolidated Fund of India;
v. anybody or board or corporation or authority or society or trust or autonomous body (by whatever name called) established or constituted under an Act of Parliament or a body owned or controlled by the Central Government;
vi. any other entity which the Central Government may, by notification, specify to be a procuring entity for the purpose of this Act, being an entity that receives substantial financial assistance from the Central Government in so far as the utilization of such assistance towards procurement is concerned.

The other regulations and guidelines of the general public procurement regime (as discussed in the response under paragraph 8 above) may be additionally applicable to a public agency, depending on the (a) the nature of the procuring entity and (b) the sector to which the underlying public procurement relates to.

4. **What public agencies are not subjected to the application of the general Public Procurement regime?**

Please see response to Question B.3 above. All agencies that fall under the ambit of the understanding of 'state entity' for the purposes of the Constitution of India, would fall within the purview of the restrictions and regulations prescribed for public procurement. Entities that do not fall within this understanding of 'state entities', would therefore not be subject to such restrictions.

5. **Are there any non-public entities subjected to the application of the general Public Procurement regime?**

Non-public entities are typically not subject to the provisions of the general public procurement regime. However in certain cases, where projects/contracts are awarded to private entities by a governmental authority, the terms of the project agreements/bid documents may require that the successful bidder undertake all downstream procurements in accordance with prescribed guidelines, which inter-alia mandate procurement through international competitive bidding (ICB) processes. We may also note that the conditions of eligibility for certain exemptions/preferential status under applicable laws in India may also require adherence to specified procurement procedure.

Illustratively, eligibility for deemed export benefits (in certain cases) and declaration of a power project as a Mega Power Project, both mandate that the procurement by the person claiming such benefit/preferential status is undertaken on ICB basis.

C. **Requirements for Foreign Companies to Participate in Public Procurement Processes**

1. **Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?**

Foreign companies are, in most cases, not required to set up branches, subsidiaries, or otherwise enter into joint ventures and other commercial arrangements in relation to participation in bid processes relating to public procurement processes. At the same time it is pertinent to note that:

1. Certain bid documents for public procurements, may by their terms require that the successful bidder, incorporates a special purpose company (SPV), in India, for the purposes of discharging the contractual obligations. Further 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;

2. Where certain specified extent of the public procurement is identified by the procuring entity as being required to be sourced from India/ or subject to offset, this requirement would additionally be required to be adhered to by the successful bidder;
2. **Are there any reciprocity regulations?**

Under Indian law, there are no general reciprocity requirements in respect of public procurements. However, there may subsist:

(i) Bi-lateral/ multilateral trade agreements that may extend beneficial regimes to certain nations, including *illustratively* direct tax avoidance regimes.

(ii) Restrictions on the commercial transactions with certain host nations (as further discussed in our response under paragraph C.3)

3. **Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?**

Unless otherwise specified under the applicable bid documents, there typically no direct restrictions on the participation by foreign companies. However, it is pertinent to note that, as discussed under paragraph C.1:

(i) Certain bid documents for public procurements, may by their terms require that the successful bidder incorporate a special purpose company (SPV), in India, for the purposes of discharging the contractual obligations.

Further, under the prevalent foreign direct investment (FDI) policy of the Government of India, foreign investment is prohibited/ restricted in certain sectors, including, *illustratively*, the Defense Sector, wherein FDI permissible to the extent of 26% only.

(ii) There subsist certain sectors for which private participation is prohibited, such as Atomic Energy, Railway Transport (other than Mass Rapid Transport Systems), and therefore all private parties including foreign bidders would not be eligible for participation in public procurement for the same (except to the extent specifically permitted by the government).

(iii) To the extent certain specified portions of the public procurement is identified by the procuring entity as being required to be sourced from India/ or subject to offset, the foreign bidders would not eligible to participate and/ or would be required to adhere to such requirement.

(iv) There may exist certain specific host nation specific restrictions, including *illustratively*, restrictions on import of rough diamond from Cote d’Ivoire or arms and related material from Iraq, as specified under the terms of the Foreign Trade Policy.

It is also noteworthy, that 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. *Illustratively*, where any (Indian) procuring entity has existing loan arrangements with Export-Import Bank of United States, such procuring entity, may on account of such prior contractual arrangements, be required to not have such dealing with entities based in Iran (to such extent that the same is restricted under applicable laws of the United States of America).

**D. Procedures for Awarding Public Procurement Contracts**

1. **Is there a Bidders’ Registry?**

There is presently no centralized bidders registry. However, governmental agencies may, from time to time, pre-qualify/ empanel, certain bidders, on the basis of their technical qualifications, for identified categories of projects/assignments. Subsequently, during the validity of such pre-qualifications/ evaluations, bid documents for such category(s) of project/ assignments, may only be addressed to such pre-qualified/ empanelled bidders.
2. **Is electronic procurement fully implemented?**

Pursuant to the office memorandum dated November 30, 2011, and the amendment thereto dated March 30, 2012, as issued by the Department of Expenditure, Ministry of Finance, Government of India, the government of India is in the process of introduction of an e-procurement regime, under which procurements by the Central Government, Central Public Sector Enterprises and autonomous/statutory bodies constituted by the Central Government would be required to undertaken through e-procurement. Presently e-procurement is being introduced by these bodies in a phased manner, in respect of tenders of value of INR One Million and above.

It is pertinent to note that the procuring entity is presently able to opt out of the e-procurement process, in cases where it is able to demonstrate confidentiality requirements, on account of national security or otherwise to safeguard the interests of such procuring entity.

Corresponding measures are also being implemented by various state governments.

3. **What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?**

For participation in bids processes of the Central Government, the Bidder is required to obtain registration on the e-procurement portal of the Central Government, <http://eprocure.gov.in>, and also obtain necessary digital signatures and e-tokens, from the designated providers. Further, bids are required to be submitted only in identified electronic formats of PDF/xls/rar/dwf, unless otherwise specified by the authority issuing such tender. Additionally requisite bid security, and other specified documents, may notwithstanding the electronic tendering process, be required to be provided in original hard copy (and not in electronic form).

Similar requirements are also specified in respect of procurements by various state governments, where similar web portals of the relevant state governments have been/are in the process of being created.

It is pertinent to note that as the Government is in the process of transitioning to e-procurement processes, there may be instances where bid documents are not uploaded on the designated web portals, or that the same are only available for download in electronic format (without a corresponding electronic submission process) or available solely in hard copies.

4. **What are the possible ways of association for participating in public procurement proceedings?**

The nature of the associations permissible for participating in public procurements in India, is governed by the terms of the tender documents. Typically, the following association mechanisms are available:

(i) Incorporated joint venture, with the bidders being shareholders in such company.

(ii) Unincorporated joint venture, through the submission of joint bid. Typically where a bid is submitted through the means of a unincorporated joint venture, the bid documents also require the submission of a joint bidding agreement and/or a memorandum of understanding and/or letter of association, recording such unincorporated joint venture and the submission of a joint bid thereby.

Participation in bid processes may also be undertaken through other forms of associations of persons’, such as partnership arrangements, societies etc. However such associations are not commonly utilized for participating in bid processes, *inter-alia* on account of taxation (and other financial) inefficiencies.
5. What type of procurement procedures exist?

Some of the prevalent mechanisms for public procurements are as under:
(i) Procurement through the means of an advertised tender enquiry, which in addition to publication on the authority’s website/ other governmental websites, are also typically published in national newspapers having a wide circulation and in the Indian Trade Journal (published by the Government of India). Where it is contemplated as being a global tender, the bid documents are also to be circulated to the embassies of foreign states and provided for publication on the websites of such embassies;
(ii) Procurement through a limited tender enquiry, where the tender is provided to only certain (previously) pre-qualified/ empanelled bidders;
(iii) Procurement through swiss challenge method, in respect of projects proposed by private parties;

6. What are the modes of selection processes and when are they applicable?

Subject to the applicable sector specific regulations and legislation, the mechanism for the selection of the successful bidder, is typically subject to the requirements prescribed in terms of the applicable bid documents. Some the commonly adopted mechanism for the selection of the successful bidder in bid documents, are enumerated below:
(i) Selection of the lowest bidder (L1 method), this method is typically adopted for the selection of the successful bidder, inter-se technically qualified bidders, in respect of lump sum and rate contracts;
(ii) Selection of the highest bidder (H1 method), this method is adopted for the selection of the successful bidder, inter-se technically qualified bidders, in respect of revenue sharing based contracts and/ or contracts that contemplate an upfront premium from the successful bidder and/ or provide for a return on equity investment by the procuring entity.
(iii) Selection of the bidder requiring the lowest government grant, or the lowest subsidy (as evaluated on a net present value basis), which is typically adopted for projects that are financially not viable (or have low viability);
(iv) Selection of the bidder requiring the shortest concession period, which is typically adopted for projects that a fixed revenue stream
(v) Selection of the bidder offering the high extent of capacity creation, investment, or otherwise the highest quantum of work. This may be adopted on a case to case basis. Illustratively, this mechanism is adopted under the bid documents for production sharing contracts for oil & gas resources, where the bid parameter is inter-alia the minimum work program offered to be undertaken by the bidder.

Further selection of the bidder may also be based on the combined scores from the evaluation of their technical bid and financial bid, on the basis of a pre-determined weightage mechanism. In 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 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.

We may also note that certain procuring entities may also reject bids that are extremely low or otherwise on financial terms extremely prejudicial to the bidder (this is typically evaluated on the basis of the prevailing market rates).

7. Is the bidding company required to post any bond or insurance?

The terms of the bid documents may prescribe the bidders to provide identified extents of bid security for the purposes of the bid. This bid security may either be a lumpsum
amount, or be an identified percentage of the bid value. This bid security is typically returned to the unsuccessful bidders upon the selection of the successful bidder, while the bid security for the successful bidder is retained, until replaced with the requisite performance security (discussed below).

It is pertinent to note that as a part of the contractual arrangement with the procuring entity, the successful bidder is required to also provide performance security, for the due performance of the contractual obligations by the said bidder. This too, as in the case of the bid security, may be specified as a lump sum amount, or an identified percentage of the bid value.

Further, all bid securities/ performance securities, are typically in the form of an on demand bank guarantees (or in case of smaller amounts, on demand bank drafts). In certain cases these may be supplemented/ replaced by (a) a parent company performance guarantees, provided by the parent companies of the bidders, and (b) payment retention mechanisms, where under certain part of the payment from each tranche payable under the contract is retained, and is only released on the due completion of the entire contract.

8. What are the criteria for evaluation and comparison of bid proposals?

The criteria for evaluation and comparison for bid proposals, subject to adherence the paramount requirements of non-arbitrariness and reasonableness (as mandated by the Constitution of India), would be dependent on the specifications and criterion prescribed by the procuring entity in its bid documents. In this regard, certain general principles may be specified as under:

(i) Satisfaction of the technical qualification requirements:
   - Past experience of the bidder, particularly for similar assignments;
   - Availability of qualified personnel with the bidder, which may also include experience in similar assignments;

(ii) Satisfaction of the financial qualification requirements:
   - Networth & solvency of the bidder;
   - Financial capacity to undertake the proposed assignment under the bid;

(iii) Financial Proposal
   - The proposal would be evaluated on the basis of the L1 or H1 methods (as further enumerated in response under paragraph 21 above)

9. What are the requisites for execution of contracts after awarding?

The requisites for the contractual arrangement between the parties, would be dependent on the terms of the bid documents issued by the procuring entity. However, certain pre-requisites for the execution of the contractual arrangement between the successful bidder and the procuring entity, as are commonly seen in the Indian context, are enumerated below:

(i) The contract would be required to be executed on behalf of each of the parties, by their duly authorized officials. Typically, in the case of the successful bidder, the copy of the corporate resolutions/ powers of attorney/ agency agreements, etc., pursuant to which the requisite authorisation is granted to its authorized signatory, would, in most cases, also be required to be submitted to the procuring entity;

(ii) Where the bid documents contemplate the incorporation of a special purpose company in India by the successful bidder, such company would typically be required to be incorporated prior to the execution of the contractual arrangement, and upon its incorporation, such company would execute the contractual arrangement, on behalf of the successful bidder.

However, in certain cases, where so permitted by the terms of the bid documents, such contractual arrangements may be entered into by the
successful bidder, and subsequently novated/ assigned in favour of the special purpose company (upon its incorporation).

(iii) In certain cases, the procuring entity may, pending the execution of the contractual documentation, issue a letter of award/ letter of intent, to the successful bidder, encapsulating the key terms of the proposed contractual arrangement, and the successful bidder would be required to execute requisite assents and confirmations in respect of such letter of award/ letter of intent.

(iv) Where the bid documents prescribe the requirement of any performance security, such performance security, would typically be required to be provided to the procuring entity, on or prior to the execution of the contractual arrangement.

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

In Indian context, public procurement of projects, proposed by private developers, is typically only seen in the context of award of contracts on swiss challenge basis (that is, in cases where a private proponent suo-moto suggests the undertaking of public projects, and wherein in the subsequent bid process, the said private proponent is granted a right to be awarded the said project, subject to it matching the proposal of the highest evaluated bidder). This mechanism of bidding for projects, has pursuant to judicial challenge and review, been upheld as permissible under Indian law, but is subject to the following pre-requisites:

(i) The categories of projects available for bidding on a swiss challenge basis, and the process for submitting such swiss challenge proposals by the private proponent should be pre-identified and publicized by the relevant procuring entity.

(ii) The private proponent so suggesting such project, must in its proposal include:
   (a) Articulation of the public need for the project;
   (b) Requisite technical details of the project, i.e. details of alignment, site, cost estimates etc.
   (c) Requisite financial details, for example the details of the potential toll, revenue, internal rate of return, net present value, that may be availed of from the project;
   (d) Cost incurred by the original private proponent for undertaking the development studies related to the project.

(iii) Where the proposal of the private proponent is deemed acceptable, the procuring entity, may, invite competitive bids for the said project. As a part of the bid documents, the proposal submitted by the original private proponent along with all the information, reports, studies and data provided by the original private proponent is to be made to the other bidder.

(iv) Where highest evaluated proposal pursuant to such bid proposal is that is evaluated to be superior to that of the original private proponent, and then such original private proponent is entitled to match make a superior offer, and be thereafter awarded the project.

(v) Additionally every procuring entity utilizing the swiss challenge method:
   (a) the project be bid on a transparent and competitive bidding process;
   (b) the swiss challenge based bid process, should not be adopted in case of projects that are not amenable to competition, for example, projects requiring proprietary technology;
   (c) the government should limit the availability of state support arrangements such as, viability gap funding.

In this regard it is pertinent to note that the proposed national public private partnership policy of the Central Government, presently contemplates that swiss challenge based proposals should not be the preferred. At the same time, various state governments, such as those of the states of Gujarat, Andhra Pradesh, and Karnataka, specifically
recognize Swiss challenge as a mode of procurement by governmental agencies, and have prescribed guidelines and regulations in respect thereof.

2. **Does the private company proposing the project have any advantage for purposes of bidding?**

The private project proponent initiating a public procurement process would in any event, have the benefit of substantially higher time periods to evaluate viability of the said project, and put in place mechanisms for creation of cost efficiencies and obtain necessary technical qualifications for such project.

Further, where the project is undertaken on a Swiss challenge basis (as discussed in our response under paragraph E.1 above), the developer has a preferential right to such project, in the form of a right of first refusal on the project, and would be entitled to undertake such project, where it is able to match the offer of the highest evaluated bidders.

**F. Review Procedures**

1. **Are there any judicial review procedures applicable to the bidding processes?**

Bid processes of all ‘state entities’ (as discussed under the response in paragraph B.1 above), are subject to limited judicial review in exercise of the writ jurisdiction of the High Courts and the Supreme Court of India. Typically, the courts intervene in the bid process only on the grounds of violation of constitutional or statutory provisions, or on account of, the lack of probity, fairness and transparency, or reasonableness, or the presence of arbitrariness.

2. **Are there any judicial review procedures applicable when the contract has been executed?**

The judicial review mechanism specified in the response under paragraph F.1 above, would be equally applicable to contractual arrangement executed in furtherance of a bid process undertaken by ‘state entities’ or entities otherwise subject to public procurement laws.

Further, the contractual arrangement would also be subject to judicial review/ specific performance through intervention of the courts having the requisite jurisdiction, with respect to non-compliance with the terms of such contractual arrangement.

**G. Overview of Public Procurement Contracts**

1. **What are the regulations applicable to contract terms and its extension?**

The terms of the contract governed by Indian law would be governed by the terms of the Indian Contract Act, 1872. Where the contract relates to the sale of goods or transfer of any property it would additionally be subject to the Sale of Goods Act, 1930 and the Transfer of Property Act, 1882 respectively. Additionally, contractual arrangements may be subject to the terms of sector specific legislation, for example, contracts relating to the power sector, may additionally also be subject to the provisions of the Electricity Act, 2003, and the rules and regulations made thereunder.

It is also pertinent to note that where an extension of terms of contract for public procurement is contemplated, the same is required to be undertaken through a fresh public procurement process. A deviation from this rule is only permitted in the rarest of exigencies, and is subject further, to the relevant procuring entity being able to demonstrate sufficient and reasonable grounds requiring such extension of the current contractual arrangement with the present parties.
2. Are there any guarantees that have to be posted for the performance of the contract?

As discussed in our response under paragraph D.7, above, the successful bidder may be required to submit requisite performance security for the performance of its obligation under the contract, which may take the form of performance bank guarantees, parent company guarantees, and/ or payment retention mechanisms.

3. Are there any special powers upon the State?

The State under Indian law is entitled to sovereign immunity with respect to exercise of its sovereign functions. However, such immunity, is not available in the context of purely commercial contractual arrangements, such as those undertaken pursuant to a typical public procurement process, and the contractual obligations of the ‘Indian State’ may, to such extent, be specifically enforced in accordance with their terms, including inter-alia through the means of appropriate judicial processes in India.

4. Can fines or penalty clauses be agreed upon?

Under Indian contract law, and specifically under Section 73 of the Indian Contract Act, 1872, the non-defaulting party is entitled to be compensated by the defaulting party for actual and direct loss and damage, arising from the breach of the contract by the defaulting party. Thus, while Indian law permits the incorporation of compensatory provisions in a contract, no compensation can be claimed in respect of any remote or indirect loss or damage. Further, provisions of a punitive nature, such as fines or penalties are typically not permissible.

It is pertinent to note that parties may elect to prescribe liquidated damages under a contract, subject to the contract specifically recording an agreement of the contracting parties to the effect that (a) the occurrence of identified event of default under the contract, would cause loss and damage to the non-defaulting party and (b) the specified amounts of liquidated damages, constitute a genuine pre-estimate of amounts required to compensate the non-defaulting party for such loss and damage. We may also note that such liquidated damages are typically prescribed under most contractual arrangement with governmental agencies, in respect of delay events and/ or other specified events of defaults by the private party.

5. Can the contract be assigned?

Under Indian Law, unless otherwise specifically enumerated under the terms of the contract, contractual rights may be freely assigned by each contracting parties. However, contractual obligations cannot be assigned, unless otherwise specified to the contrary under the contract. Further, where such assignment of obligations is permitted under the contract, the same can only be undertaken with the specific consent of the counter-party to such contract.

Therefore the assignment of any specific contract, whether in part of full, is a subject matter that would significantly be determined by the terms and conditions of such contract.

6. Can advance payments be established?

It is typically permissible under Indian law for advances to be specified under a contractual arrangement.

However, it as pertinent to note that where advances are sought to be provided to a non-resident supplier of goods/ services, the same be subject to a requirement (pursuant to the Master Circular on Import of Goods and Services, dated July 2, 2012 issued by the Reserve Bank of India) that such advance be furnished only against
the provision of a standby Letter of Credit or a guarantee from identified banks, for an amount equivalent to such advance, by such non-resident supplier.

7. How is dispute resolution regulated?

The typical dispute resolution mechanisms utilised under contracts in India can be enumerated as under:

(i) Dispute resolution through court process;
(ii) Dispute through Arbitration processes;
(iii) Dispute resolution through mutual discussion and conciliation proceedings;
(iv) Dispute resolution through referral to identified experts.

Dispute Resolution through court process: The dispute resolution in relation to civil disputes (that is, matters that are not the subject matter of criminal proceeding under applicable criminal laws), are subject to the rules of procedure prescribed under the Civil Procedure Code, 1908. Additionally, depending on the forum in question, that is the High Courts or the Supreme Court of India, certain specific rules of procedure, as applicable to such forum, may additionally be applicable.

Further, decrees of foreign courts, to the extent that the same relate to reciprocating territories identified by the Government of India, can be enforced as such, with the assistance of the Indian judicial system, in accordance with the Civil Procedure Code, 1908.

Dispute Resolution through Arbitration Process: Arbitration proceedings in India, are governed by the terms of the of the (Indian) Arbitration and Conciliation Act, 1996 ("Arbitration Act"). However the parties have the freedom (subject to the Arbitration Act), to prescribe rules and procedure for such arbitral proceedings under their contractual arrangement, including inter-alia the number and mode of appointment of the arbitrators.

The Arbitration Act, recognizes awards issued pursuant to international commercial arbitration (as identified under the Arbitration Act), and such awards are enforceable, in accordance with the provisions of the Arbitration Act.

Dispute Resolution through mutual discussions and conciliation: Typically, such dispute resolution mechanisms are undertaken on the basis of the terms and conditions specified under the contractual arrangement between the parties. However, given that the Arbitration Act, also provides for a statutory framework for conciliation proceedings, it is open to the parties to specify that conciliation proceedings be undertaken pursuant to the terms of the Arbitration Act. Further, notwithstanding the applicability of the Arbitration Act, any dispute resolution through the means of mutual discussion or conciliation, is non-binding, and is typically contemplated as a pre-cursor to other dispute resolution mechanisms.

Dispute Resolution through expert determination: Such dispute resolution mechanism, typically undertaken in the context of technical/financial disputes, wherein the contractual arrangement of the parties, contemplates reference of disputes relating to certain specified subject matters for determination by an identified expert, in accordance with rules and regulations deemed appropriate by such expert (or otherwise prescribed by the contract).

It may be noted that all non-judicial dispute resolution mechanisms, irrespective of contractual arrangements to the contrary, are nonetheless subject to judicial review. However, judicial review of arbitration awards is only available on certain specified grounds, as specifically enumerated under the Arbitration Act.
8. Can international arbitration be agreed upon?

In relation to disputes inter-se domestic and international parties, it is open for the contractual arrangement to prescribe international commercial arbitration, and the (Indian) Arbitration and Conciliation Act, 1996 (“Arbitration Act”) recognizes international arbitration awards in respect of matters identified as relation to international commercial arbitration, and such awards can be enforced in accordance with the provision of the Arbitration Act.

It may however be noted that the scope and possibility of exclusion of the application of the Arbitration Act, for international commercial arbitration is presently sub-judice before the Supreme Court of India. As per present judicial precedent, such an exclusion is possible only where:

(i) The seat and the place of arbitration is outside India; and
(ii) The governing law of such contract is not Indian law.

It is also pertinent to note that Indian governmental agencies typically prefer the applicability of the provisions of Indian law as the governing law for contracts, and the Arbitration Act as the law governing the arbitration proceedings under such contract.

9. Is there any procedure for liquidation of the contract?

In the Indian context, liquidation of contracts is understood as a termination of the contractual arrangement. Under the Indian law, termination is typically the subject matter of the contractual arrangement between the parties, and is required to be undertaken in the manner agreed to by the parties under the contract.

However, it is also pertinent to note that Indian law recognizes two specific instances of termination by way of frustration and by way of repudiatory breach, which are enumerated below:

(i) Frustration: Where the contract, after being so entered into, becomes impossible to perform or, by reason of some event (which the relevant obligated party, could not prevent) become unlawful, then such contract is under Indian law deemed to be void and unenforceable, at the point of time where such contract, becomes so impossible or unlawful to perform.

However where such obligated party, undertakes such obligation, knowing (or with reasonable diligence could have known), such impossibility or unlawfulness, and which is not known to the counterparty, the obligated party would, notwithstanding such frustration of the contract, be liable to compensate the counter-party for the loss and damage sustained on account of the non-performance of the contract;

(ii) Repudiatory breach: Where a party willfully defaults in the performance of its obligations under the contract, or otherwise willfully becomes subject to disability that restricts their performance of the contract, the non-defaulting party, is entitled to terminate the contract, unless such non-defaulting party has, by words or conduct, consented to such default (or waived their right to terminate in respect of such specific instance of breach of the contract).

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Some of the applicable legislations governing public procurements are enumerated hereunder:

www.lexmundi.com
The Constitution of India, 1950
Manual of the Directorate General of Supply & Disposals:
http://www.dgsnd.gov.in/manualpdf1.zip

Prevention of corruption Act, 1988:

E:Procurement: Central Public Procurement Portal:
https://eprocure.gov.in/eprocure/app

Defense Procurement Procedure, 2011:
http://mod.nic.in/dpm/

E:Procurement Office Memorandums:
http://finmin.nic.in/the_ministry/dept_expenditure/ppcell/index.asp

Draft Public Procurement Bill:

Errata http://164.100.24.219/BillsTexts/LSBillTexts/Errata/Cor_EN_58_2012_LS.pdf

Central Vigilance Commissions Guidelines on Procurements
http://www.cvc.gov.in/proc_works.htm

Master Circular on imports of goods and services
http://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=7315

Indian Contract Act, 1872
http://indiacode.nic.in/fullact1.asp?tnm=187209

Sale of Goods Act, 1930
http://indiacode.nic.in/fullact1.asp?tnm=193003

Transfer of Property Act, 1882
http://indiacode.nic.in/fullact1.asp?tnm=188204

Electricity Act, 2003

Civil Procedure Code, 1908

Indian Penal Code, 1860
Industries (Development and Regulation) Act 1951
http://www.dipp.nic.in/English/Policies/Industries_act1951.pdf

Consolidated FDI Policy of India
http://dipp.nic.in/English/Policies/FDI_Circular_01_2012.pdf

Note: The aforesaid legislations, rules, regulations and guidelines, are as obtained from the applicable governmental agency’s online databases, and the author does not make representation with respect to the accuracy or completeness thereof.

Contact Information

Jatin Aneja
jatin.aneja@amarchand.com

Amarchand & Mangaldas & Suresh A. Shroff & Co.
Amarchand Towers
216, Okhla Industrial Estate, Phase-III
110 020 New Delhi, India

Tel 91.11.2692.0500 Fax 91.11.2692.4900
Public Procurement Guide

Latvia

Prepared by Lex Mundi member firm LAWIN

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

Latvian Public Procurement Law implements Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The main principle of public procurement in Latvia and other EU Member States is that any award of a contract should be done in non-discriminatory and transparent way. According to the Public Procurement Law of Latvia, any procurement procedure should be transparent, free competition of suppliers should be ensured, as well as equal and fair attitude to suppliers, and effective use of state and local government funds should be provided.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

1) Non-discrimination;
2) Transparency;
3) Free competition of suppliers;
4) Effective use of State and local government funds.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

The following procurement procedures should be applied:
1) an open competition;
2) a closed competition;
3) a price quotation;
4) a negotiated procedure; and
5) a design competition.

The Public Procurement Law shall be applied to procurement procedures if the procurement contract price is 10 000 lats or more.

3. What public agencies are subjected to the general Public Procurement regime?

State or local government institution, a local government, other derived public person or institution thereof.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

State defense institutions with specified exceptions.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

Legal person governed by private law, which concurrently conforms with the following criteria:
a) is established or operates in order to ensure the needs of the public, which are not of commercial or industrial nature; and
b) is subordinate or subject to the decisive influence of a State or local government institution, a local government, other derived public person or institution thereof, or subject to the decisive influence of a legal person governed by private law conforming to these criteria (this influence manifests as the majority of voting rights upon electing the members of the supervisory or executive authority or upon appointment of the administration) or more than 50 per cent of financing for activities of such legal person governed by private law comes from the State, local government, other derived public person, institution thereof or another legal person governed by private law conforming to these criteria.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

In general no, foreign companies do not need to establish any branch or subsidiary or enter into any commercial agreement with local partner.

2. Are there any reciprocity regulations?

n/a

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

Yes, there are certain restrictions depending on a particular subject matter of the tender. E.g. security services could be provided only by company established in Latvia and having a license; if the procurement contains classified information or state secrets, only companies established in Latvia and having obtained industrial certificate may participate in such tender.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders' Registry?

No, Latvia has not established any bidders' registry.

2. Is electronic procurement fully implemented?

Yes, electronic procurement is implemented in Latvia. Latvia provides for following types of electronic procurement:
   1) dynamic purchase system;
   2) electronic auction.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

Dynamic purchase system - any bidder should conform to the qualification requirements and should have submitted an indicative tender. Electronic auction - any bidder should have submitted admissible tenders and should have individual connection to the electronic equipment being used in the auction.

4. What are the possible ways of association for participating in public procurement proceedings?

In general association may participate in public tender.
5. What type of procurement procedures exist?

1) an open competition;  
2) a closed competition;  
3) a price quotation;  
4) a negotiated procedure; and  
5) a design competition.

6. What are the modes of selection processes and when are they applicable?

The criteria for selection of tenders shall be as follows: 1) the economically most advantageous tender; and 2) the tender with the lowest price. The choice of a selection mode is subject to discretion of a commissioning party.

7. Is the bidding company required to post any bond or insurance?

This is subject to rules of each particular procurement.

8. What are the criteria for evaluation and comparison of bid proposals?

Any selection should consist of two parts:  
1) qualification - selection of candidates complying with conditions specified by each particular procurement;  
2) offers - evaluation and selection of winning bidder according to selection criteria.  
3) If the selection criteria is lowest price then bidder with lowest price should get the award of a contract. If the selection criteria is economically most advantageous tender then a contract should be awarded to a bidder having obtained highest points according to rules of particular procurement.

9. What are the requisites for execution of contracts after awarding?

A procurement contract shall be entered into not sooner than either on the 11th day or 16th day, depending on a case in question, after a notification on the results of the procurement procedure. If the tender results are challenged, the procurement contract shall not be executed until review of the application.

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

n/a

2. Does the private company proposing the project have any advantage for purposes of bidding?

No, there are no advantages for such companies.

F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

In general any complaint or application regarding procurement procedure should be submitted to the Procurement Monitoring Bureau which is a state institution. Limited application should be submitted only to the court.
2. Are there any judicial review procedures applicable when the contract has been executed?

In limited cases, it is allowed to request the administrative court to annul, terminate, amend or reduce contractual term of the procurement contract already executed.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

The term of any procurement contract shall not be more than 5 (five) years. In general, any extension of a term should be done only through a new procurement procedure.

2. Are there any guarantees that have to be posted for the performance of the contract?

This is subject to rules of a particular procurement procedure.

3. Are there any special powers upon the State?

The Government of Latvia may exclude application of the Public Procurement Law if it has recognized the information regarding a contract or the implementation thereof as an official secret or application of the Law may cause harm to the protection of substantial interests of the State.

4. Can fines or penalty clauses be agreed upon?

Yes, this is allowed in procurement contracts.

5. Can the contract be assigned?

No, the contract should be implemented by a winning bidder.

6. Can advance payments be established?

Yes, this is allowed.

7. How is dispute resolution regulated?

Subject to each particular contract.

8. Can international arbitration be agreed upon?

Yes, this is allowed.

9. Is there any procedure for liquidation of the contract?

Subject to each particular contract.
H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

   Public Procurement Law -
cProcurement+Law+%28with+amendments+to+16.07.2009%29&Submit=Mekl%C4%93t&resultsPerPage=10

Contact Information

Maris Brizgo
maris.brizgo@lawin.lv

LAWIN
Elizabetes 15
LV-1010 Riga, Latvia

Tel 371.6781.4848 Fax 371.6781.4849
www.lawin.com
Public Procurement Guide

Malaysia

Prepared by Lex Mundi member firm Skrine

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

The principal policies of Malaysian Public Procurement are as follows:
   a) To stimulate the growth of local industries through the maximum utilization of local materials and resources;
   b) To encourage and support the evolvement of Bumiputera (indigenous) entrepreneurs in line with the nation's aspirations to create Bumiputera Commercial and Industrial Community;
   c) To increase and enhance the capabilities of local institutions and industries via transfer of technology and expertise;
   d) To stimulate and promote service oriented local industries such as freight and insurance; and
   e) To accelerate economic growth whereby Government procurement is used as a tool to achieve socio-economic and development objectives.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The principles on which government procurement is based on are:
   a) Public accountability
   b) Transparency
   c) Value for money
   d) Open and fair competition
   e) Fair dealing

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

The main framework for Public Procurement in Malaysia comprise of:
   a) Financial Procedure Act 1957
   b) Government Contracts Act 1949
   c) Treasury Directives and Circular Letters
   d) Federal Central Contract Circulars

3. What public agencies are subjected to the general Public Procurement regime?

All Ministries, Government Departments (Federal And State), Statutory Bodies and Local Authorities (which consists of City Councils, Municipalities and District Councils).

4. What public agencies are not subjected to the application of the general Public Procurement regime?

All public agencies are subject to the application of the Public Procurement regime.
5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

We are not aware of any non-public entities subject to the application of the Public Procurement Regime.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

Foreign companies must establish a local subsidiary company for the purposes of registration with the Ministry of Finance in order to be eligible to participate in Public Procurement Processes. However a branch office of a consultant firm may be registered (save where it is in the field of asset valuation) to participate in public procurement process. Individual foreign consultants may also be directly appointed where the costs of services do not exceed RM500,000.

2. Are there any reciprocity regulations?

By virtue of the Reciprocal Enforcement of Judgments Act 1958 (REJA), certain foreign judgments are enforceable in Malaysia. The list of foreign judgments which can be registered are as listed in the First Schedule of the REJA. Those countries include, for example, the UK, Singapore, New Zealand and India. If the judgment is not from a country listed in the First Schedule to the REJA, the only method of enforcement at common law is by securing a Malaysian judgment. This involves suing on the judgment in the local courts as an action in debt.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

This will depend on specific sector regulations and policies which may have local equity requirements.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

Yes.

2. Is electronic procurement fully implemented?

Yes as of 3 December 2002.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

All individuals, companies or corporate bodies intending to participate in Government Procurement are required to undergo a registration process. This includes all contractors of works, supplies and services. Registration authorities for the different categories of procurement are set out below: Works - Contractors Services Centre (PKK), Ministry of Works and the Construction Industry Development Board (CIDB) Malaysia Supplies - Government Procurement Division, Ministry of Finance Malaysia Services - Government Procurement Division, Ministry of Finance Malaysia Suppliers dealing with the Federal Government also need to apply for at least one (1) of the following ePerolehan Access Medium in order to fulfill the requirements of being ePerolehan Enabled: i) MyeP Card and Smart Card Reader ii) MyKad eP Enabled and Smart Card Reader iii) ePXS USB Crypto Token
4. **What are the possible ways of association for participating in public procurement proceedings?**

Interested providers may only participate in contracts and tenders but not in public procurement proceedings.

5. **What type of procurement procedures exist?**

Direct purchase, quotation and tenders.

6. **What are the modes of selection processes and when are they applicable?**

All procurement of works, supplies and services above the value of RM500,000 must be done through a tender processes. International tenders will be invited for supplies and services if there are no locally produced supplies or services available. For specific works, if local contractors do not have the expertise and capability, tenders may be called on a joint venture basis between local and foreign contractors to encourage the transfer of technology. International tenders for works may only be called when local contractors do not have the expertise and capability and a joint venture is not possible. All tenders are to be considered by the respective Agency Procurement Boards. For tenders value above RM100 million for works and RM50 million for supplies and services must be sent by the Agency Procurement Boards to the Ministry of Finance for final decision. Any decisions of the Agency Procurement Boards which are not unanimous must also be forwarded to the Ministry of Finance for final decision.

7. **Is the bidding company required to post any bond or insurance?**

Performance bonds are required for procurement contracts which has a value of RM200,000 and above. The performance bond must be obtained from locally incorporated banks, insurance companies and financial institutions that are licensed to operate in Malaysia.

8. **What are the criteria for evaluation and comparison of bid proposals?**

Criteria such as the profitability, time taken for delivery/completion, rates, frequency of service, place of implementation, administrative/running costs, fulfillment of conditions in the bid proposal, previous experience, past performance as well as financial capacity will be taken into account when evaluating bid proposals.

9. **What are the requisites for execution of contracts after awarding?**

A Letter of Intent ("LOI") will be issued to the successful bidder if necessary and may contain additional terms and conditions. However the final decision on acceptance of the tender will depend on the successful negotiation and/or acceptance of additional terms and conditions. A Letter of Acceptance ("LOA") is directly issued to the successful bidder if the bid is accepted in total. The successful bidder is then required to attest and return the Letter of Acceptance to the Government. If negotiations are necessary where the LOI requires then the LOA is issued to the successful bidder and must be returned to the Government for formalization of contract. The LOA forms part of the contract and is legally binding. Formal contracts will be drawn up upon the receipt of the LOA from the successful bidder. The successful bidders are then required to forward the Performance Bonds according to the value of the contract.

E. **Private Initiative Projects**

1. **Are there any regulations for Public Procurement of projects proposed by private companies?**

There are no specific regulations or MOF circulars dealing with the proposal of projects by private companies for public procurement.
2. Does the private company proposing the project have any advantage for purposes of bidding?

   It is expected that the criteria for evaluation and comparison of bid proposals would be the same (e.g. capability, experience, profitability).

F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

   Bidding processes would be contained in the Invitation to Bid and as such would be dealt with contractually. In practice it would be very difficult to challenge the bidding processes given that there is a very broad grant of power to procurement agencies under the treasury issued circulars. We are not aware of any cases in which aggrieved participants in a bidding procurement have successfully challenged the bidding processes or decision of procurement agencies.

2. Are there any judicial review procedures applicable when the contract has been executed?

   See response in F.1.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

   The circumstances under which a contract can be extended and modified are set out in Treasury Circulars and Directives. An extension of contract can only be given once and only for a maximum period of 2 years.

2. Are there any guarantees that have to be posted for the performance of the contract?

   This is not specifically provided for in the MOF circulars and relevant laws/regulations.

3. Are there any special powers upon the State?

   The State agencies have similar powers of procurement to that of the Federal agencies.

4. Can fines or penalty clauses be agreed upon?

   The contract would usually stipulate the Liquidated Ascertained Damages to be paid by the contractor/supplier who fails to fulfill the obligations under the contract.

5. Can the contract be assigned?

   We have sighted a government contract template which provides for the assignment of contract subject to prior written consent of the other party.

6. Can advance payments be established?

   Yes

7. How is dispute resolution regulated?

   Dispute resolution is not specifically regulated for government contracts but arbitration clauses are fairly common.
8. Can international arbitration be agreed upon?

This is not provided for specifically in the MOF circulars and relevant regulations.

9. Is there any procedure for liquidation of the contract?

Mutual termination of a contract may be requested by either the Government or the contractor. The Government will only consider a mutual termination where the implementing Agency has certified that the obligations of a contract can not be fulfilled. The Project authority will discuss the mutual termination with a committee set up by the Ministry under the relevant laws. This Committee will evaluate the recommendations by the project authority and make a decision. Where the decision is not unanimous, the proposal for mutual termination will be referred to the Ministry of Finance for a decision.

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Please refer to the answer in Question B.2.

Contact Information

Ng Ai Rene
ng.ai.rene@skrine.com

Skrine
Unit.No. 50-8-1, 8th Floor, Wisma UOA Damansara
50, Jalan Dungun, Damansara Heights
50490 Kuala Lumpur, Malaysia

Tel 60.3.2081.3999 Fax 60.3.2094.3211
www.skrine.com
Public Procurement Guide

Nicaragua
Prepared by Lex Mundi member firm Alvarado y Asociados

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

As defined in the Law 737 “Ley de Contrataciones Administrativas del Sector Público”, the principal elements are: the efficiency, publicity, and transparency, equality, control, due process, and integrity.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

According to the article 6 of Law 737, there are 8 principle: Efficiency Principle Publicity Principle Transparency Principle Equality and free competition Principle Effective Technology Principle Control Principle Due Process Principle Integrity Principle.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?


3. What public agencies are subjected to the general Public Procurement regime?

1. The executive power, including the Presidency and the Vice Presidency, Ministries of State and Decentralized Bodies.
2. The others government powers, when they perform administrative functions.
3. The autonomous entities created by the Constitution of the Republic, when performing administrative functions.
4. Decentralized entities by function.
5. Councils and governments of the Autonomous Regions of the North Atlantic (RAAN) and South Atlantic (RAAS).
6. The State Companies, unless they are in competition.
7. Financial Public Sector, meaning, the Nicaraguan Central Bank and the Public Financial Institutions regulated by the Superintendence of Banks and Other Financial Institutions.
8. Public Universities.
9. Private Universities, in the administration of funds coming from the General Budget of the Republic.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

1. The following public contracts:
   a. International contracts celebrated by the executive power that require approval of the National Assembly, pursuant to article 138 of the Nicaraguan Political Constitution.
   b. Administrative licenses or concessions of any kind, which are subject to the provisions of special laws.
   c. Public employment contracts.
d. Operations of brokerage and other contracts regulated by banking law.
e. Contracting with International Funds.
f. The agency or government entity who hires subject to the above procedure will have the sole responsibility to ensure compliance with the provisions of such international legal instruments and this Act.

2. The abroad recruitment made by the institutions providing the Foreign Service.
3. In the case of public services provided to users in exchange for an undetermined fee or fee of general application including transportation.
4. Recruitment by the municipal sector and municipal governments.
5. State Companies only in relation to its ordinary and related contracts.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

Yes, as mentioned above, the private universities, in the administration of funds coming from the General Budget of the Republic.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

No, they are not.

2. Are there any reciprocity regulations?

Only those mentioned in the international treaties, according to the article 118 of Law 737

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

No, there are not.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

Yes. Law 737, article 11 provides it.

2. Is electronic procurement fully implemented?

Yes. Law 737 articles 62 and followings provides the “SISCAE” Sistem of Electronic Public Procurement, that allows the management and dissemination of state procurement and conducting electronic transactions.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

The bidder must be registered in the SISCAE and follow the applicable current instructions to use the SISCAE. We recommend visiting the website of SISCAE (http://www.nicaraguacompra.gob.ni/sisca/portal) and revise the guides for the use of this system.

4. What are the possible ways of association for participating in public procurement proceedings?

The participants can participate under the figure of consortium demonstrating that they have the agreement of creation of consortium to participate in a public procurement.
5. **What type of procurement procedures exist?**

There are four types of procurement procedures:
1. By tender (public and selective tender);
2. Simplified procurement;
3. Minor Contracts;
4. Por concurso (by competition.)

6. **What are the modes of selection processes and when are they applicable?**

There are no special processes for the selection, but, all the offers has to be analyzed by the evaluation team, which responsibilities are: Evaluate the tenders submitted in the appropriate procurement procedures in accordance with the provisions of the bidding terms and conditions, terms of reference, the Law and its Regulations.

7. **Is the bidding company required to post any bond or insurance?**

Only those that are proper of the contract to execute.

8. **What are the criteria for evaluation and comparison of bid proposals?**

The evaluation team will analyze the provisions of the bidding terms and condition which has to include the terms of evaluation, and also the solution in case of draw.

9. **What are the requisites for execution of contracts after awarding?**

The offeror and the contractor have to sign the respective contracts, then it works as a normal contract.

E. **Private Initiative Projects**

1. **Are there any regulations for Public Procurement of projects proposed by private companies?**

No, there are not.

2. **Does the private company proposing the project have any advantage for purposes of bidding?**

N/A.

F. **Review Procedures**

1. **Are there any judicial review procedures applicable to the bidding processes?**


2. **Are there any judicial review procedures applicable when the contract has been executed?**

No, there are not.

G. **Overview of Public Procurement Contracts**

1. **What are the regulations applicable to contract terms and its extension?**

The provisions of article 87 of the Regulations of Law 737.
2. **Are there any guarantees that have to be posted for the performance of the contract?**

Chapter six of Law 737 establishes the guarantees that have to be posted: a. Seriousness of the offer: by public notary that guarantee, that the offer is valid for the period specified in the bidding terms and conditions; b. Contract Performance Guarantee: before the formalization of the contract, except on leaser contract; it is a guarantee of the 5 to 10 percent of the contract amount for services or goods contracts; and a guarantee of the 10 to 20 percent of the contract amount for the building work; c. Guarantee of Quality assurance and / or performance for the case of goods and services; d. Guarantee Against hidden defects and crippling to the case of construction; e. Advance Payment Guarantee: a guarantee of the 100% of the contract amount; f. Any other Guarantee that shall be necessary.

3. **Are there any special powers upon the State?**

4. **Can fines or penalty clauses be agreed upon?**

Yes.

5. **Can the contract be assigned?**

No, the contract cannot be assigned, except with the prior written authorization of the corresponding entity.

6. **Can advance payments be established?**

Yes.

7. **How is dispute resolution regulated?**

The disputes can be submitted to Mediation and Arbitration. Any legal resolution considered as "res judicata" must be respected by the parties.

8. **Can international arbitration be agreed upon?**

Yes.

9. **Is there any procedure for liquidation of the contract?**

Yes.
H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

http://www.nicaraguacompra.gob.ni/siscae/portal

Contact Information

Yuri Fernando Cerrato Espinoza
ycerrato@alvaradoyasociados.com.ni

Alvarado y Asociados
Planes de Altamira, III Etapa
De los semáforos de Enitel de Villa Fontana
Managua, Nicaragua

Tel 505.2278.7708 Fax 505.2278.7491
www.alvaradoyasociados.com.ni
Public Procurement Guide

Nigeria
Prepared by Lex Mundi member firm Udo Udoma & Belo-Osagie

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

Until 2007, Nigeria did not have a statute that specifically regulates public procurement. This led to the enactment of the Public Procurement Act (No. 14) of 2007 (the "Procurement Act"), which requires public institutions and other relevant parties to ensure that all public procurements are conducted in a manner that is transparent, timely and equitable and based on the agreed guidelines, thresholds and standards. The Procurement Act established the Bureau of Public Procurement ("BPP"), which oversees the procurement activities of all the procuring entities (and indirectly, oversees all public procurement affected by the provisions of the Procurement Act) and is responsible for the issuance of procurement "Certificates of No Objection". A Certificate of No Objection is the document that confirms that due process was followed in the conduct of a procurement process and authorizes the procuring entity to enter into the relevant contract. In addition to a number of other duties, the BPP is authorized by the Procurement Act to formulate general policies and guidelines relating to public sector procurement for the approval of the National Council on Public Procurement ("NCPP"), monitor the prices of tendered items and keep a national database of standard prices, prevent fraudulent and unfair procurement and where necessary, apply administrative sanctions. The BPP is supervised by the NCPP which is headed by the Minister of Finance. The Procurement Act also sets out a code of conduct for public officers that are involved in public procurement and prescribes penalties for public procurement related offences.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The basic principles applicable to public procurement, and which are being pursued in Nigeria, are accountability, fairness, reliability, transparency, ethical standards and economy. Presently, contracts cannot be awarded without consideration of the submitted bids by the Tenders Board of the relevant procuring entity and issuance of a Certificate of No Objection to the contract award by the Bureau of Public Procurement. In addition, contracts can only be awarded based on procurement plans supported by prior budgetary appropriations and the procurement entity must ensure that the relevant funds are available to meet the obligations.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

The Procurement Act and regulations issued by the Bureau of Public Procurement are the principal statutes/regulations that deal with public procurement in Nigeria. A number of States in the Federation (e.g. Rivers, Delta and Edo States) have also established public procurement laws while a few others are taking steps to do so.

3. What public agencies are subjected to the general Public Procurement regime?

The Federal Government of Nigeria, its agencies, authorities and ministries involved in procurement are subject to the Procurement Act/the public procurement regime. Also
regulated by the Procurement Act, are other entities that derive “at least 35% of the funds appropriated or proposed to be appropriated for any type of procurement described in the [Procurement] Act from the Federation Share of the Consolidated Revenue Fund”. The Consolidated Revenue Fund is the fund into which all revenues or other moneys received by the Federation of Nigeria are required, by the Nigerian Constitution, to be paid into (except for such other revenues or moneys that are payable under the Constitution or any Act of the National Assembly into any other public fund of the Federation established for specific purposes).

4. **What public agencies are not subjected to the application of the general Public Procurement regime?**

The only agencies that are not subject to the general public procurement regime are those agencies that are not connected with the Federal Government or which, even if connected with the Federal Government, do not derive up to 35% of the funds appropriated for any type of procurement from the Federation Share of the Consolidated Revenue Fund.

5. **Are there any non-public entities subjected to the application of the general Public Procurement regime?**

No.

C. **Requirements for Foreign Companies to Participate in Public Procurement Processes**

1. **Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?**

Foreign companies that wish to do business in Nigeria, whether generally or as part of a Public Procurement Process, are not permitted to do so through branches but, instead, must establish Nigerian subsidiaries. Such subsidiaries can be wholly foreign-owned and there is no requirement, once such Nigerian subsidiaries have been established, for them to enter into commercial agreements with local parties in order to participate in Public Procurement Processes.

2. **Are there any reciprocity regulations?**

No.

3. **Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?**

Nigerian companies that have foreign shareholders are prohibited from making investments in the following sectors: (a) Production of arms and ammunition. (b) Production of and dealing in narcotic drugs and psychotropic substances. (c) Production of military and para-military wears and accoutrement, including those of the Police and the Customs, Immigration and Prison Services. The procurement of special goods and of works and services involving national defense or national security (which would include the production of arms and ammunition) are, in any event, exempted from regulation by the Procurement Act.

D. **Procedures for Awarding Public Procurement Contracts**

1. **Is there a Bidders’ Registry?**

There is no general “Bidders Registry” but the Procurement Act establishes a 'Tenders Board' within each procuring entity. It also authorizes the Bureau of Public Procurement (established under the Procurement Act) to maintain a national database of federal contractors and service providers and, to the exclusion of all procuring entities,
prescribe classifications and categorizations for the companies on the register. The Tenders Board of a procuring entity is responsible for the award of procurement goods, works and services within the threshold set in the regulations published by the BPP.

2. Is electronic procurement fully implemented?

No. By virtue of section 27 of the Procurement Act, all bids submitted in response to an invitation to open competitive bidding are required to be submitted in writing. Other formats, including electronic submissions, may also be adopted in addition to the submission of written bids.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

The Procurement Act does not set out any electronic procurement procedures.

4. What are the possible ways of association for participating in public procurement proceedings?

By virtue of section 16(5) of the Procurement Act, a supplier, contractor or service provider may be a natural person, legal person or a combination of the two.

5. What type of procurement procedures exist?

The procurement method/procedure that is adopted by the procuring entity is usually dependent on the nature and size of the procurement, value of the procurement, local availability and cost of goods and services and includes the urgency with which the goods and services to be procured are required. The Procurement Act sets out 3 (three) different procedures for procurements. Part VI (sections 25 – 38) prescribes the procedure for an open invitation to bid, either by way of national competitive bidding or international competitive bidding; Part VII (sections 39 – 43) makes provision for special and restricted methods of procurement (by way of a tendering process, request for quotations or direct procurement); while Part VIII (sections 44 – 52) provides for expressions of interest to provide services for unascertained needs (procurement of consultants).

6. What are the modes of selection processes and when are they applicable?

As mentioned above, the selection process may be by way of an open invitation to bid or special and restricted methods of procurement (tendering process, request for quotations or direct procurement) or a solicitation for expression of interest. With respect to an open invitation to bid, a national competitive bidding is adopted where the capability and competitiveness of local bidders make it unattractive for foreign bidders to compete for contracts below a certain value and where the goods and works are available locally at prices significantly below those in the international markets. On the other hand, international competitive bidding is the preferred method of procurement and is applicable for large contracts for goods, works and related services. International competitive bidding is also applicable where the requirements for procurement are widely available and there is interest by foreign contractors in supplying the required goods and services. In the case of special and restricted methods of procurement, section 39(2) of the Procurement Act provides that a tendering process could be adopted in a number of situations including “where it is not feasible for the procuring entity to formulate detailed specifications for the goods and works or, in the case of services, to identify their characteristics and where it seeks tenders, proposals or offers on various means of meeting its needs in order to obtain the most satisfactory solution to its procurement needs”. In the case of a request for quotation, this may be done by the procuring authority only if it is confirmed that the value of the goods or works to be procured does not exceed a sum that shall be set in the procurement regulation. Direct procurements are done where the goods, works and 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 no reasonable alternative or substitute exists; or where there is an urgent need for the goods, works and services and engaging in tender proceedings or any other method of procurement is impractical due to unforeseen circumstances giving rise to urgency which is not a result of dilatory conduct on the part of the procuring entity. Section 44 of the Procurement Act deals with the third method of the procurement processes i.e. solicitation for expression of interest. This is adopted where a procuring entity wishes to procure services for its needs that are precise and ascertainable, and especially when it intends to enter into a contract for the purpose of research, experiment, study or development.

7. **Is the bidding company required to post any bond or insurance?**

Subject to the monetary and prior review thresholds set by the BPP, all procurements valued in excess of the sums prescribed by the BPP require bid security in an amount not more than 2% of the bid price to be provided by way of a bank guarantee issued by a reputable bank that is acceptable to the procuring entity. Further, in relation to the procurement of goods and services, the provision of a performance guarantee is a precondition for the award of any procurement contract upon which a mobilization fee is to be paid. This guarantee is required to be for a sum that is at least 10% of the contract value or an amount equivalent to the mobilization fee requested by the supplier or contractor, whichever is higher.

8. **What are the criteria for evaluation and comparison of bid proposals?**

Generally, bids are examined to determine if they – (a) meet the minimum eligibility requirements stipulated in the solicitation documents; (b) have been duly signed; (c) are substantially responsive to the bidding documents; and (d) are generally in order. Bids that meet the above requirements, in addition to those stipulated in the solicitation documents, are subsequently subjected to a bid evaluation to determine and select the lowest evaluated responsive bid from bidders that have responded to the bid solicitation. By virtue of section 33(1) of the Procurement Act, the successful bid shall be that which is submitted by the lowest cost bidder. In the case of special and restricted methods of procurement, proposals are evaluated on the basis of criteria previously set by the procuring entity, which shall also prescribe the weight to be accorded to each criterion and the manner in which these criteria are applied in the evaluation of the: (a) qualification, experience, reliability, professional and managerial competence of the consultant or service provider and of the personnel to be involved in providing the services; (b) effectiveness of the proposal submitted by the consultant or service provider in meeting the needs of the procuring entity; (c) the proposal, including any ancillary or related cost; (d) the effect that the acceptance of the proposal will have on the balance of payments position and foreign reserves of the government, the extent of participation by local counsel, the economic development, potential offered by the proposal, including domestic investment or other business activity, the encouragement of employment, the transfer of technology, the development of managerial, scientific and operational skills and the counter trade arrangements offered by the consultant or service provider; and (e) national defense and security considerations. The procuring entity selects the successful proposal by either choosing the proposal with the lowest evaluated price or the best combined evaluation in terms of the general criteria set out in the request for proposals and the price quoted.

9. **What are the requisites for execution of contracts after awarding?**

The Procurement Act does not prescribe any requisites for execution of contracts after they have been awarded.
E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

2. Does the private company proposing the project have any advantage for purposes of bidding?

F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

2. Are there any judicial review procedures applicable when the contract has been executed?

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

2. Are there any guarantees that have to be posted for the performance of the contract?

3. Are there any special powers upon the State?

4. Can fines or penalty clauses be agreed upon?

5. Can the contract be assigned?

6. Can advance payments be established?

7. How is dispute resolution regulated?

8. Can international arbitration be agreed upon?

9. Is there any procedure for liquidation of the contract?

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Contact Information

Dan Agbor
dan.agbor@uubo.org

Udo Udoma & Belo-Osagie
St Nicholas House, (10th & 13th Floors)
Catholic Mission St, P.O.B. 53123 (Ikoyi)
Lagos, Nigeria

Tel 234.1.4622307.10/8970622 Fax 234.1.4622311
www.uubo.org

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Public Procurement Guide

Panama
Prepared by Lex Mundi member firm Arias, Fábrega & Fábrega

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

The Constitution of Panama permits the State, its autonomous or semiautonomous entities and Municipalities to contract for the sale or lease of its property. It determines that any disposition of funds or assets, except as determined by law, should be carried out by public tender. The law shall establish measures to ensure competition throughout the greater benefit to the state and full justice in the award. The current law that regulates public purchases is Law 22 of June 27, 2006, as amended and restated. Executive Decree No. 366 of December 28, 2006 regulates Law 22 of 2006 while Decree No. 317-L.e.g. of 12 December 2006 issued by the General Comptroller of the State regulates the securities to be issued to ensure contractual obligations with the State and confirms the templates to be used. Executive Decree No. 188 of 2009 regulates the selection of bidders thru the Electronic System for Public Contracts known as "PanamaCompra" and Law No. 6 of 2002 dictates standards for transparency in public administration, sets the Habeas Data action and other provisions.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The basic principles applicable to Public Procurement in Panama are: (a) efficiency; (b) efficacy; (c) transparency; (d) due process; (e) publicity; (f) economy and (g) responsibility.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

See answer to number A.1. above.

3. What public agencies are subjected to the general Public Procurement regime?

All governmental agencies, autonomous and semi-autonomous entities, municipalities, financial intermediaries and mixed companies in which the State of Panama is the owner of at least 51% of its shares or patrimony are subject to the General Public Procurement Regime. Companies owned by the State are governed by their articles of incorporation and are subject to Panama corporate law and the code of commerce as well.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

Public agencies that have their own procurement laws are not subject to the Public Procurement Regime. Contracts entered by the State with foreign individuals or legal entities for the execution of works and procurement of goods, services or advice, consultancy or technical services, may apply the rules and procedures under those agreements or international cooperation agreements, in which case the general law that regulates public purchases, (Law 22 of 2006, as amended) applies as a supplement.
5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

Companies owned by the State of Panama may follow the general Public Procurement regime or apply their specific contract and concession regulations. These type of companies must clearly state in the bid documentation the procedure to be followed each time.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

Panama has an open non-discriminatory government procurement system under which both nationals and foreigners can freely participate and bid for public contracts. Under current laws and regulations foreign companies are not legally required to register in Panama, set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in the initial pre-contractual part of Public Procurement Processes. However, registration may be established as a requirement under the bidding documents and would be subject to the scope of the work required. Once a contract is awarded, foreign companies would need to obtain local permits and register locally. Some of these requirements are: a. registration of a branch in Panama or as foreign members of a consortia as foreign entities in Panama (branches); b. registration with the Engineering and Architectural Technical Board in Panama; c. operational or business permit to carry out the desired activity; d. taxpayer’s registration number; e) registration with the Municipalities in which the companies might be carrying out a project or works.

2. Are there any reciprocity regulations?

There are no reciprocity regulations currently in place regarding General Public Procurement regime. Nevertheless, it is worth noting that foreign companies and individuals wishing to participate in public procurement process in Panama would be subject to the measures of retaliation regulated by Law No. 58 of December 12, 2002 which refers to reciprocity that Panama applies to natural persons or legal entities whose countries discriminate against the Republic of Panama. Discrimination applies to natural or legal person, goods, services, public works, lease, value, title or bottom of Panamanian origin.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

Panama does not have at this time any restrictions upon foreign companies based on the purpose or type of contract the State or its entities might offer.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

There is a bidder's registry and it is called PanamaCompra. Any foreign or local person interested in participating in bids may register in said registry. Information will be sent to the bidders thru the address listed in this registry. They can also request to receive notices on contracts which relate to their line of business which they have posted in the registry.

2. Is electronic procurement fully implemented?

The use of the Electronic System for Public Purchases “PanamaCompra” will be obligatory for all the public institutions included in the scope of the application of the
Law. The public entities must publish in the System “PanamaCompra” all the information that is generated in minor purchases, in the contractor selection procedures, in direct purchases and in the contractual stage, according to the dispositions of applicable regulations. Panama electronic procurement system permits all offers to be available to the public thru the “PanamaCompra” system. Persons presenting proposals as well as third parties have access to all documents presented including the evaluation report, adjudication resolution and any objections to the process. The system may not be considered fully implemented as yet since only the contracting entity may upload information into it. Proposals must be presented in written form accompanied by a CD with all information which the entity uses to place in the electronic register.

3. **What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?**

Bidders should register under the "PanamaCompra" system, however, at this time bidders cannot present their proposal electronically. Bidders need to present their proposal at the address indicated in the bid documentation and the contracting party will upload the information on the website.

4. **What are the possible ways of association for participating in public procurement proceedings?**

The laws of Panama permit two or more persons to present the same proposal jointly, for the award, celebration, and execution of a contract. The parties may participate as a consortium or accidental association. All parties will be joint and severally responsible for all obligations derived from the proposal and the contract.

5. **What type of procurement procedures exist?**

- **Minor Purchases.** The procedure for minor purchases allow, in an expedite way, the purchase of goods, works, and services which do not exceed US$30,000.00, complying with a minimum of formalities.
- **Public bid.** The procedure in which the price is the determinant factor, as long as it complies with all the requirements and technical aspects required in the list of charges. This procedure is used when the amount of the purchase is higher than US$.30,000.00.
- **Best Value Bid.** The procedure in which the price is not the determinant factor, and could be carried out when the goods, works or the services that are going to be contracted have a high level of complexity and the amount of the contract is greater than US$30,000.00. The technical, economic, administrative, and financial aspects are evaluated and the bid is awarded to the proponent who has the highest points in the evaluation specified in the bid. Best Value bid with separate evaluation. The procedure could be used to purchase items in excess of US$20,000,000.00 Only one contractor develops all the requirements for one work or construction project and public infrastructure. In this selection procedure, in the first phase, only the technical aspect of the proposals are evaluated, and a grade is assigned based on said aspects; and, in a later phase, the opening of the economic proposals takes place and it is awarded to the proponent who obtains the highest grade according to the methodology of the evaluation established in the bid package.
- **Framework Agreement bid.** The procedure where one or more proponents will be selected, with whom a contract for massive and common use products or services will be signed. The selection criteria is defined by the General Directorate of Public Contracts in the corresponding list of charges. Reverse Auction The reverse auction bid is a bidding process in order to obtain the best price of a good, of a service, or of a work for the institution or institutions, within a determined term. Abbreviated Bid. The procedure in which the State selects and awards a contract based on the lowest price or, in the acts of best value, based on highest evaluation, as long as all the requirements and technical aspects required in the list of charges are fulfilled. It could be used when the amount of the contract is higher than US$.30,000.00, the object of the contract responds to the need to satisfy a social interest and it is required to be described in the Law. Turn Key Contracts. The procedure where the contractor is...
obliged before the State to make different provisions which must include, as a general rule, studies, designs, list of charges, and the execution of a work in exchange of a determined price by the contracting entity. In these cases, the contracting entity must establish the bases and the terms of reference which determine with more precision the work.

6. **What are the modes of selection processes and when are they applicable?**

See answer to number D.5. above.

7. **Is the bidding company required to post any bond or insurance?**

Subject to the bid documentation, the bidding company would need to present a proposal bond to secure its proposal. Additionally, and always subject to the bid documentation, once the contract is awarded, the company would be required to present an investment bond, a performance bond, an early payment bond and applicable insurances.

8. **What are the criteria for evaluation and comparison of bid proposals?**

The criteria are established under the bid proposal and are generally best technique, best price or best technique and price.

9. **What are the requisites for execution of contracts after awarding?**

Subject to the bid documentation and the scope of work, the company awarded the contract would need to obtain all necessary permits to carry out the objects of the contract, obtain a performance bond, an investment bond, insurance when required and execute and sign the contract by its legal representative.

**E. Private Initiative Projects**

1. **Are there any regulations for Public Procurement of projects proposed by private companies?**

There are presently no regulations or restriction for private companies to propose projects. The contracts which will be required for those projects will be subject to the general public procurement regime.

2. **Does the private company proposing the project have any advantage for purposes of bidding?**

A private company proposing a project would not have any advantage for the purpose of the bidding process.

**F. Review Procedures**

1. **Are there any judicial review procedures applicable to the bidding processes?**

There are two administrative review procedures applicable to bidding processes before a judicial review is available. For violations to the legal steps of a bidding process, the parties participating in the process may submit a challenge before the National Directorate of Public Contracting. The decisions adopted by the National Directorate of Public Contracting in this regard are final. If a contract is awarded or if a bidding process is declared void, then the parties participating in the process may submit a challenge before the Public Contracting Administrative Tribunal. The decisions adopted by this tribunal exhaust the administrative review procedures and allow for the affected party to submit a formal judicial claim before the Third Chamber of the Supreme Court. This will be the only judicial review procedure applicable to the bidding process.
2. Are there any judicial review procedures applicable when the contract has been executed?

A contract already executed may be judicially reviewed before the Third Chamber of the Supreme Court, thru a Nullity Action.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

The Public Contracting law provides for some specific terms that must be included and observed in public procurement contracts, such as termination causes. For all other matters, general rules for civil contracts apply.

2. Are there any guarantees that have to be posted for the performance of the contract?

There are at least two guarantees required regularly for the performance of the contract: the performance bond and the investment bond. The bonds are issued in favour of the contracting entity and the General Comptroller’s Office of the Republic. The performance bond is required to guarantee the compliance of all obligations established in the contract. It should be valid for the period of the execution of the contract and once the contract is completed it would continue in force to correct any defects as may be prescribed under the contract. The investment bond or compliance investment bond is a security requested in cases where there is an obligation to invest an amount of money, in order to guarantee the compliance of the investment under the terms and conditions agreed by the contracting parties under the bid. There is also a bond named early payment bond which is required for the purpose of guarantying the reimbursement of the amount delivered as advance to a contractor. This security is demanded as long as the contractor does not use the amounts of money advanced for the timely and due execution of the contract. This bond is never for an amount lower than one hundred percent (100%) of the amount advanced, and is in force for a period that is equal to the main period and an additional term of thirty calendar days after its expiration.

3. Are there any special powers upon the State?

A special power reserved only for the State is the right to terminate or resolve the contract. Generally, this occurs for breach or noncompliance of the contracting party, or for public interest reasons. In both cases an administrative act, duly motivated must be issued.

4. Can fines or penalty clauses be agreed upon?

The law establishes that fines might be imposed when the contractor does not deliver its work on time. Fines are established between one percent (1%) and four percent (4%) of an amount calculated based on each calendar day of delay of the value equivalent to the portion left to be delivered or performed by the contractor.

5. Can the contract be assigned?

Subject to any restrictions in the contract and depending on its scope, a contractor could assign the rights which arise from the contract, with the previous compliance with all formalities established by law. It will be necessary that the concessionaire meets the conditions and provides the security demanded from the contractor, and that the corresponding contracting entity and the guarantor approve the assignment, evidencing it in the corresponding file. Also, the credits that are generated from a contract could be assigned in the form established by the Ministry of Economy and Finance for the entities of the Central Government.
6. **Can advance payments be established?**

Subject to the terms of the bid and the type of contract awarded, advance payments are permitted by law and may be established in the contact.

7. **How is dispute resolution regulated?**

The resolution of disputes arising out of the validity, interpretation, performance or compliance of the contract is subject to what is agreed in the contract. As a general rule, these are subject to the jurisdiction of the Third Chamber of the Supreme Court. Exceptionally, the State may agree to submit the disputes to arbitration. See answer to question No. 36 below.

8. **Can international arbitration be agreed upon?**

As a general rule, the state will not submit to Arbitration. However, it is also possible for an individual or private entity to settle disputes with the State, its autonomous and semiautonomous entities, as well as with the Panama Canal Authority through arbitration. For its validity the arbitration clause would have to be part of the contract executed between the State or public entity and the individual or private entity, or whenever international conventions or bilateral treaties provide for conflict resolution through binding arbitration, as would be the case in the various investment protection treaties Panama has entered into (example: U.S., France, the Netherlands, Canada, and Germany). In absence of the preceding, a favorable recommendation of the Attorney General, and authorization of the Council of Ministers would be required in order for the State to engage in arbitration. In certain cases, prior to initiating arbitration, it is also possible to reach negotiated solutions for the settlement of disputes with the State, as provided in most bilateral investment treaties. In order to engage negotiations for the settlement of a dispute, a special authorization would have to be granted by the Council of Ministers to the President of the Republic, with favorable recommendation of the Attorney General.

9. **Is there any procedure for liquidation of the contract?**

The law refers to contract resolution not contract liquidation. Contract resolution is permitted for non-compliance of the obligations of the contractor. Non-compliance gives place to the administrative resolution of the contract which should be carried out through an administrative act properly motivated. The contracting entity will first notify the guarantor of the non-compliance contractor and grant the guarantor a term of thirty calendar days, following the notification of noncompliance, to exercise the option to pay the amount of the bond, or substitute the contractor in all its rights and obligations. The party contracting with the State may request for the contract liquidation, understood as the right to collect on any pending payments due by the State.
H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.


Contact Information

Rosa Restrepo
rrestrepo@arifa.com

Arias, Fábrega & Fábrega
Plaza 2000, 16th Floor
50th Street
Panama, Panama

Tel 507.205.7000 Fax 507.205.7001/02
www.arifa.com/arifa/
A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

   The principal elements are: (a) procurement of infrastructure projects, goods and consulting services (b) Regardless of source of funds, whether local or foreign (c) By all branches and instrumentalities of government, its department, offices and agencies.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

   The basic principles are transparency in the procurement process and in the implementation of the procurement contracts, competitiveness by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in the public bidding, and public monitoring of the procurement process and the implementation of awarded contracts with the end in view of guaranteeing that these contracts are awarded pursuant to the applicable law.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

   The main regulation is the Government Procurement Reform Act (GPRA) and its revised implementing rules and regulations (IRR).

3. What public agencies are subjected to the general Public Procurement regime?

   All government agencies, including government owned and controlled corporations, government financial institutions, state universities and colleges, local government units, are subject to the general Public Procurement regime. The implementing government agency is the Government Procurement Policy Board.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

   Public agencies are not covered if the funding is from foreign grants, unless the government and the foreign grantor or international financing institution agree otherwise.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

   Projects that are covered by the Build Operate Transfer Law would be covered by the general Public Procurement regime in the event a portion of the BOT project would be funded by the government.
C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

As a general rule, eligible bidders should be at least 60% Filipino Equity. The exception however is that foreign bidders are eligible to participate when provided for under treaty or international agreement; when the foreign supplier is a citizen, corporation, association of a country, the laws or regulations of which grant reciprocal rights or privileges to citizens, corporations, associations of the Philippines; when the goods sought to be procured are not available from local suppliers; or when there is a need to prevent situations that defeat competition or restrain trade.

2. Are there any reciprocity regulations?

Foreign bidders may be eligible to participate when provided for under any treaty or international or executive agreement as provided in Section 4 of the Government Procurement Reform Act which states that any treaty or international or executive agreement affecting the subject matter of the law to which the Philippine government is a signatory shall be observed.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

There are. The reference list would be Eighth Foreign Investment Negative List issued by the Office of the President in 2010.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

There is a supplier's registry under the PhilGEPS website below http://www.philgeps.net/

2. Is electronic procurement fully implemented?

The GPRA does provide for electronic procurement and is now fully implemented. More details are found in their official website http://www.philgeps.net/

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

Administrative Order No. 17 of the Office of the President issued last 28 July 2011 laid down the steps and measures for a bidder to be able to present a bid in an electronic procurement procedure.

4. What are the possible ways of association for participating in public procurement proceedings?

The following shall be eligible to participate in the bidding for the supply of goods: (a) duly licensed Filipino citizens / sole proprietorships (b) partnerships duly organized under the laws of the Philippines and of which at least 60% of the interest belongs to citizens of the Philippines (c) corporations duly organized under the laws of the Philippines and of which at least 60% of the outstanding capital stock belongs to citizens of the Philippines (d) cooperatives duly organized under the laws of the Philippines and of which at least 60% belongs to citizens of the Philippines (e) persons / entities forming themselves into a joint venture i.e. a group of two or more persons /
concerned shall be at least 60%. For this purpose, Filipino ownership or interest shall be based on the contributions of each of the members of the joint venture as specified in their JVA.

5. **What type of procurement procedures exist?**

   Competitive Bidding is the general rule. Alternative methods of procurement are limited source bidding, direct contracting, repeat order, shopping, and negotiated procurement.

6. **What are the modes of selection processes and when are they applicable?**

   The GPRA uses a simple pass/fail marking system where incomplete documents are given a fail mark, and complete documents are given a passing mark. The bidders that passed can proceed to the next stage. The bidder with the lowest calculated bid shall be declared the winner.

7. **Is the bidding company required to post any bond or insurance?**

   Yes a bid security is required.

8. **What are the criteria for evaluation and comparison of bid proposals?**

   Completeness of documents.

9. **What are the requisites for execution of contracts after awarding?**

   The requisites are: (a) submission of documents within the prescribed period such as joint venture agreement or construction license (b) posting of performance security (c) signing of the contract (d) approval by higher authority

E. **Private Initiative Projects**

1. **Are there any regulations for Public Procurement of projects proposed by private companies?**

   There are no provisions on unsolicited proposals under the GPRA. But under the BOT law, unsolicited proposal is provided.

2. **Does the private company proposing the project have any advantage for purposes of bidding?**

   Yes. Under the BOT Law, unsolicited proposals are subject to a swiss challenge. Under the swiss challenge, the government invites competitors to improve on the deal offered by the original proponent. The original proponent would then get the right to win the deal by merely matching any better terms offered by his competitors - an advantage the original proponent holds by virtue of having proposed a project that the government had not thought of by itself in the first place.

F. **Review Procedures**

1. **Are there any judicial review procedures applicable to the bidding processes?**

   Yes, court action may be resorted to only after the protests before the bids and awards committee have been threshed out fully.

2. **Are there any judicial review procedures applicable when the contract has been executed?**
G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

   The contract terms shall be primarily governed by the GPRA and its revised IRR including its annexes on contract implementation guidelines for the procurement of goods, supplies and materials; procurement of infrastructure projects and procurement of consulting services.

2. Are there any guarantees that have to be posted for the performance of the contract?

   There is a performance security required prior to the signing of the contract to guarantee the faithful performance by the winning bidder of its obligations under the contract in accordance with the bidding documents.

3. Are there any special powers upon the State?

   Yes, the Philippine government has special powers over procurement contracts. But such powers i.e. the power to unilaterally modify the contract and power to unilaterally terminate for public interest reasons are subject to the constitutional right of non-impairment of contracts on the part of the private party.

4. Can fines or penalty clauses be agreed upon?

   Yes (liquidated damages)

5. Can the contract be assigned?

   It depends

6. Can advance payments be established?

   Yes

7. How is dispute resolution regulated?

   All contracts involving public private partnership projects and/or those entered into under the Build Operate Transfer Law between government and private entities shall include provisions on the use of alternative dispute resolution (ADR) mechanisms at the option and upon agreement of the parties to said contracts. When parties to the abovementioned contracts agree to submit the case for ADR, the use of either domestic or international ADR mechanisms shall be highly encouraged, giving the parties complete freedom to choose which venue and forum shall govern their dispute, as well as the rules or procedures to be followed in resolving the same.

8. Can international arbitration be agreed upon?

   Yes.

9. Is there any procedure for liquidation of the contract?

   There is no specific legal procedure mandated by the GPRA
H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.


Contact Information

Fernando C. Sioson  
fernando.sioson@romulo.com

Carrie Bee Hao  
carrie_bee.hao@romulo.com

Romulo Mabanta Buenaventura Sayoc & de los Angeles  
21st Floor, Philamlife Tower  
8767 Paseo de Roxas  
1226 Makati City, Philippines

Tel 63.2.848.0114 Fax 63.2.815.3172  
www.romulo.com
Public Procurement Guide

Poland

Prepared by Lex Mundi member firm Wardyński & Partners

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

The principal elements of Public Procurement Regulation regard objective and subjective scope of the regulation, principles of the organizing and conducting proceedings, types of the procedures, public procurements contracts, public authorities responsible for public procurements in Poland and legal remedies.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

- the principle of fair competition
- the principle of equal treatment of bidders
- the principle of impartiality and objectivity
- the principle of transparency
- the principle of written form
- the principle of using of the Polish language
- the principle of the primacy of the basic tender modes - open tender and restricted tender

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

PUBLIC PROCUREMENT LAW: Act of 29 January 2004 - Public Procurement Law (consolidated text Journal of Laws of 2010, No. 113 item. 759) (herein after "PPL Act")
SECONDARY LEGISLATION: Regulation of the Prime Minister of 10 May 2011 on non-price mandatory tender evaluation criteria with respect to certain types of public contracts (Journal of Laws No. 96, item 559) Regulation of the Prime Minister of 26 October 2010 on report on contract award procedure (Journal of Laws, No. 223, item 1458) Regulation of the Prime Minister of 22 March 2010 on the rules regarding the procedure for examining the appeals (Journal of Laws No.48, item 280) Regulation of the Prime Minister of 15 March 2010 on the amount of and the manner for collecting the registration fee for the appeal, kinds of costs in the appeal procedure and the manner for their calculation (Journal of Laws No. 41, item 238) Regulation of the Prime Minister of 16 October 2008 on the standard forms of notices placed in the Public Procurement Bulletin (Journal of Laws, No. 12, item 69) Regulation of the Prime Minister of 28 January 2010 on the list of priority and non-priority services (Journal of Laws, No. 12, item 68) Annexes Regulation of The Prime Minister of 30 December 2009 on the types of documents which may be requested by the awarding entity from the economic operator and forms in which these documents may be submitted (Journal of Laws, No. 226, item 1817) Regulation of The Prime Minister of 23 December 2009 on the average exchange rate of Polish zloty against Euro being the basis for converting the value of public contracts (Journal of Laws, No. 224, item 1796) Regulation of The Prime Minister of 23 December 2009 on the value threshold of contracts and design contests which imposes an obligation of dispatching the notices to the Office for Official Publications of the European Communities (Journal of Laws, No. 224 item 1795) Regulation of the Prime Minister of 10 September 2007 amending the regulation on the scope of
information included in annual report on the conducted contract award procedures, its standard form and the manner of submission (Journal of Laws No. 175, item 1226) Regulation of the Prime Minister of 25 August 2006 on the scope of information included in annual report on the conducted contract award procedures, its standard form and the manner of submission (Journal of Laws No. 155, item 1110) Regulation of the Prime Minister of 2 July 2007 on the manner of conducting the qualifying procedure for members of the National Appeal Chamber, the manner of appointing the qualifying committee, as well as detailed scope of the qualifying procedure (Journal of Laws No. 120, item 820) Regulation of the Prime Minister of 22 March 2004 on the amount of remuneration of the Chairman, Vice Chair

3. What public agencies are subjected to the general Public Procurement regime?

In general, following entities are subjected to the general Public Procurement regime: 1) the public finance sector units within the meaning of provisions on public finances; 2) state organizational units not having legal personality, other than those specified in item 1; 3) legal persons, other than those specified in item 1, established for the specific purpose of meeting needs in the general interest, not having industrial or commercial character, if the entities referred to in these provisions and in items 1 and 2, separately or jointly, directly or indirectly through another entity: a) finance them in more than 50%, or b) have more than half of shares or stocks, or c) supervise their managerial board, or d) have the right to appoint more than half of the members of their supervisory or managerial board; 4) associations of the entities referred to in items 1 and 2, or entities referred to in item 3.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

PPL Act states that this Act shall not apply to certain types of contracts. Thus, all public agencies in Poland are subjected to the application of the general Public Procurement regime, however there are a number of exceptions relating to the award of specific contracts, e.g.: 1) contracts of the National Bank of Poland related to: a) the exercise of tasks concerning the implementation of the financial policy, in particular contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, b) the trading of securities issued by the State Treasury, c) the management of internal and external debt, d) the issue of currency and the administering of that currency, e) accumulation of foreign exchange reserves and management of those reserves, f) accumulation of gold and precious metals, g) the operation of bank accounts and conduct of bank financial settlements; 2) contracts of National Economy Bank related to: a) the exercise of tasks concerning the performance of tasks referring to handling of funds established, entrusted or transferred to National Economy Bank under separate acts as well as referring to conducting government programs, in part concerning: - running of bank accounts, conducting cash settlement and conducting activities on the interbank market, - raising financial resources in order to provide cash flow, financing the activity of handled funds and programs as well as refinancing of credit action, b) concerning the transactions on the interbank market referring to management of the state debt; c) related to the banking business of the National Economy Bank, which concerns: - opening and maintaining bank accounts, conduct financial settlements and activities in the interbank market, - raising funds to ensure financial liquidity and credit refinancing.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

Non-public entities subjected to the application of the general Public Procurement regime: 1) entities awarding contract for the purposes of exercising one of the activities listed in the PPL Act ("utilities contracts"), if such an activity is exercised on the basis of special or exclusive rights, or if the public sector entities, separately or jointly, directly or indirectly through another entity, have a dominant influence over them, in particular: a) finance them in more than 50%, or b) have more than half of the shares or stocks, or c)
have more than half of the votes resulting from the shares or stocks, or d) supervise their managerial board, or e) have the right to appoint more than half of the members of their managerial board; 2) entities other than those specified in items 1 and 2, if all of the following circumstances occur: a) more than 50% of the value of the contract awarded by them is financed from public funds or by the public sector entities, b) the value of a contract is equal to or exceeds the EU thresholds, c) the contract object is works comprising the activities in the field of overland and maritime engineering, construction of hospitals, sport, recreation and leisure centers, school buildings, facilities used by the universities or buildings used by the public administration or services connected with such works; 7) entities with which concession for works contract was concluded under the Act of 9 January 2009 on concession for works or services, insofar as they award contracts for the purpose of the execution of that concession.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

There are no specific provisions that require the foreign bidders to establish a company or a branch or made an agreement with a local partner to be entitled to participate in public procurement. Establishing a company or a branch may, however, be considered in connection to tax issues related to the performance of the contract. The contractors may also compete for the award of the contract jointly. If so contractors shall appoint a plenipotentiary to represent them in the contract award procedure or in the procedure and conclusion of a public procurement contract.

2. Are there any reciprocity regulations?

As a Member State of European Union, Poland has become a party to the Government Procurement Agreement ("GPA") made within the World Trade Organization (WTO). Currently, apart from the European Union and its Member States are parties to the GPA agreement also Switzerland, Norway, USA, Iceland, Liechtenstein, Canada, Japan, South Korea, Hong Kong, China, Taiwan, Singapore, Aruba and Israel. The purpose of the GPA is to liberalize and to develop of international trade by ensuring equal access to public procurement markets countries – signatories of the agreement. GPA agreement is based on a non-discriminatory rules of the contractors and using to the contractors from the countries which are parties to the GPA the same rules as to the native contractors.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

The restriction concerns national defense. Poland, as well as some other EU countries, benefited from the right to grant limited access to their procurement contracts in the scope of the public security and defense procurements providing the so-called Member States preferences or access to their public procurement in this area exclusively to contractors from the EU states. Contractors from countries other than EU countries may have access to the procurements in this area on the basis of reciprocity.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

The is no official Bidders Registry in Poland. However the national authority responsible for Public procurement in Poland – Public Procurement Office President runs, publishes and updates on the PPO website list of economic operators that caused damage by perform a contract or by performing a contract incorrectly, if the damage was stated by the legally valid decision of the court, and deletes economic operators from
the list. Such economic operators can no compete for the award of the public procurement for defined period of time.

2. **Is electronic procurement fully implemented?**

Electronic public procurement is not fully implemented in Poland. So far, contracting authorities may award public procurement in the form of electronic bidding procedure if the contract value is less than the EU thresholds.

3. **What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?**

Requirements regarding submitting offer in electronic bidding is specified in the tender announcement/notice published by the contracting authority. Such notice specified i.a. the requirements re. registration on the bidding platform/website.

4. **What are the possible ways of association for participating in public procurement proceedings?**

Bidders may compete for a contract individually or jointly. If bidders compete for a contract jointly than they shall appoint a proxy to represent them in the contract award procedure or in the procedure and conclusion of a public procurement contract. If a bid submitted by bidders competing for a contract jointly has been selected, the awarding entity may request prior to the conclusion of a public procurement contract, an agreement resolving cooperation between bidders.

5. **What type of procurement procedures exist?**

The primary procedures for awarding contracts are open tender and restricted tender. Awarding entity may also award contracts by negotiated procedure with publication, competitive dialogue, negotiated procedure without publication, single-source procurement procedure, request-for-quotations procedure or by electronic bidding procedure.

6. **What are the modes of selection processes and when are they applicable?**

The basic procedures for awarding contracts are open tender and restricted tender. Other types of the procedures may be applicable only on the conditions specified by the provisions of PPL Act. Negotiated procedure with publication The awarding entities may award contracts by negotiated procedure with publication if at least one of the circumstances listed below has occurred: 1) during the prior award procedure under open tendering, restricted tendering or competitive dialogue all the tenders have been rejected and the original conditions of the contract are not substantially altered; 2) in exceptional circumstances, where the nature of the supplies, services or works or the entailed risks make prior pricing impossible; 3) the specific characteristics of the services to be procured cannot be established in advance in such a way so as to enable the selection of the best tender under the procedure of open or restricted tendering; 4) the object of the contract is works carried out purely for the purpose of research, experiment or development, and not to provide profits or to recover any incurred research and development costs; 5) the contract value is less than EU thresholds. Competitive dialogue The awarding entity may award a contract by competitive dialogue if the following conditions are all met: 1) in particular, due to the complex nature of the contract, and in particular when it is not possible to describe the object of the contract in the way specified by the provision of article 30 and 31 of PPL Act or to objectively define the legal or financial conditions of contract performance, it is not possible to award contract by the open tendering procedure or restricted tendering procedure; 2) the price is not the only criterion of the selection of the best tender. Negotiated procedure without publication The awarding entities may award their contracts by negotiated procedure without publication, if at least one of the following circumstances has occurred: 1) during the prior award procedure under open or restricted tendering no
request to participate in the procedure has been submitted, no tenders has been submitted or all the tenders have been rejected in view of the incompatibility with the description of the object of contract, and the original terms of the contract are not substantially altered; 2) the design has been held, the prize of which consisted in the invitation of at least two authors of the selected contest projects to participate in negotiations without publication; 3) the object of the contract is products manufactured purely for the purpose of research, experiment or development, and not to provide profits or to recover research or development costs incurred; 4) due to a previously unforeseeable extreme urgency for the award of a contract not resulting from the events brought about by the awarding entity, the time limits provided for open tendering, restricted tendering or negotiations with publication

7. Is the bidding company required to post any bond or insurance?

The awarding entity may require the economic operators to pay a deposit prior to the final date for submission of tenders. The awarding entity shall define the amount of the deposit, however not more than 3% of the contract value. After selection of the bod and before signing a contract the awarding entity may request the economic operator to provide security on due performance of the contract (performance bond). The deposit and security on due performance of the contract (performance bond) may be paid in one or several of the following forms: 1) cash; 2) bank sureties or guarantees of collective savings-loan fund, however the surety of collective savings-loan fund is always a financial surety; 3) bank guarantees; 4) insurance guarantees; 5) sureties given by entities, referred to in Article 6b paragraph 5 item 2 of the Act of 9 November 2000 on Establishment of Polish Agency for Enterprise Development (Dz. U. No. 109, item 1158, as amended) With the approval of the awarding entity a performance bond may be provided also: 1) bills of exchange with the surety of bank or collective savings-loan fund; 2) by establishing a pledge on securities issued by the State Treasury or unit of territorial self-government; 3) by establishing a registered pledge, in accordance with the principles laid down in the provisions concerning registered pledges and the pledge register.

8. What are the criteria for evaluation and comparison of bid proposals?

Bid proposals evaluation criteria are laid down in the specification of essential terms of the contract. Bid proposals evaluation criteria shall be price or price and other criteria linked to the object of the contract, in particular quality, functionality, technical parameters, use of best available technologies with regard to the impact on the environment, exploitation costs, aftersales service and period of contract performance. Bid proposals evaluation criteria shall not pertain to the characteristics of the economic operator, and in particular to its economic, technical or financial credibility.

9. What are the requisites for execution of contracts after awarding?

Before signing a contract the awarding entity may request the economic operator to provide security on due performance of the contract (performance bond).

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

There are no such regulations.

2. Does the private company proposing the project have any advantage for purposes of bidding?

There are no such regulations.
F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

There are 2 review procedures applicable to the bidding processes - appeal and complaint to the court. An appeal shall only be admissible against actions incompliant with the PPL Act, performed by the awarding entity in the course of contract award procedure or against failure to act which the awarding entity is bound to perform under this Act. The appeal should be lodged to the President of the National Appeals Chamber. The Chamber issues a judgment on the dismissal or admission of an appeal. The parties and participants of the appeal procedure may complain to the court against the Chamber’s ruling. The complaint should be lodged with the district court competent for the seat or place of residence of the awarding entity and should be lodged through the Chairman of the Public Procurement Office.

2. Are there any judicial review procedures applicable when the contract has been executed?

A procurement contract shall be null and void if the awarding entity: 1) used the negotiated procedure without publication or single-source procurement in breach of provisions of the PPL Act; 2) failed to place the contract notice in the Public Procurement Bulletin or submit it to the Publications Office of the European Union; 3) conclude the contract in breach of provisions of PPL Act if this prevented the National Appeals Chamber from examining the appeal before the conclusion of a contract; 4) prevented the economic operators who were not admitted to participate in a dynamic purchasing system so far from submitting indicative tenders or prevented the economic operators who were admitted to participate in a dynamic purchasing system from submitting tenders in a contract award procedure conducted under framework of that system; 5) awarded a contract under framework agreement prior to the expiry of the time limit specified by the PPL Act; 6) used the request-for-quotation in the breach of provisions of PPL Act. A procurement contract shall not be subject of annulment, if: 1) if the awarding entity had reasonable grounds to believe that it acts in compliance with the PPL Act and the contract was concluded respectively 5 days after the notice of intention to conclude a contract was placed in Public Procurement Bulletin or 10 days after such notice was published in Official Journal of the EU; or 2) if the awarding entity had reasonable grounds to believe that it acts in compliance with the PPL Act, and the contract was concluded after the expiry of the time limit fixed in PPL Act. The annulment of the contract shall be in effect from the moment of its conclusion.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

As a rule, any modification of provisions of the concluded contract with reference to the content of the tender, which was the basis for the choice of the economic operator, is prohibited, unless the awarding entity envisaged the possibility of conducting such a modification in the contract notice or specification of essential terms of contract and determined the terms of such modification. The modification of the procurement contract done in breach of the above rules shall be null and void.

2. Are there any guarantees that have to be posted for the performance of the contract?

After selection of the bod and before signing a contract the awarding entity may request the economic operator to provide security on due performance of the contract (performance bond). Security on due performance of the contract (performance bond) may be paid in one or several of the following forms: 1) cash; 2) bank sureties or guarantees of collective savings-loan fund, however the surety of collective savings-loan fund is always a financial surety; 3) bank guarantees; 4) insurance guarantees; 5) sureties given by entities, referred to in Article 5b paragraph 5 item 2 of the Act of
November 2000 on Establishment of Polish Agency for Enterprise Development (Dz. U. No. 109, item 1158, as amended) With the approval of the awarding entity a performance bond may be provided also: 1) bills of exchange with the surety of bank or collective savings-loan fund; 2) by establishing a pledge on securities issued by the State Treasury or unit of territorial self-government; 3) by establishing a registered pledge, in accordance with the principles laid down in the provisions concerning registered pledges and the pledge register.

3. **Are there any special powers upon the State?**

No.

4. **Can fines or penalty clauses be agreed upon?**

Possibility to negotiate penalty clauses and other terms of the contract depends on the procedure. As a rule, however, in the most popular models i.a. open and restricted tenders contracting authority submit form of the contract which contractor must accept. During the preceding the contractor can comment on the changes in the conditions of the contract but the contracting authority is not obliged to agree for such changes.

5. **Can the contract be assigned?**

No, the contract cannot be assigned because the contracts shall be awarded only to economic operators chosen in accordance with the provisions of PPL Act.

6. **Can advance payments be established?**

Yes, the awarding entity may establish advance payments.

7. **How is dispute resolution regulated?**

The manner of dispute resolutions is regulated in the contract. As a rule disputes arising out of a contract shall be resolved by a court. The contract may provide other way of dispute resolutions i.a. national or international arbitration.

8. **Can international arbitration be agreed upon?**

The manner of dispute resolutions is regulated in the contract. As a rule disputes arising out of a contract shall be resolved by a court. The contract may provide other way of dispute resolutions i.a. national or international arbitration which is typical for construction contracts biased on FIDIC conditions of contract.

9. **Is there any procedure for liquidation of the contract?**

The contract may be terminated under the terms of the contract. In the event of a material change of circumstances which causes that the execution of the procurement contract is no longer in the public interest, and which could not have been foreseen at the time of concluding the contract, the awarding entities may renounce a contract within a period of 30 days from the date on which they became aware of these circumstances. In such case the economic operator may demand remuneration due for the performed part of the procurement contract.
H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Legal framework of Polish Public Procurement Law and English translations of relevant regulations are placed on the Public Procurement Office website:
http://www.uzp.gov.pl/English/

Contact Information

Tomasz Mis  
tomasz.mis@wardynski.com.pl

Wardyński & Partners  
Aleje Ujazdowskie 10  
00-478 Warsaw, Poland  

Tel 48.22.437.82.00 Fax 48.22.437.82.01  
www.wardynski.com.pl
Public Procurement Guide

Portugal

Morais Leitão, Galvão Teles, Soares da Silva & Associados

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

Portuguese Public Procurement Regulation derives mostly from the transposition of the European Union’s regulations on public procurement, namely Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Decree-Law no. 18/2008, of 29 January, amended by Law no. 59/2008 September 11th, Decree-law no. 278/2009, October 2nd, Law no. 3/2010, April 27th, Decree-law no. 131/2010, December 14th, Law no. 64-B/2011, December 30th and Decree-law no. 149/2012, July 12th, which transposes the said Directives and approves the Public Procurement Code (“PPC”) (“Código dos Contratos Públicos”), is the principal element. Notwithstanding, there are other important diplomas to be considered: - Decree-Law no. 37/2011, of 19 February, that creates the Public Procurement National Agency (“Agência Nacional de Compras Públicas”); - Decree-law no. 197/99, of 8 June, that establishes the legal regime for public expenditure; - Decree-Law no. 104/2011, of 6 October, that establishes the legal regime for public procurement on the fields of defense and security; - Decree-Law no. 111/2012, of May 23, that defines the new rules applicable to the State’s intervention regarding the definition, conception, preparation, launching, awarding, modification, supervision and monitoring of the public-private partnerships; - Decree-Law no. 143-A/2008, of 25 July, that establishes the principles and rules applicable to communications and archive of data and information as foreseen in the PPC. Furthermore, one should consider the Ordinances (“Portarias”) that regulate specific matters of the PPC: - Ordinance no. 701-A/2008, of 29 July, that establishes the models of the notices foreseen in the PPC; - Ordinance no. 701-B/2008, of 29 July, that nominates the PPC accompaniment commission; - Ordinance no. 701-C/2008, of 29 July, that publishes the European Union’s Directives’ thresholds; - Ordinance no. 701-D/2008, of 29 July, that approves the models of “statistic data” to be sent to the Public Procurement National Agency, as foreseen in the PPC; - Ordinance no. 701-E/2008, of 29 July, that approves several models of “data blocks” published in internet site dedicated to the public contracts (“Portal dos Contratos Públicos”), as foreseen in the PPC; - Ordinance no. 701-F/2008, of 29 July, that regulates the constitution, operation and management of the internet site dedicated to the public contracts (“Portal dos Contratos Públicos”); - Ordinance no. 701-G/2008, of 29 July, that defines the rules of electronic procurement platforms; - Ordinance no. 701-H/2008, of 29 July, that approves the obligatory content of the program.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The basic principles applicable to Public Procurement are the ones established in the European Union’s regulation. As communicated by the European Commission in its Interpretative Communication 2006/C 179/02 (*), these principles include the free movement of goods (Article 28 of the EC Treaty), the right of establishment (Article 43), the freedom to provide services (Article 49), non-discrimination and equal treatment,
transparency, proportionality and mutual recognition. According to the European Court of Justice, the principles of equal treatment and of non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition. Besides the above mentioned principles, the former public procurement regulation in our jurisdiction established a list of principles that are still applied by the Courts. Those are: principle of legality and public interest, impartiality, good faith, stability and responsibility. (*) Commission Interpretative Communication 2006/C 179/02 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

Please see answer A.1. above.

3. What public agencies are subjected to the general Public Procurement regime?

PPC establishes in its article 2, no. 1, that the following public agencies are contracting authorities subject to the Public Procurement regime: the State, autonomous regions, municipalities, public institutes, public foundations, public associations and the associations formed by one or several of such authorities. Furthermore, no. 2 of article 2 determines that the “bodies governed by public law” (“organismos de direito publico”) are also considered as contracting authorities, meaning bodies, public or private: i) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; ii) financed, for the most part, by the entities named in no. 1, or subject to management supervision by those entities; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the said entities.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

At this moment, there are some exemptions to be considered: - Public foundations created at the light of the public higher education legal regime; - Public Hospitals when celebrating public works contracts or lease or supply contracts whose value is below the European Union’s Directives’ thresholds. These exemptions, however, will be eliminated with the entry into force of the last amendment to the PCC, which will occur on August 11th 2012.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

Yes. As mentioned in answer B.3. above, it is also considered as a “body governed by public law” (“organismo de direito publico”) any private body: i) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; ii) financed, for the most part, by the entities named in no. 1 of article 2, or subject to management supervision by those entities; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the said entities (vg. article 2, no. 2 of PPC). In the water, energy, transport and postal services sectors (“special sectors”), it is also considered as contracting authorities subject to the Public Procurement regime: i) bodies not included in article 2 that operate in the said sectors and that are subject, directly or indirectly, to a dominant influence by the contracting authorities mentioned in article 2; ii) bodies not included in article 2 that are entitled to special or exclusive rights, not granted through an awarding procedure with international publicity, that reserve the operation of one or several activities in the water, energy, transport and postal services sectors and significantly affect the capacity of other entities to operate one or several of the said activities (vg. article 7 of PPC). Please note that in the case of “bodies governed by public law” and the “special sectors” bodies, the scope of the Public Procurement
regime only included the following contracts: - Public works contracts; - Public works concessions; - Public services concessions; - Public lease or supply contracts; - Public service contracts. Also, the concessionaires of public works contracts, not considered as contracting authorities, are subject to the principles of publicity and competition in the awarding of works contracts, whose value is above the European Union’s Directives’ thresholds (vg. article 276 of PPC).

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

No, foreign companies are not required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes. Notwithstanding, after the awarding takes place, it may be required, for the execution of certain contracts, that the contractor establishes some type of representation in Portugal (such requirements will result from the tender documents or from the law. In that regard, where public works or services concessions are involved, the PPC establishes, when the contract is silent in that aspect, that the concessionaire should maintain its headquarters in Portugal).

2. Are there any reciprocity regulations?

Pursuant to article 81 of PPC (habilitation phase), there is some documentation that the contractor does not need to present before the contracting authority when the same contractor is national from a State of the European Economic Area or the World Trade Organization.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

No.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

No, there is not a Bidders’ Registry. Please note that, nevertheless, Portuguese bidders usually submit, as a replacement for such certificate, a certificate of RNPC (“Registo Nacional de Pessoas Colectivas”).

2. Is electronic procurement fully implemented?

Yes, electronic procurement is fully implemented in Portugal.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

In order to present a bid in an electronic procurement procedure, the bidder must: (i) Verify by the tender documents which electronic platform will be used by the contracting authority in the procedure at hand; (ii) Register in the relevant electronic platform and obtain a authentication certificate (“certificado de autenticação”) issued by relevant electronic platform; (iii) Obtain an electronic qualified signature certificate (“certificado de assinatura digital qualificada”) and time stamps (“selos temporais”) from certified entities.
4. **What are the possible ways of association for participating in public procurement proceedings?**

Pursuant to the PPC, it is possible for a group of undertakings to participate in a public procurement proceeding without any legal form of association. The obligation to associate only arises if the proceeding is awarded to such group of undertakings (the tender documents shall specify the type of association to be implemented, which, usually, is one of the following forms: (i) company; (ii) consortium or (iii) “ACE” (complementary company group). Nevertheless it is possible for the group of undertakings to associate themselves in a pre-bid phase, usually, in the form of a consortium or “ACE” (complementary company group).

5. **What type of procurement procedures exist?**

There are five types of procurement procedures according to PPC: - Direct award (“ajuste directo”), pursuant to article 16, no. 1, paragraph a) of the PPC; - Public tender (“concurso publico”), pursuant to article 16, no. 1, paragraph b) of the PPC; - Limited tender with prior qualification (“concurso limitado por prévia qualificação”), pursuant to article 16, no. 1, paragraph c) of the PPC; - Negotiation procedure (“procedimento de negociação”), pursuant to article 16, no. 1, paragraph d) of the PPC; - Competitive dialogue (“diálogo concorrencial”), pursuant to article 16, no. 1, paragraph e) of the PPC.

6. **What are the modes of selection processes and when are they applicable?**

The selection process may only be applied in the following procedures: (i) Limited tender with prior qualification (“concurso limitado por prévia qualificação”), (ii) Negotiation procedure (“procedimento de negociação”) and (iii) Competitive dialogue (“diálogo concorrencial”). There are two types of selection processes at the disposal of contracting authorities: (i) the simple mode and (ii) the complex mode. The choice of the model must be reflected in the procedure documents. - In the simple mode, all candidates that fulfil the minimum requirements regarding technical and financial capacity are deemed as qualified and are invited to present a bid. - In the complex mode, the selection is made on the basis of the greater technical and financial capacity regarding the bidders who fulfil the minimum requirements. For such effect, the contracting authority establishes in the tender documents the minimum number of candidates to be selected (which cannot be inferior to five, except in the negotiation procedure and competitive dialogue where the number of candidates to be qualified cannot be inferior to three).

7. **Is the bidding company required to post any bond or insurance?**

The PPC does not have any provision regarding the presentation of a bid bond. Nevertheless and in theory, it is possible for a bid bond to be required in the tender documents (as long as such requirement cannot be construed as a discriminatory, disproportional and anticompetitive measure for the tender at hand).

8. **What are the criteria for evaluation and comparison of bid proposals?**

According to article 74 of PPC, there are two possible criteria for evaluation and comparison of bid proposals: the lowest price or the most economically advantageous tender (MEAT). The lowest price criterion may only be adopted when all the remaining aspects of the contract, apart from price, are defined in the specifications. When the MEAT criterion is used, a model for bid evaluation must be approved, whereby each factor or sub-factor of the criterion is duly identified and weighted. The factors and sub-factors under the MEAT criterion cannot relate to qualities, facts or characteristics pertaining to the bidders themselves (except for the contracts not included in the scope of the Directives). The model must also specify how the scores under each factor or sub-factor are granted and all the parameters of such graduation. The model cannot be based upon the characteristics of the bids to be presented, at the exception of the one
being evaluated (for instance, the price of a bid cannot be evaluated considering the bid that presented the lowest price).

9. **What are the requisites for execution of contracts after awarding?**

After the awarding is granted, several steps must take place before the contract is entered into: (i) the habilitation phase takes place (whereby the awarded bidder evidences before the contracting authority, through the presentation of documents, that it has no legal impediments for the signature of the contract and that it fulfils the professional and legal requirements, pursuant to the law, to execute the contract); (ii) the bond is presented by the awarded bidder to the contracting authority; (iii) any commitments regarding third parties obligations must be confirmed; (iv) the draft of the contract is sent to the awarded bidder for acceptance; (v) the awarded bidder is notified of date and place where the contract shall be signed.

E. **Private Initiative Projects**

1. **Are there any regulations for Public Procurement of projects proposed by private companies?**

As a general rule, private companies cannot propose projects where public procurement is involved (there is an exception regarding the granting of public domain concessions). Furthermore, please note that when an undertaking has, directly or indirectly, provided any support or assistance in the preparation of the tender documents (namely, specifications) that grants such undertaking an advantage that may jeopardize normal competition conditions, it is then legally forbidden for that undertaking to become a bidder or a candidate in such procedure (please see article 55 j) of the PPC, in accordance to the last amendment).

2. **Does the private company proposing the project have any advantage for purposes of bidding?**

No. See previous answer.

F. **Review Procedures**

1. **Are there any judicial review procedures applicable to the bidding processes?**

Yes. Whenever the bidding processes relates to services, supply and works contracts as well as public works concessions, the tender documents can be directly challenged in Court, as well as the acts of formation of the contract (namely, the awarding decision). The interested party must file such challenge in a one month period after notification or awareness of such act (such challenge may be accompanied by an interim injunction to stall the procedure). Bidding processes relating to other type of contracts are subject to the general judicial review procedures (the challenge, which also can be accompanied by an interim injunction, must be made in a three month period or, if the interested party claims that such act in null and void, at all times).

2. **Are there any judicial review procedures applicable when the contract has been executed?**

Yes. After the contract has been executed, its validity (either partial or whole) can be challenged in Court, not only by the contracting parties, but also by: - The party that has challenged the awarding decision or any act regarding the formation of the contract (such challenge may be extended to the contract itself); - Any party that considers itself damaged by the fact that the pre-contractual procedure, legally due, has not been adopted; - By a losing bidder, claiming that the executed contract does not correspond to the terms of the awarding act; - By a party claiming that the executed contract does not correspond to the initial terms which led such party not to enter the procurement procedure, although such party fulfilled the requirements for such effect.
G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

The PPC has general provisions applicable to the terms of all contracts under its scope as well as specific rules on the terms of particular contracts (namely, public works contracts, render of services contracts, concession of public works/services, supply and lease contracts). In what concerns the extension of contracts, the PPC stipulates that supply, lease and render of services contracts cannot surpass 3 years, including prorogations (except if it is deemed as necessary or convenient in face of the nature of the obligations under the contract or of the execution conditions). For concessions of public works/services, the length of the contract must be fixed in accordance to the period of time necessary for the amortization of the investment made by the concessionaire. If the contract does not specify a specific term, the PPC states, under article 410, that the contract is valid for 30 years (including any tacit and express prorogations).

2. Are there any guarantees that have to be posted for the performance of the contract?

Yes. As a general rule, a performance bond must be presented if the contract to be entered into implies payments by the contracting authority and the contract has the value equal or over 200.000€. The value of the bond is of 5% of the contractual price. Should the bid price be considered as abnormally low, the value of the bond is of 10% of the contractual price. The bond can be presented through a bank guarantee, cash deposit or insurance bond (the models of the bond should be described in the tender documents).

3. Are there any special powers upon the State?

As a general rule, the State (as any other contracting authority) has the following special powers: - Power to supervise the execution of the contract; - Power to give instructs on the execution of the contract; - Power to unilaterally modify the contract; - Power to apply fines/sanctions; - Power to unilaterally terminate the contract by reasons of public interest; - Power to redeem (concession contracts); - Sequestration (concession contracts).

4. Can fines or penalty clauses be agreed upon?

The contracting authority may impose the penalties/fines set forth in the contract or in the law in case of default of the private contractor. In any case, please note that the accrued value of penalties cannot exceed 20% of the contractual price. Whenever the accrued value of penalties exceeds such threshold, the contracting authority may terminate the contract (if, by reasons of public interest, the contract is not terminated when the limit of 20% is met, the limit for penalties is raised to 30% of the contract price).

5. Can the contract be assigned?

Yes, the contract can be assigned pursuant to articles 316 to 324 of PPC. As foreseen in articles 318 and 319, the assignment must be authorized by the contracting authority and is subject to the following rules: i) the assignor must present all the documentation that was demanded to the assignee in the formation of the contract; ii) the assignor must fulfil all the technical and financial minimal requirements that were demanded to the assignee in the formation of the contract.

6. Can advance payments be established?

Yes, advance payments can be established pursuant to article 292 of PPC. Please note that, in general, advance payments are subject to the following requirements: - The
payments cannot be higher than 30% of the contract value; - The contractor must present a bond of an equal or superior value of the advance payments.

7. How is dispute resolution regulated?

The contract may have an arbitration clause. Arbitration in Portugal is ruled by Law 63/2011, December 14th. If there is no arbitration clause, the dispute shall be settled in the State Administrative Courts.

8. Can international arbitration be agreed upon?

Yes, international arbitration can be agreed upon and normally it is settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (“ICC Rules”).

9. Is there any procedure for liquidation of the contract?

The PPC establishes a procedure for liquidation of public works contracts only. Pursuant to article 392 of PPC, after the contractor signs the documentation regarding the state of the works, the price correspondent to the measured works, where no diverge exists, is liquidated, after all the discounts are taken into account.

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.


Contact Information

Margarida Olazabal Cabral
mocabral@mlgts.pt

Morais Leitão, Galvão Teles, Soares da Silva & Associados
Rua Castilho, 165
1070-050 Lisbon, Portugal

Tel 351.213.817.400 Fax 351.213.817.499
www.mlgts.pt

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www.lexmundi.com/GlobalPracticeGuides
A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

Main regulation governing this issue is Serbian Law on Public procurement. This law determines conditions, manner and procedure for procurement of the goods and services and assignment of works in cases when purchaser is state body, organization, institution or some other legal entity determined by this law. Furthermore, the Law on Public Procurement determines manner of recording of contracts and other information regarding public procurement. This law also determines the scope of work and organizational form of the Directorate for public procurement, organizes Republic Commission for protection of rights regarding public procurement, where it also determines the manner of protection of the bidders rights and protects the public interest.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The main principles governing this area are the principle of economy and effective use of public resources, principle of ensuring the competition between the bidders, principle of transparency of the public procurement process, and principle of equality of the bidders.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

The main regulation is Serbian Law on Public Procurement. Further there are many bylaws in this area and some of the most important are Rule book on mandatory elements of concur documentation in public procurements, Rule book on manner of keeping of the evidence of public procurements, Rule book on way of handling the electronic offers and manner of conducting the electronic bids in public procurements, Rule book on procedure of public procurement of small value, Regulation on procedure for awarding certificates to public procurement officials and so on.

3. What public agencies are subjected to the general Public Procurement regime?

Serbian laws determine that purchaser could be: 1. State bodies, organizations, institutions and other direct or indirect users of budget resources which are further determined by Law governing the budget system and budget, as well as organization for mandatory social insurance; 2. Public companies; 3. Legal entities which business activity is of public interest and which is financed by at least 50% from the budget; or in which more than half of managing bodies are occupied by entities described under 1 and 2; or representatives of these entities (1 and 2) have more than half of votes in legal entity; or these entities are supervising the subject legal entity; or in case when these entities possess more than 50% of stocks in this legal entity. 4. The legal entity founded by entities 1 and 2 and whose business activity is of public interest and which satisfies at least one of the conditions described under 3 above.
4. What public agencies are not subjected to the application of the general Public Procurement regime?

The law does not directly prescribe which public agencies are not subject to the general public procurement regime, however, it prescribes situations where Law on public procurement is not going to be applicable. This is in situation when organization, considered as purchaser in the sense of the Law on public procurement, which is by Republic of Serbia or, governing sub entity, or local municipality and based on some special law, bylaw or some other regulation, determined specially and exclusively to provide services which are subject of public procurement; or to organizations for which different rules on procurement are applicable, such as international Agreements, or which are financed from foreign loans; or when providing the basic living conditions in cases of disasters, other accidents, in compliance to provisions governing those situations; in situations which are determined as confidential and which could jeopardize State security, and so on.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

Yes there are. The Law on public procurement prescribes that purchasers in the sense of the Law on public procurement will be other legal entities which business activity is of public interest and in which more than half of managing bodies are occupied by entities described under 1 and 2 in question 10; or representatives of these entities (1 and 2 from question 10) have more than half of votes in legal entity; or these entities are supervising the subject legal entity; or in case when these entities possess more than 50% of stocks in other legal entity; or in case when such legal entity is financed more than 50% from the budget of the Republic of Serbia. This is also the case with the legal entity founded by entities 1 and 2 from question 10 and whose business activity is of public interest and which satisfies at least one of the conditions described in previous sentence.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

The answer on this question is coming from a principle of equality of bidders. The Law stipulates that a procuring entity shall ensure equality of all bidders in all phases of the public procurement procedure. Furthermore, the procuring entity may not impose requirements that would constitute territorial, subject or personal discrimination among bidders, or discrimination arising from the classification of the business activity performed by the bidder. At the end, the Law is clear when saying that a procuring entity shall not exclude any bid merely because the bidder's registered address is located in a state with which the Republic of Serbia has not concluded an agreement on equal treatment of domestic and foreign bidders, if there is de facto equality as determined by the Ministry in charge of foreign economic relations. However, there has to be such agreement in order to have completely same treatment for foreign and domestic bidders.

2. Are there any reciprocity regulations?

Yes there is. The Law stipulates that if a bidder offers products originating from a country with which Republic of Serbia has not concluded an agreement that would enable domestic bidders to have equal access to the market of that country, such a bid may be rejected if more than 50% of the products offered in the bid originate from such country.
3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

There is no explicit provision in Law on public procurement that restricts foreign companies to participate in some public procurement. However, there are provisions that could indirectly prevent the participation of foreign bidders. Such provision is the one on reciprocity, and in sense that if there is not concluded agreement between Serbia and that specific country the companies from that country could be easily rejected. Further, the Law in its article 7 stipulates that for certain situations public procurement is not prescribed. In its paragraph 4 it says: “The provisions of this Law shall not apply to the procurement….to which the special regulation stipulates that can be defined as confidential and that is, by the decisions of the competent body based on authority provided in special regulations, defined as confidential, because the knowledge of unauthorized persons that such procurements are conducted, or knowledge that subjects of public procurement have certain specifications, or are executed by specific bidder, would threatened the national security and security of the citizens”. In this sense it is hard to believe that such procurement will be given to foreign companies.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

Every procuring entity is obliged to collect and to keep records of certain data concerning public procurement procedures and awarded public procurement contracts. Further, there have to be conducted the reports on concluded public procurement contracts which shall contain the information on the procuring entity, procedure and subject of the public procurement, value of the public procurement, bidder with which the public procurement contract was concluded, received bids and the public procurement advert. A procuring entity is further obliged to deliver to the Public Procurement Office in a calendar year a quarterly report on concluded public procurement contracts and public procurement procedures. The Public Procurement Office than prepares a summary of reports on concluded public procurement contracts on the basis of the delivered quarterly reports of procuring entities and posts it on the Public Procurement Portal. On the other side there is no one centralized bidder’s registry, however, there are some registries, like the Bidder’s Registry for construction companies, which are defined by certain profession.

2. Is electronic procurement fully implemented?

Electronic procurement proceeding is not yet fully implemented. However, the Rulebook on treatment of electronic tenders and the implementation of electronic bids in public procurement proceeding is rendered. This Rulebook shall govern the handling of electronic bids and the implementation of electronic procurement in public procurement procedures. Electronic bid or offer is part of a bid which the bidder shall submit in electronic form and as such must be provided in tender documentation. Electronic bid should also meet the principle of electronic exchange and it should represent the entirety with other parts of the bid. Electronic bidding is competition among bidders in public procurement proceeding through the providing of new, more favorable bids electronically, which are ranked using automatic evaluation. The submission of electronic bids is possible if the procuring entity provides for such a possibility in the tender documents.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

A bidder may submit a bid in electronic form if the procuring entity provides for such a possibility in the tender documents. Such bid must have the electronic signature protection while the signature must be certified by the qualification certificate. The electronic bid must have a time mark. The information system of the procuring entity
must provide a technologically independent receipt of bids and access to the bids only after the expiry of the time limit for bid receipt.

4. What are the possible ways of association for participating in public procurement proceedings?

A bid may be submitted by a group of bidders. In that case, a procuring entity may not request a group of bidders to associate themselves into a legal entity so that they may submit a joint bid. The procuring entity may require a group of bidders to submit a legal act binding them to execute jointly the procurement contract if the joint bid is assessed as the most advantageous one, provided that such a request is necessary for successful procurement contract execution. The legal act shall specify the responsibility of each bidder for the contract performance. The bidders forming a group of bidders shall bear unlimited joint liability towards the procuring entity. The procuring entity may request legal entities forming a group of bidders to state in their bids or requests to participate the names and adequate professional qualifications of the persons who will be responsible for contract execution.

5. What type of procurement procedures exist?

Pursuant to the Public Procurement Act we point out the following public procurement procedures: a) an open procedure, as a regular procedure in which all the parties with an interest in obtaining the contract may submit their bids under the terms set forth in the tender documentation, the public call to bid and the Public Procurement Act, b) a restrictive procedure, as a procedure that has two stages, where the first stage consists of the procuring entity recognizing the qualifications of bidders on the basis of previously determined qualification requirements, and the second stage consists of the procuring entity calling on all bidders whose qualifications have been recognized (candidates) to submit their bids, c) a negotiation procedure, as a procedure with a public call to bid and negotiation procedures without a public call to bid, characterized by a complete absence of competition or minimal competition, may be conducted only if the legal requirements have been fulfilled, i.e. in case of circumstances specifically listed by the law. Apart from fulfilling such requirements, the procuring entity also has to ensure in the negotiation procedure that the agreed price does not exceed the comparable market price and to employ due diligence in inspecting the quality of the subject of such public procurement, d) a small value public procurement, as a procedure of procurement of goods, services or works of the same kind where the estimated value on an annual level is less than the value specified in the the Serbian Budget Act.

6. What are the modes of selection processes and when are they applicable?

There is only one mode of selection process – the process in which Most Advantageous Bid is selected. Having examined the bids in the public procurement procedure, a procuring entity shall firstly reject all the incorrect, inadequate and unacceptable bids. Afterwards, a procuring entity shall evaluate the bids that it has not rejected by applying the criteria elements and rank them accordingly. After conducting the evaluation and ranking of the bids, the procuring entity shall select the most advantageous bid even if it has received at least one correct and adequate bid. That mode of selection process is mandatory applicable in each and every case.

7. Is the bidding company required to post any bond or insurance?

The procuring entity may specify in the tender documents the type of financial security instruments by which bidders guarantee the fulfillment of their obligations in the public procurement procedure, as well as the fulfillment of their contractual obligations and the refund of advance payment (various forms of pledging securities or other movable property, mortgages, promissory notes, guarantees given by other legal person possessing adequate creditworthiness, bank guarantees, insurance policies, etc.).
8. **What are the criteria for evaluation and comparison of bid proposals?**

The criteria for evaluating bids are 1) the economically most advantageous bid or 2) the lowest price offered. The economically most advantageous bid criterion is based on various criteria, depending on the subject of public procurement, especially including: 1) price offered, 2) payment terms, 3) delivery period or period of completion of services or works, 4) current costs, 5) cost effectiveness, 6) quality, 7) technical and technological advantages, 8) after-sale service and technical assistance, 9) warranty period and the type of warranties, 10) obligations concerning spare parts, 11) post-warranty maintenance and 12) aesthetic and functional characteristics.

9. **What are the requisites for execution of contracts after awarding?**

The public procurement contract must be concluded in accordance with the most advantageous bid but it may not be concluded prior to the expiry of the time limit for the submission of a request for the protection of the bidders' rights. After concluding the contract the procuring entity may allow any change in the price only for objective reasons, which must be specified in the tender documents or stipulated by special regulations. Additionally, the avoidance of the causes for annulment of the Public procurement contracts (Article 120), as described in the point 37 of this file, may also be considered as the requisite for execution of contracts after awarding.

**E. Private Initiative Projects**

1. **Are there any regulations for Public Procurement of projects proposed by private companies?**

There are no specific regulations for Public Procurement of projects proposed by private companies. The law on public procurement is also applicable on private companies.

2. **Does the private company proposing the project have any advantage for purposes of bidding?**

The private company that proposes the project do not has any advantage for purposes of bidding.

**F. Review Procedures**

1. **Are there any judicial review procedures applicable to the bidding processes?**

Public procurement Law does not foresees distinctive judicial proceeding which would encompass the review procedures applicable to the bidding processes. Only the standard judicial procedure is available to the interested parties. On the other hand, Public procurement Law (in Articles 100 – 118) incorporates separate body and prescribes the rules of distinct administrative proceeding which shall be conducted by such body. The Republic Commission for the Protection of Rights in Public Procurement Procedures is autonomous and independent body of the Republic of Serbia which ensures the protection of bidders' rights and public interest in public procurement procedures. Within its competences the Republic Commission decides on requests for the protection of bidders' rights and public interest, decides on appeals lodged against the procuring entity's conclusions, decides on the procuring entity's proposal that the submitted request for the protection of rights shoul not stay the activities in public procurement procedure, decides on the expenses of the rights protection procedure, monitors the implementation of decisions adopted by it, cooperates with foreign institutions and experts in the field of public procurement and performs other activities in accordance with the law. The Republic Commission renders a Conclusion as a decisive act by which it rejects a request for the protection of rights, terminates the procedure on the basis of receiving a written notice on withdrawal of the request for the protection of rights prior to the making of the decision, rejects the appeal as inadmissible, untimely or lodged by an unauthorized person, accepts the request for
the protection of rights and cancels the public procurement procedure wholly or partly if
the request for the protection of rights is well-founded, rejects the request for the
protection of rights as unfounded or confirms the conclusion of the procuring entity or
cancels the conclusion of the procuring entity and orders further actions of the procuring
entity.

2. **Are there any judicial review procedures applicable when the contract has been executed?**

Public procurement Law does not foresee distinctive judicial proceeding which would
encompass the review procedures applicable when the contract has been executed.
Only the standard judicial procedure is available to the interested parties. On the other
hand, Public procurement Law (in Article 120) prescribes that public procurement
contract shall be deemed as annulled and void in the cases described in the point 37 of
this file.

**G. Overview of Public Procurement Contracts**

1. **What are the regulations applicable to contract terms and its extension?**

The applicable regulations are the Serbian Law on Contracts and Torts as Lex
Generalis which prescribes main conditions on the terms, extension, termination, form,
content and other crucial issues related to the every contract. As a Lex Specialis in this
particular issue the Serbian legislature possess the Public procurement Law which
determines the Subject of a Public Procurement Contract (in Articles 4 – 7) separately
in the cases of Procurement of Goods, Procurement of Works and Procurement of
Services.

2. **Are there any guarantees that have to be posted for the performance of the contract?**

As per Public procurement Law, the procuring entity may specify in the tender
documents the type of financial security instruments by which bidders guarantee the
fulfillment of their obligations in the public procurement procedure, as well as the
fulfillment of their contractual obligations and the refund of advance payment. Hence,
various forms of pledging securities or other movable property, mortgages, promissory
notes, guarantees given by other legal person possessing adequate creditworthiness,
bank guarantees, insurance policies and other sorts of guarantees could be posted for
the performance of the contract by the procuring entity’s request. Additionally, the law
regulating the annual budget of the Republic of Serbia stipulates the amount of public
procurement funds above which a procuring entity is obliged to demand a bank
guarantee for the fulfillment of obligations in the public procurement procedure, as well
as for the fulfillment of contractual obligations. It is very important to stress that the
procuring entity shall be authorized to cash the guarantee submitted alongside the bid if
the bidder does not sign a contract after its bid has been selected or if the bidder
withdraws his bid or after it after the expiry of the time limit for bid submission.

3. **Are there any special powers upon the State?**

Special powers upon the Republic of Serbia are manifested through the Public
Procurement Office which is a special organization for performing technical activities in
the area of public procurement, providing conditions for economic, efficient and
transparent use of public funds for public procurement and promotion of competition
and equality of bidders in the public procurement procedure. The Public Procurement
Office submits to the Government a public procurement report in the previous year,
including a proposal for measures to be undertaken, by 31 May of the current year.
Public Procurement Office a) participates in drafting of the regulations pertaining to the
sphere of public procurement, b) provides consulting services to procuring entities and
bidders, c) monitors public procurement procedures, submission of requests for the
protection of rights in the case of violation of public interest, d) informs the body in
charge of public fund auditing, budget inspection and other bodies competent for the
initiation of offence proceedings on irregularities in conducting public procurement
procedures, e) issues the certificates to public procurement officers, as well as keeping
the register of the public procurement officers who have been issued certificates, f)
performs the publication and distribution of relevant technical literature, g) prepares the
model decisions and other acts the procuring entity adopts in public procurement
procedures, h) collects the information on public procurement in other states, i) collects
the statistical and other data on the procedures conducted, public procurement
contracts concluded and on the efficiency of the public procurement system as a whole,
j) performs the formation and maintenance of the public procurement portal for the
purpose of improving general information provision to procuring entities and bidders, k)
cooperates with foreign institutions and experts in the field of public procurement and l)
cooperates with other government bodies and organizations, compulsory social
insurance organizations, as well as bodies of a territorial autonomy and local
government.

4. Can fines or penalty clauses be agreed upon?

In the Public procurement Law there are no restrictions which would ban the agreed
fines or penalty clauses in the public procurement contract. Hence, it could be
concluded that such clauses might be introduced by the contractual parties in
accordance with the Law on Contracts and Torts.

5. Can the contract be assigned?

In the Public procurement Law there are no restrictions which would ban the
assignation of the contract. Hence, it could be concluded that the assignation might be
performed by the contractual parties in accordance with the Law on Contracts and
Torts.

6. Can advance payments be established?

In the Public procurement Law there are no restrictions which would ban the advance
payments. On the contrary, the advance payment possibility is implicitly prescribed
since the procuring entity may specify in the tender documents the type of financial
security instruments by which bidders guarantee the refund of the advance payment.
Hence, it could be concluded that the advance payment might be established in
accordance with the Law on Contracts and Torts.

7. How is dispute resolution regulated?

There are no separate provisions of the Public procurement Law which regulate the
dispute resolution. Furthermore, Public procurement Law does not foresees distinctive
judicial proceeding which would encompass the review procedures applicable to the
bidding processes or the review procedures applicable when the contract has been
executed. Only the standard judicial procedure is available to the interested parties in
the case of dispute. However, the Republic Commission for the Protection of Rights in
Public Procurement Procedures, as autonomous and independent body of the Republic
of Serbia, conducts an administrative proceeding in which the bidders’ rights and public
interest are protected. The only provision which refers to the possibility of dispute is
implemented in the Article 16. of the Public procurement Law. Namely, it is stated that
in the event of dispute, the Serbian version of tender documents and bid shall prevail
even though a procuring entity may allow bids to be submitted in a foreign language,
especially in the section pertaining to technical characteristics, quality and technical
documentation.
8. Can international arbitration be agreed upon?

In the Public procurement Law there are no restrictions which would ban the arbitration clause. Hence, it could be concluded that the arbitration might be agreed by the contractual parties in accordance with the law.

9. Is there any procedure for liquidation of the contract?

Public procurement contract shall be deemed as annulled and void if it has been concluded in contravention of the provisions of the Public procurement Law regulating the manner and the procedure of awarding public procurement contract and if a procuring entity has acted in contravention of the provisions on determining the value of public procurement per lot. Additionally, if the agreement has been concluded in order to settle rights and liabilities without applying the public procurement procedure or if a procuring entity has selected the most advantageous bid under conditions other than those prescribed by the Public procurement Law or concluded a contact with a bidder whose bid was not selected as the most advantageous one, the contract shall also be deemed as annulled and void. The other reasons for annulment of the Public procurement contract: a) if a procuring entity authorized a third person, who is not the procuring entity for the purposes of the Public procurement Law, to conduct the public procurement procedure so as to avoid the application of the Public procurement Law, b) if the amendments to the original contract have been effected in contravention of the provisions of the Public procurement Law, c) if the agreement has been concluded in contravention of the Republic Commission’s decision and d) if the agreement has been concluded without a prior public procurement procedure, which the procuring entity was obligated to apply according to the provisions of the Public procurement Law. Separate procedure for the liquidation of the Public procurement contract has not been prescribed by the Public procurement Law.

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.


Contact Information

Stefan Dobric
stefan.dobrio@jpm.rs

Jankovic, Popovic & Mitic O.A.D.
6 Vladimira Popovica Street
11000 Belgrade, Serbia

Ivan Perovic
ivan.petrovic@jpm.rs

Tel 381.11.207.6850 Fax 381.11.207.6899
www.jpm.rs
Public Procurement Guide

Switzerland
Prepared by Lex Mundi member firm Pestalozzi Attorneys at Law Ltd

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

The Swiss regulations on public procurement govern the procedures and legal remedies for the purchase of goods and services, including construction contracts, by public authorities. The applicable regulations intend to make these procedures transparent, to increase the competition between the bidders and to ensure the equal treatment of all bidders. Last but not least, public procurement regulations aim to enhance efficient use of public funds.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The basic principles applicable to public procurement in Switzerland are non-discrimination and equal treatment of all bidders, including foreign ones, effective competition, immutability of the offers after submission and waiver of bidding rounds (cantonal procurements only), compliance with the rules on recusal, compliance with the rules on health, safety and working conditions of the employees, equal treatment of men and women as well as confidentiality of the information communicated in the offer. These principles are stated in article 8 of the FAPP (Federal Act on Public Procurement) as well as in article 11 of the IAPP (Intercantonal Agreement on Public Procurement).

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

The general basis of Swiss public procurement law is the Agreement on the Government Procurement of the World Trade Organization in force in Switzerland since January 1, 1996 (GPA), the bilateral treaty between the Swiss Confederation and the European Community on certain aspects of government procurement in force since June 1, 2002, and the bilateral treaty between the Swiss Confederation and the other member states of the European Free Trade Association (EFTA) in the current form in force since June 1, 2002. These treaties contain numerous provisions that apply directly, without particular implementation by Swiss federal or cantonal laws. These provisions may be referred to directly in public procurement proceedings.

On the federal level, the above-mentioned treaties have been implemented by the FAPP (and its related ordinance).

On the cantonal level, they have been implemented by the IAPP and 26 cantonal laws or ordinances. In some cantons, there are even communal ordinances that apply in addition to the international, federal and cantonal laws.

3. What public agencies are subjected to the general Public Procurement regime?
On the federal level, the following public agencies are subjected to the general public procurement regime (article 2 para. 1 letter a - f FAPP):

1) the federal administration;
2) the Swiss Alcohol Board;
3) the Swiss Federal Institutes of Technology and their research institutions;
4) the postal and the automobile services of the Swiss Post (if not competing with third parties that are not subjected to the GPA);
5) the Swiss Federal Nuclear Safety Inspectorate;
6) the Swiss National Museum;
   a. certain public and private law organizations being active in specific sectors (water and energy supply, transportation, telecommunications services).

On the cantonal level and within the scope of the above-mentioned international treaties, the following public agencies are subjected to the general public procurement regime (article 8 para. 1 letter a - d IAPP):

a. the cantons, the communities and the bodies governed by public law on the cantonal and community level (with certain limitations);
b. authorities as well as public and private companies that have certain exclusive or special powers in specific sectors (water and energy supply, transportation, telecommunications services);
c. other public agencies determined by the relevant state treaties.

On the cantonal level and outside the scope of the above-mentioned international treaties, the general public procurement regime applies also to (article 8 para. 2 letter a and b IAPP):

a. other institutions providing cantonal or communal services (with certain limitations);
b. objects and services subsidized with public funds by over 50 % of their overall costs.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

Certain exceptions apply with regard to the applicability of the general public procurement regime to the above-mentioned agencies. On the cantonal level, for instance, the general public procurement regime does not apply to commercial or industrial activities of the concerned agencies.

Also, public agencies with certain activities are not subjected to the general public procurement regime as the concerned activities are entirely carved out from public procurement laws. This applies to the procurement of certain military material, to certain contracts with institutions for disabled persons, charities and penal institutions, to contracts granted within the framework of agricultural or food aid programs, to contracts granted on the basis of an international treaty between GPA contracting states or Switzerland and third states in respect of an objective to be achieved and jointly funded, and to contracts that are awarded on the basis of a particular procedure of an international organization.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

As mentioned above, public and private companies that have certain exclusive or special powers in specific sectors (water and energy supply, transportation, telecommunications services), other institutions providing cantonal or communal services as well as objects and services subsidized with public funds by over 50 % of the overall costs are also subjected to the application of the general public procurement regime even if they cannot be qualified as public entities.
1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

On both the federal and the cantonal level, there is no general requirement for foreign companies to set up branches or subsidiaries or otherwise to enter into any commercial agreements with local partners in order to participate in public procurement processes.

2. Are there any reciprocity regulations?

On the federal level, bidders from GPA contracting states benefit from the generally applicable public procurement regime and may participate in a public procurement process without any restrictions, provided that these states grant reciprocal rights. As to bidders from other states, they only benefit from the generally applicable public procurement regime if their state of origin and Switzerland have entered into corresponding contractual agreements or if the Swiss Federal Council has established that there will be no discrimination against Swiss bidders in the concerned state.

Likewise, on the cantonal level, only bidders from states being a party to an international treaty benefit from the generally applicable public procurement regime and may participate in a public procurement process without any restrictions.

As to bidders from other states, they are not generally excluded from participating in Swiss public procurement processes. As such bidder do not benefit from the generally applicable public procurement regime, however, their legal position is considerably weaker, especially in court proceedings.

3. Are there any contracts or matters from which foreign companies are restricted (eg. national defense, hazardous waste disposal, security services, etc)?

No such general restrictions with regard to foreign companies exist.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

On both the federal and the cantonal level, the contracting authority must, upon expiry of the offer period, open the bids and thereby observe certain formal requirements and prepare minutes of the opening procedure with a minimal content defined by law (names of persons present, names of bidders, receipt date of bids, offered prices). Bidders are entitled to inspect these minutes at the latest after the award of the contract. In contrast, bidders have no general inspection right with regard to the other documents on the file of the contracting authority such as the offers of other bidders or the authority's assessment and evaluation of the offers.

2. Is electronic procurement fully implemented?

On both the federal and the cantonal level, electronic procurement is implemented to a large extent. By law, invitations to bids must be published on an internet platform (www.simap.ch) and the access to information published on that platform is free of charge.

Electronic procurement is also implemented to a large extent with regard to the dispatch of the authorities' bid specifications and with regard to the filing of the offers. In many cases, bid specifications are available for download from the
above-mentioned internet platform. Likewise, many contracting authorities allow or even request the filing of electronic offers. Bidders, however, have no right to the filing of their offers in electronic form.

3. **What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?**

No steps and measures are required to have access to the information published on the electronic public procurement platform ([www.simap.ch](http://www.simap.ch)).

To participate in a public procurement procedure and in particular to download the relevant bid specifications, a bidder must register on the platform. The registration and all services provided by the platform are free of charge, but the contracting authorities may ask for a fee for the delivery of bid specifications.

As to offers in electronic form, no general requirement of encryption, electronic signatures or the like applies. Contracting authorities, however, may require that such requirements are fulfilled.

As mentioned above, presenting a bid in electronic form is only allowed if explicitly provided for in the bid specification.

4. **What are the possible ways of association for participating in public procurement proceedings?**

Contracting authorities may exclude bidder consortiums, syndicates and working groups from participating in a procurement proceeding. In the absence of such exclusion, associations may participate in a proceeding. If bidder consortiums and the like are excluded, however, the concerned bidder can organize themselves differently and participate in the concerned proceeding with one bidder taking the lead and the others acting as subcontractors, unless subcontractors are excluded as well.

Contracting authorities may also exclude the use of subcontractors or allow the use of subcontractors only upon the contracting authority’s approval. Frequently, contracting authorities require that subcontractors fulfill the same requirements as the bidders and provide references for their contribution to the bid.

5. **What type of procurement procedures exist?**

On both the federal and the cantonal level, four different types of procedures exist: the open tendering procedure (offenes Verfahren), the selective tendering procedure (selektives Verfahren), the invitation tendering procedure (Einladungsverfahren) and the direct award (freihändiges Verfahren).

The invitation procedure is not explicitly regulated in the FAPP and only mentioned in its related ordinance. Therefore, on the federal level, the invitation procedure is only possible if the requirements for a direct award are fulfilled.

In addition, planning and full service competitions (Planungs- und Gesamtleistungswettbewerbe) are possible. However, such competitions are no particular types of procurement procedures, so they must follow the open, the selective or the invitation tendering procedure.

Due to the principle of legality, contracting authorities are bound by a *numerus clausus* and may only apply the above-mentioned procedure types.

6. **What are the modes of selection processes and when are they applicable?**
On both the federal and the cantonal level, the contracting authorities are free to choose between the open tendering procedure and the selective tendering procedure. However, contracting authorities should consider that selective procedures are more time consuming and therefore in particular useful if many offers are expected or if the assessment and evaluation of the offers is complex.

In contrast, direct awards may be granted only as an exception if certain particular requirements are fulfilled. For instance, a direct award is allowed if, for technical reasons, only one bidder is in the position to provide the required goods or services and no reasonable alternative or substitute is available. Likewise, a direct award is allowed for additional deliveries by the original supplier of replacement parts if a change of supplier would force the contracting authority to procure replacement parts not being interchangeable with already existing equipment.

7. Is the bidding company required to post any bond or insurance?

On both the federal and the cantonal level, there is no general requirement for bidders to post any bond or insurance or to provide any other security.

Nevertheless, the contracting authorities may require the bidders to post a bond or insurance if this correlates with the matter of the contract.

8. What are the criteria for evaluation and comparison of bid proposals?

On both the federal and the cantonal level, the contracting authority awards the contract to the bidder that submits the economically most advantageous offer.

To determine the economically most advantageous offer, the contracting authority must determine and consider the appropriate factors, depending on the goods or services to be procured. Relevant factors are, for instance, technical characteristics, price of investment, operating costs and profitability, quality standards and also experience, delivery deadlines, customer service, aesthetics and environmental sustainability.

The contracting authorities have a broad range of discretion when determining the criteria relevant for a particular procedure. However, they must always consider the offered prices. In the case of highly complex goods or services, the weight of the price may be as low as 20%, but not lower. In contrast, in the case of more standardized goods or services, the contracting authority must weigh the price higher, up to 100%. In any case, the contracting authority must publish the relevant criteria in the bid specifications with their order of weighting.

On the federal level, contracting authorities may negotiate the offers with the bidders, if the bid specifications provide for such negotiations and further provided that the authorities treat the bidders equally, conduct the negotiations in a written process and keep the relevant information confidential.

On the cantonal level, negotiations with bidders are a strictly prohibited.

9. What are the requisites for execution of contracts after awarding?

On both the federal and the cantonal level, Swiss public procurement law distinguishes between the award of the contract on the one hand and the conclusion of the contract on the other. The entire procedure relating to the contract award and appeal proceedings against the contract award are governed by public laws, whereas the conclusion of the contract and the contract itself are governed by private laws (mainly the Federal Code of Obligations).
The contract award is made in the form of a public law decision against which an appeal may be filed within a certain period of time. After the expiry of this period or after a final rejection of an appeal, if any, the award enters into legal force. Once the award has entered into legal force, the contracting authority and the winning bidder may conclude the contract. During an appeal proceeding, they may only do so if the court does not grant suspensive effect to the appeal.

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

On both the federal and the cantonal level, there are no particular regulations for the public procurement of projects by private companies.

As mentioned above, private companies are subject to the general public procurement regime for projects and services that are publicly subsidized by over 50% of their overall costs, if private companies perform public tasks or if they perform activities and have certain exclusive or special powers in specific sectors (water and energy supply, transportation, telecommunications services).

2. Does the private company proposing the project have any advantage for purposes of bidding?

No, on both the federal and the cantonal level, a private company that is subject to the general public procurement regime must obey to the applicable rules in the same way as a public company.

F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

On both the federal and the cantonal level, any important decision by a contracting authority (such as the invitation to bid with the bid specifications, the award of the contract, the cancellation of the contract award, the exclusion of a bidder from the procedure, the abortion of a procurement procedure) must be taken in the form of a public law decision. Against such orders, bidders may under certain circumstances file court appeals.

2. Are there any judicial review procedures applicable when the contract has been executed?

Generally, on both the federal and the cantonal level, once the contract has been executed, there is no possibility to revoke it by a judicial review procedure. Therefore, no appeal by an unsuccessful bidder is possible against the contract itself. Nevertheless, the competent court of appeal may determine that an underlying public law decision was unlawful, in particular the contract award.

While such a decision does not affect the validity of the contract, it may provide an unsuccessful bidder with a legal basis to claim damages from the contracting authorities. In any case, such a damage claim is limited to the expenses that the unsuccessful bidder had in connection with the procurement procedure. It does not cover lost profit.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

On both the federal and the cantonal level, there is no legal requirement to include the contract details into the bid specifications. Nevertheless, many
contracting authorities do so to enhance transparency and to accelerate the process after the contract award.

The contract itself is subject to the applicable private law, mainly the Federal Code of Obligations.

On both the federal and the cantonal level, an extension of an existing contract is not possible. Certain exceptions apply, for instance to extensions of insignificant importance and to extensions that were already part of the bid specifications. Also, an exception applies to additional deliveries by the original supplier, which are intended either as replacement parts or as extension of existing supplies if a change of supplier would force the contracting authority to procure equipment or services that are not interchangeable with already existing equipment. Likewise, an existing contract may be extended by a limited volume (50% of the main contract value) to additional construction services that were not included into the initial contract but that are within the objectives of the original bid specification and that, through unforeseeable circumstances, became necessary to complete the concerned construction services, provided that procuring such services from a different contractor would be difficult for technical or economic reasons and cause significant inconveniences to the contracting authority.

If none of these exemptions apply, an extension of the contract must be made in accordance with the applicable public procurement regime. Therefore, a new procurement procedure is required.

2. Are there any guarantees that have to be posted for the performance of the contract?

On both the federal and the cantonal level, there is no general requirement to provide guarantees or other securities for the performance of the contract. Nevertheless, contracting authorities may ask for such guarantees.

3. Are there any special powers upon the State?

No.

4. Can fines or penalty clauses be agreed upon?

Yes, on both the federal and the cantonal level, contractual penalty clauses may be agreed upon, for instance with regard to delivery delays or quality deficiencies.

5. Can the contract be assigned?

On both the federal and the cantonal level, the contract may only be assigned if such an assignment is provided for in the relevant contract or if the contracting authority agrees upon such an assignment.

6. Can advance payments be established?

Yes, on both the federal and the cantonal level, advance payments may be established.

7. How is dispute resolution regulated?

On both the federal and the cantonal level, dispute resolution is subject to the general rules and principles of administrative court proceedings.
contrast to other administrative court proceedings, an appeal in a public procurement proceeding has only suspensive effect if explicitly granted by the court.

8. Can international arbitration be agreed upon?

Yes.

9. Is there any procedure for liquidation of the contract?

On both the federal and the cantonal level, there is no special procedure for the liquidation of the contract. As the contract is not governed by the public procurement regime, the general rules and principles of private contract law apply.

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Link to the Federal Act on Public Procurement (FAPP):
http://www.admin.ch/ch/d/sr/c172_056_1.html
Link to the Ordinance to the Federal Act on Public Procurement:
http://www.admin.ch/ch/d/sr/c172_056_11.html
Link to the Intercantonal Agreement on Public Procurement (IAPP):

Contact Information

Michael Lips
Andrea P. Lippuner
michael.lips@pestalozzilaw.com
andrea.lippuner@pestalozzilaw.com

Pestalozzi
Löwenstrasse 1
8001 Zurich, Switzerland
Tel 41.44.217.91.11 Fax 41.44.217.92.17
www.pestalozzilaw.com

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www.lexmundi.com/GlobalPracticeGuides
A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

Pursuant to Public Procurement Law (Law no.4734) (published in the Official Gazette dated January 22, 2002, numbered 24648) ("PPL"), the principle elements of public procurement are transparency, competition, equal treatment, reliability, confidentiality, public supervision, and fulfillment of needs appropriately, promptly and efficient use of sources.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

Basic principles which are applicable to public procurement are as follows; compliance with regulations of related ministries (mostly ministry of finance in this case), general communiques of related ministries, the PPL and the Law of Public Procurement Contracts (Law No. 4735) (published in the Official Gazette dated January 22, 2002, numbered 24648) ("Law of Contracts"); compliance with the notice periods stated in Article 13 of PPL; compliance with the basic principles according to the Law of Contracts.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

The main regulations applicable to public procurement in Turkey are as follows: PPL; Regulation of Administrative Appeal Against Procurements (published in the Official Gazette dated May 24, 2004, numbered 25471); Law of Contracts; State Procurement Law (Law No. 2886) (published in the Official Gazette dated September 10, numbered 24648); General Communique on Public Procurement (published in the Official Gazette dated August 22, 2009, numbered 27327) ("Communique").

3. What public agencies are subjected to the general Public Procurement regime?

As per Article 2 of PPL public agencies which are subjected to the general public procurement regime are as follows; public and private institutions within the scope of general budget; administrations with special budget; special provincial administrations and municipalities and their related revolving funds organizations; associations (except those operating as professional organizations and their supreme institutions); legal entities; state economic enterprises; social security establishments.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

As per Article 2 of PPL, public agencies which are not subjected to the general public procurement regimes are as follows; professional organizations and foundation institutions of higher education etc. Additionally, service procurements of public agencies, which are listed in Article 3 of PPL, are not subjected to PPL provisions. These procurements are including but not limited to; energy and fuel purchases by the
state economic enterprises; goods and services procurements by General Directorate of Youth and Sports; goods and services procurements with regard to repair and restoration and landscaping of cultural properties of foundations.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

As per Article 2 of PPL, there are several non-public entities subjected to the application of the general public procurement regime. These entities are, pursuant to Article 2, including but not limited to legal entities specified such as funds; banks; legal entities that are incorporated with special law and assigned for public services; etc.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

No, with respect to new regulations foreign companies may participate in public procurement process without any specific restriction.

2. Are there any reciprocity regulations?

According to public procurement legislation, there is no reciprocity regulations, all foreign companies are subjected to PPL. However, it is noteworthy that according to Article 63 of PPL, the contracting authorities may insert some provisions to the tender documents which will restrict foreign companies’ participation to public procurement. Besides, a price advantage may apply for domestic tenderers up to 15% in working and service procurements and a price advantage up to 15% may apply to domestic tenderers who offer domestic products in goods procurements. Hence, foreign tenderers and domestic tenderers who perform joint venture with foreign tenderers may be restricted from public procurement process.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

According to PPL, foreign companies which are out of the scope of PPL cannot enter into procurements regarding public construction works. Additionally, PPL and the related regulation include other restrictions regarding foreign companies. The restrictions are not listed as numerous clauses in PPL; therefore this issue may be determined based on each individual case.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

There is an electronic registration system called “Electronic Platform of Public Procurement” (“EPPP”) which the bidders shall submit in the required information and documentation during the steps of the procurement process. As per Additional Clause 1 of PPL, the methods and principles regarding the use of EPPP may be determined by the Public Procurement Agency. All of the announcements would be made pursuant to Article 13 of PPL shall be published on EPPP at the same time. The Public Procurement Agency is in charge in the evaluation of the bids.

2. Is electronic procurement fully implemented?

The procurement process is led mainly by the Public Procurement Institution of Turkey. According to PPL, and the Electronic Procurement Implementation Regulation (“EPIR”) published in the official gazette dated, February 25, 2011 and numbered, 27857), the Page public procurement process is mainly directed by the Public Procurement Agency.
However, pursuant to PPL and EPIR, bidders also have the option of submitting their bids on EPPP. So, electronic procurement process is not fully implemented, but it exists as an option. The stages related to procurement process, such as the tender notice, preparation and submission of the tender document, submission of the documents concerning participation and qualification, preparation, submission, and evaluation of the tenders, finalization and approval of the procurement, notification of the final tender decision, and signing of the contract as well as all sorts of notifications may be carried out over the EPPP. All the notices to be made related to public procurement process shall also be published in the EPPP.

3. **What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?**

Please be advised that pursuant to the Electronic Procurement Implementation Regulation (“EPIR”) (published in the official gazette dated, February 25, 2011 and numbered, 27857) the steps and measures that should be addressed for a bidder in order to present a bid in electronic procurement procedure is explained. According to EPIR, the bidders must be registered in EPPP (Electronic Public Procurement Platform) with the registration documents that are required by the regulation. As per Articles 19 and 23 of EPIR, the bidders prepare their offers through EPPP by submitting their required documents. The documents are signed by e-signature and submitted to Public Procurement Agency before the procurement date. These electronic offers are saved pursuant to the Electronic Signature Law (numbered 5070), (published in the official gazette dated January 23, 2004 numbered, 25355). Consequently, the tenders are initiated on the day of procurement at the same hour, in the presence of the bidders and those present.

4. **What are the possible ways of association for participating in public procurement proceedings?**

Please be informed that pursuant to Article 14 of PPL, the association may include many legal entities or real persons and can be established as joint-venture or consortium. A joint-venture or consortium may tender every type of bid however, if the project requires for specialization, the administration that held the bid has right to indicate whether the consortium or the joint-venture can tender for the bid. Besides, if the subject of the bid requires for subcontractor, it can included in the bid documents.

5. **What type of procurement procedures exist?**

There are 3 types of procurement procedures according to the PPL which are; (i) Open Tender Procedure, (ii) Tender to Predetermined Bidders, (iii) Negotiated Tendering

6. **What are the modes of selection processes and when are they applicable?**

There are three types of public procurement procedures according to the Public Procurement Law, which have been mentioned above. These procedures are as follows: (i) Open Tender Procedure: All tenderers may submit their tenders. (ii) Tender to Predetermined Bidders/ Restricted Tender Procedure: Only tenderers, who are invited following pre-qualification by the contracting authority, can submit their tenders. (iii) Negotiated Tendering: Negotiated tendering shall be applied in such cases like if no tender is submitted, if it is inevitable to conduct the tender procedures immediately, if the procurement is of character requiring a research and development process, if technical and economical qualifications of the subject of the bid cannot be determined because it is unique and complicated.

7. **Is the bidding company required to post any bond or insurance?**

As per Article 42 of PPL, the bidders shall pay the performance bond within 10 days (an additional time of 12 days shall be given for foreign bidders) from the notification date of the bidder. In pursuant to Article 42 of PPL, the bidders shall pay the performance bond
8. **What are the criteria for evaluation and comparison of bid proposals?**

The stages of evaluation and comparison of bid proposals are as follows: (i) The tenders of tenderers with complete and appropriate documents and appropriate tender letters and preliminary guarantees shall be subjected to a detailed evaluation. (ii) The tenders that are found ineligible and the tenders with arithmetic errors in unit price charts shall be disqualified. (iii) The tender commission shall determine those that are abnormally low compared to the other tenders or to the estimated cost determined by the contracting authority. (iv) Tender commission shall evaluate the abnormally low tenders. The Authority is entitled to set limit values or inquiring criteria or average values in order to identify and evaluate abnormally low tenders and to determine the economically most advantageous tender. (v) Finally, the economically most advantageous tender shall be determined solely on the basis of price or together with the price by taking into account the non-price factors such as operation and maintenance costs, cost-effectiveness, productivity, quality and technical merit.

9. **What are the requisites for execution of contracts after awarding?**

As per Article 42 of PPL, the bidders shall pay the performance bond within 10 days after the notification of awarding and sign the procurement contract, for the execution of contracts. In pursuant to PPL twelve days shall be added to this period of 10 days for foreign bidders. So, PPL requires the performance bond and the signing of the contract for execution after awarding.

**E. Private Initiative Projects**

1. **Are there any regulations for Public Procurement of projects proposed by private companies?**

No, as a general rule, the procedures of public procurement of projects are regulated within the scope of PPL and related regulations which have been mentioned above. There is no specification regarding the procurement of projects proposed by private companies, in pursuant to PPL.

2. **Does the private company proposing the project have any advantage for purposes of bidding?**

No, as a general rule, the procedure of public procurement of projects are regulated under PPL and related regulations which have been mentioned above. All of the companies and organizations within the scope of the PPL are subjected to same rules. However, there are some advantages for domestic tenderers. Please refer to answer C.2.

**F. Review Procedures**

1. **Are there any judicial review procedures applicable to the bidding processes?**

Yes, according to the Regulation of Administrative Appeal against Procurements and Article 54 of the PPL, there are three types of judicial review procedures applicable to the bidding processes. These are the procedures regarding the appeals which shall be directed to the Public Procurement Agency. These procedures are as follows: (i) Complaint (ii) Complaint with objection (iii) Review of claims
2. Are there any judicial review procedures applicable when the contract has been executed?

Yes, pursuant to Regulation of Administrative Appeal against Procurements and Article 55, 56 and 57 of the PPL, there are three types there is an appeal procedure against these decisions of the Public Procurement Agency. (i) Require of explanation (ii) Correcting errors (iii) Filing of an appeal with a stop of execution request before the state courts may be the procedures applicable, against the Public Procurement Agency.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

Law of Contracts regulates public procurement contracts and designates procedure and principles regarding the application of the public procurement contracts. Additionally pursuant to Article 36 of Law of Contracts, Turkish Code of Obligation (Law No. 6098) (published in the Official Gazette dated April 29, 1926 and numbered 359) (“TCO”) shall be applied in case there is no provision regarding contracts in Law of Contracts.

2. Are there any guarantees that have to be posted for the performance of the contract?

Pursuant to PPL, there are two types of guarantees that have to be posted for the performance of the contract. These guarantees are as follows: (i) preliminary guaranty and (ii) performance guaranty As per Article 33, tenderers shall give a preliminary guaranty which shall not be less than 3% of the bid price. However, as long as it has been stated in the procurement document, preliminary guaranty is not obligatory in consultancy service procurements. Additionally, performance guaranty has been regulated under PPL. As per Article 43 of PPL, remaining tenderers shall give a performance guaranty with an amount of 6 % which is calculated based on the tender price. However, as long as it has been stated in the procurement document, the preliminary guaranty may not be given before signing the document in consultancy service procurements. As a result, a deduction of 6 % from each progress payment shall be retained as guarantee.

3. Are there any special powers upon the State?

No, according to PPL and other related Laws state courts are only judicial authorities to apply against the procedure.

4. Can fines or penalty clauses be agreed upon?

Pursuant to Article 7 of Law of Contracts, it is obligatory to add a clause regarding the fines or penalties in case of default in the contract. However, there is no provision that regulates default penalty under PPL but, Article 20 indicates that default is a reason to terminate the contract and in any cases if the tenderer do not fulfil its contractual obligations, there shall be a default penalty.

5. Can the contract be assigned?

As per Article 16 of Law of Contract, in obligatory circumstances with the written permission of tendering official, contracts may be assigned to a third party. However, conditions regarding the first tender shall be fulfilled by the assignee. Besides, except for the assignments regarding the name and statute change, contractor shall not assign or take over another contract within the following three years from the assignment of the contract.
6. **Can advance payments be established?**

Pursuant to Article 7 of Law of Contracts, it is obligatory to add a clause regarding advance payment. The clause shall state whether an advance payment shall be paid. If the advance payment will be paid than the conditions and amount shall be stated in the relevant clause.

7. **How is dispute resolution regulated?**

The dispute resolution procedure is regulated according to Regulation of Administrative Appeal against Procurements and to PPL. There are three types of judicial review procedures applicable to the bidding processes, and the appeal of these decisions is possible before the state courts. Please refer to questions 27 and 28.

8. **Can international arbitration be agreed upon?**

As a general rule, in accordance with the principle of freedom of contracts parties may agree upon international arbitration regarding Public Procurement contracts because these contracts are considered as private law contracts since one party is a private entity. However, the principle of freedom of contract has been restricted specially on public procurement procedure with the Adjudication Typed Specification Regarding General and Common Principles to be applied to All Types of Purchasing Procurements within the Scope of State Procurement Law numbered 2886 (published in the Official Gazette dated May 27, 1984 and numbered 18413) (2886 sayili Devlet İhale Kanunu Kapsamindaki İdarelerin Her Türü Alımı İhalelerinde Uygulanacakları Genel ve Ortak Esasları Belirleyen Eksiltme Tip Sartnamesi) Besides, as per Article 57 of PPL only the state courts are determined as the judicial authorities, and parties shall not agree upon international arbitration.

9. **Is there any procedure for liquidation of the contract?**

Conditions regarding delivery, examination and acceptance of the business have been issued by the Law of Contracts. Additionally, with respect to different types of public procurement contracts there are different procedures regarding the liquidation of the contract. Types of public procurement contracts may be listed as follows: (i) Construction work procurement (ii) Goods procurement (iii) Service procurement (iv) Consultancy procurement
H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

   Regulations Web Links
   Public Procurement Law (Law no.4734) (published in the Official Gazette dated January 22, 2002, numbered 24648)
   http://www.ihale.gov.tr/public_procurement_law-50-1.html (English)
   http://www1.ihale.gov.tr/mevzuat/ (Turkish)
   Procurement Contracts (Law No. 4735) (published in the Official Gazette dated January 22, 2002, numbered 24648)
   http://www1.ihale.gov.tr/mevzuat/ (Turkish)
   Regulation of Administrative Appeal Against Procurements (published in the Official Gazette dated May 24, 2004, numbered 25471)
   http://www1.ihale.gov.tr/mevzuat/ (Turkish)
   State Procurement Law (Law No. 2886) (published in the Official Gazette dated September 10, numbered 24648)
   http://www.mevzuat.adalet.gov.tr/html/637.html (Turkish)
   General Communique on Public Procurement (published in the Official Gazette dated August 22, 2009, numbered 27327)
   http://www1.ihale.gov.tr/mevzuat/ (Turkish)

Contact Information

Kemal Serdengecti  
kserdengecti@pekin-pekin.com

Erenalp Renceber  
erencber@pekin-pekin.com

Pekin & Pekin  
10 Lamartine Caddesi  
Taksim  
34437 Istanbul, Turkey  
Tel 90.212.313.3500 Fax 90.212.313.3535  
www.pekin-pekin.com
Public Procurement Guide

USA, Arkansas

Prepared by Lex Mundi member firm Rose Law Firm, A Professional Association

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

The responses to the following questions address the elements of the different types of public procurement in the State of Arkansas.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The underlying purposes and policies of Arkansas law on public procurement are to: (1) Simplify, clarify, and modernize the law governing procurement by this state; (2) Permit the continued development of procurement policies and practices; (3) Provide for increased public confidence in the procedures followed in public procurement; (4) Ensure the fair and equitable treatment of all persons who deal with the procurement system of this state; (5) Provide increased economy in state procurement activities by fostering effective competition; and (6) Provide safeguards for the maintenance of a procurement system of quality and integrity. Ark. Code Ann. § 19-11-202.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

Arkansas Code Annotated Title 19, Chapter 11, and the Rules of the Arkansas Office of State Procurement (noted in this survey response as “R[#]”, followed by a reference to the related the Ark. Code Ann. section)

3. What public agencies are subjected to the general Public Procurement regime?

Any agency, institution, authority, department, board, commission, bureau, council, or other agency of the state supported by appropriation of state or federal funds, except an exempt agency. Exempt agencies are the constitutional departments of the state, the elected constitutional offices of the state, the General Assembly, including the Legislative Council and the Legislative Joint Auditing Committee and supporting agencies and bureaus thereof, the Arkansas Supreme Court, the Court of Appeals, circuit courts, prosecuting attorneys, and the Administrative Office of the Courts. Note that even “exempt agencies” are not exempt when that agency procures any item of printing, stationary, or supplies. Ark. Code Ann. §§ 19-11-207, 19-11-203(30), and 19-11-203(13); Ark. Constitution Amend. 54.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

Exempt agencies are the constitutional departments of the state, the elected constitutional offices of the state, the General Assembly, including the Legislative Council and the Legislative Joint Auditing Committee and supporting agencies and bureaus thereof, the Arkansas Supreme Court, the Court of Appeals, circuit courts, prosecuting attorneys, and the Administrative Office of the Courts. Note that even
“exempt agencies” are not exempt when that agency procures any item of printing, stationary, or supplies. Ark. Code Ann. §§ 19-11-207, 19-11-203(30), and 19-11-203(13); Ark. Constitution Amend. 54.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

No.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

No. However, in some situations, an attempt is made to give preference to local companies over foreign companies. Ark. Code Ann. §§ 19-11-259, 19-11-304, 19-11-305, and 19-11-306.

2. Are there any reciprocity regulations?

No.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

No.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

Yes. A business shall make application on the Office of State Procurement web site to have its name placed on the State Master Vendors lists for the commodities and services it wishes to supply or provide. To register for the vendors list, visit: https://www.ark.org/vendor/index.html. To register for the emergency vendors list, visit: http://www.dfa.arkansas.gov/offices/procurement/Pages/emergencyCommodityServiceRegistry.aspx. R3: 19-11-217 and R4: 19-11-217.

2. Is electronic procurement fully implemented?

No.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

N/A.

4. What are the possible ways of association for participating in public procurement proceedings?

To participate in public procurement proceedings, the current bid proposals may be viewed on the website of the Office of State Procurement at: http://www.arkansas.gov/dfa/procurement/bids/index.php.

5. What type of procurement procedures exist?

- Competitive sealed bidding (Ark. Code Ann. § 19-11-229; R1 to R15: 19-11-229)

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6. What are the modes of selection processes and when are they applicable?

- Competitive sealed bidding (Ark. Code Ann. § 19-11-229; R1 to R15: 19-11-229)-Unless otherwise authorized by law, all contracts shall be awarded by competitive sealed bidding.
- Competitive sealed proposals (Ark. Code Ann. § 19-11-230; R1 to R5: 19-11-230)-When use of competitive sealed bidding is not practicable and advantageous, a contract may be awarded by competitive sealed proposals. Where evaluation involves relative abilities of bidders to perform, including degree of technical or professional experience, and price is not the only consideration, use of competitive sealed proposals is appropriate. Where types of supplies or services may require use of comparative, judgmental evaluation, use of competitive sealed proposals is appropriate.
- Small procurements (Ark. Code Ann. § 19-11-231; R1: 19-11-231)-Any procurement not exceeding $5,000 may be made in accordance with small procurement procedures issued by State Procurement Director, but procurement requirements shall not be artificially divided so as to constitute a small procurement.
- Proprietary or sole source procurements (Ark. Code Ann. § 19-11-232; R1 to R2: 19-11-232)-A contract may be awarded for a required or designated commodity or service to a sole/mandatory supplier when State Procurement Director, head of a procurement agency, or designee of either officer above the level of agency procurement official determines in writing that it is not practicable to use other than the required or designated commodity or service. Brand name or design specifications are not sufficient explanation for sole source. Such procurements may include: (1) requirements of performance compatibility with existing commodities or services; or (2) repairs involving hidden damage.
- Emergency procurements (Ark. Code Ann. § 19-11-233; R1 to R2: 19-11-233)-State Procurement Director, head of a procurement agency, or designee of either officer may make or authorize others to make emergency procurements of commodities or services, which if not immediately initiated, will endanger human life or health, state property, or functional capability of a state agency.
• Competitive bidding (Ark. Code Ann. § 19-11-234; R1 to R7: 19-11-234)- Contracts in which the purchase price exceeds five thousand dollars ($5,000) and is less than or equal to twenty-five thousand dollars ($25,000) may be awarded by use of competitive bidding procedures, which requires obtaining bids by direct mail request to prospective bidders, telephone, or electronic media. If three competitive bids are not obtained, the competitive bid form must show the names of at least three firms contacted in attempt to obtain competition or the reason why three firms were not contacted. However, in any such instances, competitive sealed bidding is permitted.

• Multiple award contracts (Ark. Code Ann. § 19-11-262 and R1: 19-11-262)- Multiple award contracts may be made only if the State Procurement Director or an agency procurement official determines in writing that a single award is not advantageous to the State of Arkansas.

• Special procurements (Ark. Code Ann. § 19-11-263 and R1: 19-11-263)- The State Procurement Director or the head of a procurement agency may initiate a procurement above $25,000 when the officer determines that an unusual or unique situation exists that makes the application of all requirements of competitive bidding, competitive sealed bidding, or competitive sealed proposals contrary to the public interest.

• Procurement of professional services (Ark. Code Ann. § 19-11-801 to -807)- The Request for Qualifications is, in the absence of sole source justification, the procurement method recommended when contracting for architectural, engineering, land surveying, legal, and interior design services. It may also be used, with prior approval from the Office of State Procurement, as the selection method for other professional and consultant service contracts when it is determined to be the most suitable method of contracting.

• Procurement of consultant services and design professional contracts (Ark. Code Ann. § 19-11-1001 to -1012; R1 to R2: 19-11-1006, R1 to R3: 19-11-1008, R1: 19-11-1009, R1: 19-11-1010, R1: 19-11-1011, R1 to R6: 19-11-1012)- The head of any state agency entering into certain consulting and design professional contracts must certify that the services proposed to be provided under such contract are necessary for operation of the state agency in fulfilling its legal responsibilities and cannot be provided by an existing state agency, that the contractor is fully qualified to perform and has no vested interest in the subject matter of the contract that would constitute a conflict of interest, and certain other representations. Certain consulting and design professional contracts must be submitted to the Legislative Council or the Joint Budget Committee, if the General Assembly is in session, for prior approval. The State Procurement Director provides forms for such standard contracts.

7. Is the bidding company required to post any bond or insurance?

Sometimes. Bidders shall submit bid bonds or performance bonds or similar assurances when required by the terms and conditions of the invitation for bids, solicitation or request for proposals, as obligees with surety satisfactory to the procurement agency, in a sum not to exceed one hundred percent (100%) of the contract price. Ark. Code Ann. § 19-11-235(c); R1: 19-11-235.

8. What are the criteria for evaluation and comparison of bid proposals?

• Competitive sealed bidding (Ark. Code Ann. § 19-11-229; R1 to R15: 19-11-229)-Awarded to the responsive and responsible bidder who has submitted the lowest bid that meets the requirements and criteria set forth in the invitation for bids.

• Competitive sealed proposals (Ark. Code Ann. § 19-11-230; R1 to R5: 19-11-230)-Awarded to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration price, the evaluation factors set forth in the request for proposals, and the results of any discussions conducted with responsible offerors.
• Small procurements (Ark. Code Ann. § 19-11-231; R1: 19-11-231)-Awarded in accordance with small procurement procedures promulgated by the State Procurement Director.

• Proprietary or sole source procurements (Ark. Code Ann. § 19-11-232; R1 to R2: 19-11-232)-Requires approval by State Procurement Director, head of a procurement agency, or designee of either office above the level of agency procurement official. Awarded based on the state or agency’s need of the commodity or service, the lack of responsible/responsive competition, the provider’s exclusive capabilities, the uniqueness of the commodity or service, etc.

• Emergency procurements (Ark. Code Ann. § 19-11-233; R1 to R2: 19-11-233)-Requires approval of State Procurement Director, head of a procurement agency, or designee of either officer. Awarded based on lowest price.

• Competitive bidding (Ark. Code Ann. § 19-11-234; R1 to R7: 19-11-234)-Awarded to the responsive and responsible bidder who has submitted the lowest bid that meets the requirements, criteria, and specifications.

• Multiple award contracts (Ark. Code Ann. § 19-11-262; R1: 19-11-262)-Awarded based on the criteria contained in the invitation for bids and limited to the least number of suppliers necessary to meet the requirements of the requesting agencies.

• Special procurements (Ark. Code Ann. § 19-11-263; R1: 19-11-263)-Awarded based on a written determination by the State Procurement Director or the head of the procurement agency.

• Procurement of professional services (Ark. Code Ann. § 19-11-801 to -807; R1 to R2: 19-11-801, R1: 19-11-802)-The request for qualifications procurement method is used, with prior written approval from the State Procurement Director, when the qualifications or specialized expertise of the vendor is the most important factor in selection. Initial selection based upon the respondent’s qualifications. The requesting agency shall select three qualified firms and then shall select the firm considered the best-qualified and capable of performing the desired work and negotiate a contract for the project with the firm selected. Only after the most qualified respondent is identified does cost become a factor in determining the award.

9. What are the requisites for execution of contracts after awarding?

In competitive sealed bidding, after award of a bid, if negotiation of any matters is necessary, the winning bidder may be determined to be non-responsive if the bidder and the agency are unable to reach a negotiated adjustment; in such event, negotiations continue with the next lowest bidder. R10: 19-11-229. The same is true for competitive sealed proposals; if negotiations are necessary but are not successful, then negotiations can continue with the next respondent deemed most likely to be awarded a contract. R3: 19-11-230. After award of a professional services contract under Ark. Code Ann. § 19-11-801 et seq., the state agency or political subdivision (collectively, the “Requesting Party”) and the selected firm shall jointly prepare a detailed, written description of the scope of the proposed services. If a satisfactory contract cannot be negotiated, negotiations with the selected firm shall terminate, and the Requesting Party shall then undertake negotiations with another of the qualified firms selected. If the Requesting Party is unable to negotiate a satisfactory contract with any of the three selected firms, then the Requesting Party shall reevaluate the necessary professional services, again compile a list of qualified firms, and proceed again with the procedures under Ark. Code Ann. § 19-11-801 et seq. Ark. Code Ann. § 19-11-805. The statutes on procurement of consulting and design professional contracts provide that the State Procurement Director shall supply standard forms for such contracts to be utilized by all state agencies. Ark. Code Ann. § 11-9-1012.
E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

None that apply specifically to projects proposed by private companies.

2. Does the private company proposing the project have any advantage for purposes of bidding?

N/A

F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?


2. Are there any judicial review procedures applicable when the contract has been executed?


G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?


2. Are there any guarantees that have to be posted for the performance of the contract?

Sometimes. Bidders shall submit bid bonds or performance bonds or similar assurances when required by the terms and conditions of the invitation for bids, solicitation or request for proposals, as obligees with surety satisfactory to the procurement agency, in a sum not to exceed one hundred percent (100%) of the contract price. Ark. Code Ann. § 19-11-235(c); R1: 19-11-235.
3. Are there any special powers upon the State?


4. Can fines or penalty clauses be agreed upon?

Yes. State agencies, including exempt agencies, may enter into contracts which contemplate the payment of interest and late charges, but only when such late charges are incurred sixty (60) days after payment is due or carrying charges under such regulations as may be promulgated by the State Procurement Director. Ark. Code Ann. § 19-11-224; R1: 19-11-224.

5. Can the contract be assigned?

There are no Arkansas statutes or regulations governing assignment of contracts awarded under Arkansas procurement law.

6. Can advance payments be established?

There are no Arkansas statutes or regulations governing advance payments under contracts awarded under Arkansas procurement law.

7. How is dispute resolution regulated?

According to Ark. Code Ann. § 19-11-258, contract controversies are resolved according to Ark. Code Ann. §§ 19-11-244 to -248:

- Ark. Code Ann. § 19-11-244 and R1 to R2: 19-11-244 pertain to resolution of protested solicitations and awards.
- Ark. Code Ann. § 19-11-245 and R1 to R3: 19-11-245 pertain to debarment or suspension from consideration for award of contracts.
- Ark. Code Ann. § 19-11-247 pertains to remedies for unlawful solicitation or award.
- Ark. Code Ann. § 19-11-248 addresses the finality of administrative determinations under the procurement statutes.

8. Can international arbitration be agreed upon?

There are no Arkansas statutes or regulations addressing whether arbitration may be agreed upon in contracts awarded under Arkansas procurement law; however, Ark. Code Ann. §§ 19-11-244 to -248 contain provisions relating to dispute resolution matters. Ark. Code Ann. § 19-11-246 provides that the State Procurement Director, head of a procurement agency, or a designee of either officer is authorized, prior to commencement of an action in a court or any other action provided by law concerning the controversy, to settle and resolve a controversy arising under or by virtue of a contract, including controversies based on breach of contract, mistake, misrepresentation, or other cause for contract modifications or rescission.

9. Is there any procedure for liquidation of the contract?

There are no Arkansas statutes or regulations governing liquidation of a contract awarded under Arkansas procurement law.
H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

   The Arkansas Code Annotated can be viewed at no charge at:
   http://www.lexisnexis.com/hottopics/arcode/Default.asp. A collection of the laws and regulations relevant to public procurement, published by the Arkansas Office of State Procurement, can be viewed at:

Contact Information

Robyn P. Allmendinger  
rammendinger@roselawfirm.com

Rose Law Firm, A Professional Association
120 East Fourth Street
Little Rock, Arkansas 72201

Tel 1.501.375.9131 Fax 1.501.375.1309
www.roselawfirm.com
Public Procurement Guide

USA, Connecticut
Prepared by Lex Mundi member firm Murtha Cullina LLP

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

Most public procurement here is based on sealed low bid proposals. The State is starting to move towards greater flexibility, but the statutes strongly favor low bid with prequalifications.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The idea is for a transparent process--that is for contracting all bidders must receive the same information and price is the criteria. For professional services (architecture, engineering and construction management), the bidding entity has more flexibility to evaluate the bidders on their history, experience and perceived strengths and weaknesses.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?


3. What public agencies are subjected to the general Public Procurement regime?

Prequalification under Section 4a-100 of the Connecticut General Statutes is the most important. This requires potential bidders to register with the Department of Administrative Services, and pass muster with them before they are deemed able to bid on public work in excess of $500,000 within the State.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

None.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

No.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

No.
2. Are there any reciprocity regulations?
   No.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?
   Bidders are prequalified under Section 4a-100 of the Connecticut General Statutes. The Department of Administrative Services maintains a list of such prequalified companies.

2. Is electronic procurement fully implemented?
   Yes. Law 737 articles 62 and followings provides the “SISCAE” Sistem of Electronic Public Procurement, that allows the management and dissemination of state procurement and conducting electronic transactions.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?
   No.

4. What are the possible ways of association for participating in public procurement proceedings?
   Bids for general contractors are straight low bids. Bids for architects and construction managers are typically requests for qualifications which permits the bidding entity to take into account the bidders’ histories and experiences as well as price.

5. What type of procurement procedures exist?

6. What are the modes of selection processes and when are they applicable?
   Bids for general contractors are straight low bids. Bids for architects and construction managers are typically requests for qualifications which permits the bidding entity to take into account the bidders’ histories and experiences as well as price.

7. Is the bidding company required to post any bond or insurance?
   Bid bonds in the amount of 10% of the bid are required.

8. What are the criteria for evaluation and comparison of bid proposals?
   For general contractors and sub-contractors the criteria is essentially price, since all bidders are pre-qualified. For construction managers and architects, the bidding entity has the ability to create other criteria. Typically, these include level of similar experience, strength of management team and track history as well as price. The scoring must be identified before the bids are collected.

9. What are the requisites for execution of contracts after awarding?

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?
   No explicit regulations, but as public private partnerships are rare, it is difficult to get buy in from the government.
2. Does the private company proposing the project have any advantage for purposes of bidding?

Not explicitly, but there is always an advantage in describing a project to fit your strengths.

F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

In Connecticut it is typically very difficult for a disappointed bidder to establish that it has standing. In order to establish standing, a disappointed bidder must show that there was fraud, corruption, favoritism or other acts which undermine the integrity and objectivity of the bid process.

2. Are there any judicial review procedures applicable when the contract has been executed?

Typically, the bid protests are brought before the contracts are finalized. However, actions frequently continue beyond the signing of the contracts.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

Public construction triggers prevailing wage requirements under Sections 31-53 and 31-53a of the Connecticut General Statutes. In addition, bidders on such projects must be prequalified under Section 4a-100 of the General Statutes.

2. Are there any guarantees that have to be posted for the performance of the contract?

Connecticut requires both payment and performance bonds.

3. Are there any special powers upon the State?

There is currently a dispute as to whether the state is subject to any statute of limitation. That is the subject of a case before our supreme court which should be decided within the next few months.

4. Can fines or penalty clauses be agreed upon?

Connecticut does not permit penalty clauses, but does permit liquidated damages based on a good faith estimate of the likely loss for delay.

5. Can the contract be assigned?

Typically, no.

6. Can advance payments be established?

If agreed upon, yes.

7. How is dispute resolution regulated?

Connecticut requires that construction within its borders must be governed by Connecticut law.
8. Can international arbitration be agreed upon?

Connecticut construction projects must be litigated or arbitrated in Connecticut, using Connecticut law.

9. Is there any procedure for liquidation of the contract?

Not as a matter of statute.

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Contact Information

Mike Donnelly  
mdonnelly@murthalaw.com

Murtha Cullina LLP  
CityPlace I, 29th Floor  
185 Asylum Street  
Hartford, Connecticut 06103-3469

Tel 1.860.240.6000 Fax 1.860.240.6150  
www.murthalaw.com
Public Procurement Guide

USA, Ohio
Prepared by Lex Mundi member firm Calfee, Halter & Griswold, LLP

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?
   Federal, State, and local laws and ordinances

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?
   Usually contractors are selected on lowest price so long as they are responsive to the request for proposals and responsible enough to perform the work. These general standards vary depending on what level of government is soliciting the work and what scope of work is being solicited, i.e., services or contracting.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?
   Ohio Revised Code-State Federal Acquisition Regulation-Federal Local ordinances-City or town

3. What public agencies are subjected to the general Public Procurement regime?
   All with certain exceptions for certain agencies and for Cities that have home rule

4. What public agencies are not subjected to the application of the general Public Procurement regime?
   None that I am aware of

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?
   No, unless they are acting as agent for the government

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?
   Should have an Ohio presence visa presence in the state or applicable license to do business in the state

2. Are there any reciprocity regulations?
   Not to my knowledge.
3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

   If by foreign you mean non-US, yes.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders’ Registry?

   for certain public entities

2. Is electronic procurement fully implemented?

   No

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

   Depends on who issues the solicitation and what the solicitation says as to electronic bidding.

4. What are the possible ways of association for participating in public procurement proceedings?

   Joint Venture, subcontractor, local corporate or subsidiary presence, partnership, vendor

5. What type of procurement procedures exist?

   Competitive and very limited sole source.

6. What are the modes of selection processes and when are they applicable?

   Solicitation and statutes define selection process and what factors must be considered to evaluate the bids.

7. Is the bidding company required to post any bond or insurance?

   Usually yes, but not always depending on nature of project, services sought, and agency issuing the solicitation.

8. What are the criteria for evaluation and comparison of bid proposals?

   responsiveness to the requested info in the solicitation and responsible from a business perspective to perform the solicited scope of work.

9. What are the requisites for execution of contracts after awarding?

   Bonds and insurance in place and a signature.

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

   There are procedures where a private entity commits to improve or develop a public project as consideration for the State or local government allowing a certain private project or development to go forward
2. Does the private company proposing the project have any advantage for purposes of bidding?

No, except the practical advantage of knowing the project better.

F. Review Procedures
1. Are there any judicial review procedures applicable to the bidding processes?

Yes, federal or State courts depending on which government issues the solicitation.

2. Are there any judicial review procedures applicable when the contract has been executed?

Yes, limited bid protest rights for specified causes discovered after award.

G. Overview of Public Procurement Contracts
1. What are the regulations applicable to contract terms and its extension?

In the FAR or ORC or in the terms of the Contract.

2. Are there any guarantees that have to be posted for the performance of the contract?

There are usually guarantees in the form of schedule and/or performance milestones. There are also warranties of the work and equipment for a period after project completion.

3. Are there any special powers upon the State?

Termination for convenience, setting aside a solicitation if there is a perception of or actual bidding irregularities, audit rights over contractor finances. Also, government usually protected from damages not pursuant to a written change order.

4. Can fines or penalty clauses be agreed upon?

Yes

5. Can the contract be assigned?

Usually not, but federal system permits assignment only if government approves and original contractor guaranties performance of assignee.

6. Can advance payments be established?

In very limited circumstances

7. How is dispute resolution regulated?

By law and, to some extent, by contract for ADR provisions.

8. Can international arbitration be agreed upon?

No

9. Is there any procedure for liquidation of the contract?

Yes, termination for default
H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Ohio Revised code Federal Acquisition Regulation

Contact Information

Pete Comodeca
pcomodeca@calfee.com

Calfee, Halter & Griswold, LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114

Tel 1.216.622.8200 Fax 1.216.241.0816
www.calfee.com
Public Procurement Guide

Venezuela

Prepared by Lex Mundi member firm Hoet Pelaez Castillo & Duque

A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

Public procurement is regulated by the Public Procurement Act (PPA) and the Regulations of the Public Procurement Act (RPPA). The PPA and the RPPA provides for a detailed regulation of the bidding proceedings, the performance of the contract, payment procedures, modification of the contract, reasons for unilateral termination of the contract by the contracting entity, interim measures of protection that can be taken by the contracting entity in the case of breach of contract by the contractor, and sanctions.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

Article 2 of the PPA establishes that the basic principles applicable to Public Procurement are those of economy, transparency and honesty, planning, efficiency, equality, competition, publicity and the promotion of the participation of the people by through any form of productive partnership or association.

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

As mentioned before, the main regulations are those of the Public Procurement Act and its Regulations. PPPs are regulated by the Promotion of Private Investment through the Concessions Regime Act.

3. What public agencies are subjected to the general Public Procurement regime?

The entities of the national, federal states and municipalities and its decentralized entities, universities, Central Bank, state-owned companies or associations and its direct subsidiaries, public foundations, Communal Councils and/or any other organization of the community dealing with public funds.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

There are no public agencies excluded from the general Public Procurement regime.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

No.
C. Requirements for Foreign Companies to Participate in Public Procurement Processes

1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?

No, foreign companies are not required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes.

2. Are there any reciprocity regulations?

There are no reciprocity regulations.

3. Are there any contracts or matters from which foreign companies are restricted (e.g. national defense, hazardous waste disposal, security services, etc)?

No, there are no restricted contracts or matters for foreign companies.

D. Procedures for Awarding Public Procurement Contracts

1. Is there a Bidders' Registry?

Yes, but there is no need to register for those interested in participate in Internationally Announced Open Tenders. Those companies offering highly specialized services of sporadic use are also excluded from the obligation of registration before the National Contractors Registry.

2. Is electronic procurement fully implemented?

It is established in the PPA but it has not been widely used.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

If there is no need to register in the National Contractors Registry, the main step is to obtain the bidding package, where all the details of the proceeding will be explained.

4. What are the possible ways of association for participating in public procurement proceedings?

Any kind of association is allowed to participate in public procurement proceedings. If any restriction applies, it will be explicitly mentioned in the bidding package.

5. What type of procurement procedures exist?

Open Contest, Internationally Announced Open Contest, Closed Contest, Request for Quotations, and Direct Award.

6. What are the modes of selection processes and when are they applicable?

Open Contest, Internationally Announced Open Contest, Closed Contest, Request for Quotations, and Direct Award.

7. Is the bidding company required to post any bond or insurance?

Yes, the bidding company is required to post a bond for the maintenance of the offer.

8. What are the criteria for evaluation and comparison of bid proposals?

The criteria for evaluation and comparison of bid proposals are set in the corresponding bidding package. Usually there is a matrix where all the elements of interest for the contract are given a value for the award.
9. **What are the requisites for execution of contracts after awarding?**

   For the execution of the contract, the following documentation must have been already given to the contracting entity: A document establishing the date of the commencement of the works or provision of services, solvencies, bonds or insurances required, the bidding package and the bid proposal, payment schedule, corporate documentation of the contractor, warranty certificates (if needed).

E. **Private Initiative Projects**

1. **Are there any regulations for Public Procurement of projects proposed by private companies?**

   No.

2. **Does the private company proposing the project have any advantage for purposes of bidding?**

   Unless it is provided for in the bidding package, there are no advantage for the company proposing the project.

F. **Review Procedures**

1. **Are there any judicial review procedures applicable to the bidding processes?**

   Yes. Applications for judicial review will be submitted to the special jurisdiction for the judicial review of administrative matters.

2. **Are there any judicial review procedures applicable when the contract has been executed?**

   Yes.

G. **Overview of Public Procurement Contracts**

1. **What are the regulations applicable to contract terms and its extension?**

   The PPA and its Regulations establish several limitations to the negotiation of the terms of the contract. The main regulations to the terms of the contracts are on: advanced payments, guarantees on advanced payments, performance bond, labor bond, insurance on civil responsibility, commencement of the works or provision of services, modifications to the contract, control and fiscalization of the contract, payment proceedings, termination of the contract, acceptance of the works or services.

2. **Are there any guarantees that have to be posted for the performance of the contract?**

   Yes, usually a performance bond have to be posted. The bond cannot be lower than 15% of the price of the contract. If the bond is not posted, the contracting entity may agree to withhold a 10% of each payment, which should be released to the contractor once when the works or services are accepted.

3. **Are there any special powers upon the State?**

   Yes, the State have the power to unilaterally terminate the contract, modify it, interpret its terms and conditions, and impose interim measures in the case of breach of the contract by the contractor.
4. Can fines or penalty clauses be agreed upon?
   Yes.

5. Can the contract be assigned?
   Yes, under the conditions set by the PPA and the contract.

6. Can advance payments be established?
   Yes, up to 70% in exceptional circumstances.

7. How is dispute resolution regulated?
   Usually disputes are submitted to the Venezuelan tribunals, but local and international arbitration is allowed in certain cases.

8. Can international arbitration be agreed upon?
   Yes.

9. Is there any procedure for liquidation of the contract?
   Yes, the proceeding includes a provisional and final acceptance phases.

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

   The Public Procurement Act and the Regulations of the Public Procurement Act can be found at http://www.snc.gob.ve/base_legal

Contact Information

José Gregorio Torrealba R.  Hoet Pelaez Castillo & Duque
jtorealba@hpcd.com  Centro San Ignacio, Torre Kepler
                       Av. Blandín, La Castellana
                       1060 Caracas, Venezuela

                       Tel 58.212.201.8611 Fax 58.212.263.7744
                       www.hpcd.com

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