



**LEGALINK**  
A Global Network of Independent Law Firms

## Public Procurement Law

### Guidelines for contracts with public authorities

Public Procurement Law  
Guidelines for contracts with public authorities

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# **Public Procurement Law**

**Guidelines for contracts  
with public authorities**

3<sup>rd</sup> edition

# Introduction

\*All answers in this booklet do not constitute legal advice as to the Legal Position of the countries represented by the Legalink members in this booklet and specific advice should be sought in relation to each particular set of facts and circumstances.

Globalisation is one of the key topics in discussion worldwide. Undertakings are operating not only in their home countries but more and more cross-border. Cross-border transactions demand advice on the laws of other countries, a professional network as Legalink provides for. Considering what kind of business areas are involved in the global markets, one part of cross-border opportunities should be paid more attention in the future: participation on contracts with public authorities all over the world, which is a huge market. The actual so called Financial Crisis has even enlarged this market.

As long as undertakings are not organized with foreign subsidiaries in the particular state involved, business in this market seems to be out of range or at least very difficult to handle and borders still are felt as high hurdles. The Legalink network with its special know-how in this field of law can help undertakings, who are interested in going into this cross-border business area, and provide for best advice.

This booklet shall give guidelines for practitioners on the basis of 17 frequently asked questions concerning contracts with public authorities (see p. 10). The answers hereto may give you an overview\* with regard to the national law of many countries represented by the Legalink network. The answers are ordered by countries in alphabetical order.

If you are interested in concrete business projects, please do not hesitate to contact the member law firms of Legalink in the specific states concerned or contact us in Berlin. We would be pleased to organize for you the contacts worldwide within our network Legalink.

The 3<sup>rd</sup> edition of the booklet covers 35 contributions of 32 membercountries.

Berlin, April 2009

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# Index

Questions .....	10
Austria .....	14
Belgium .....	22
Brazil.....	30
Czech Republic .....	36
England, Wales and Northern Ireland .....	46
European Commission .....	54
Finland.....	64
France .....	72
Germany .....	80
Hong Kong .....	90
Hungary.....	98
India .....	124
Indonesia .....	125
Ireland .....	134
Italy .....	142
Japan.....	148
Kuwait .....	158
Mexico.....	166
New Zealand.....	174
Norway.....	188
Panama .....	196
Peru.....	202
Poland .....	218
Portugal .....	219
Romania.....	226
Singapore.....	236
Slovakia .....	242
South Africa .....	254
South Korea .....	262
Switzerland.....	270
Thailand.....	278
USA I (federal law) .....	284
USA II (federal law).....	298
USA III – Ohio (state law).....	304

## Questions

- 1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**
- 2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be produced?**
- 3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be produced (thresholds) and if so, what are the thresholds?**
- 4. In what way does the contracting authority have to inform the market about the intended procurement?**
- 5. Does a potential bidder which is interested in the contract need to have a specific legal form, *e.g.*, corporation, to submit a tender?**
- 6. Are bidders allowed to submit joint offers, *e.g.*, as general contractor and subcontractor or as bidding consortium?**
- 7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**
- 8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**
- 9. Is a multinational bidding consortium allowed to submit a bid?**
- 10. In which language do the tenders have to/can be submitted and which form is required, *e.g.*, written form, fax, e-mail or digital?**
- 11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

- 12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?**
- 13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**
- 14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**
- 15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**
- 16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g., through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**
- 17. Can your office**
  - give legal advice to foreign clients concern in the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
  - represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
  - Please name a contact person within your office for questions of public procurement law!**

# **Austria**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes, in the Federal Act on the Award of Contracts 2006 (Purchase Contract Awards Act, or BVerG) there are several provisions concerning the different procurement procedures - corresponding to the European rules. Which procurement procedure shall be applied, depends on the requested services of the contracting authority.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be produced?**

The BVerG 2006 distinguishes between procurement procedures for contracting authorities and procurement procedures for sectoral principals. In the award procedures for contracting authorities the following types of contracts must be distinguished: works contracts, supply contracts, service contracts, works concession contracts and classification of service contracts.

The sectoral purchases area are gas, heat and electricity; water; traffic; post; seeking and finding of kerosene, gas, carbon and other solid combustibles; and finally harbours and airports.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be produced (thresholds) and if so, what are the thresholds?**

The Austrian legislator does not distinguish with respect to the procedure for awarding of contracts being at the lower part of the threshold or being at the upper part of the threshold. There are some differences especially with respect to the publication requirement of public contracts, the procedures which are available for the authorities, in the time limits, as well as at the awarding control procedure itself.

The thresholds themselves are to be distinguished between the individual order types (works, supply and service contracts, works concession contracts, competitions), whereas the thresholds for awarding services in the sectoral field (water, energy and transport supply, as well as telecommunication services) are partly higher as for the classical awarding procedure. Currently, there are following thresholds applicable broken down by the contract type.

- a) supply contracts:
  - 1. central procurement bodies: EUR 133.000,--
  - 2. contracting authority: EUR 206.000,--
  - 3. sectoral principals: EUR 412.000,--
- b) works contracts and works concession contracts: EUR 5.150.000,--
- c) service contracts and competitions:
  - 1. central procurement bodies: EUR 133.000,--
  - 2. contracting authority: EUR 206.000,--
  - 3. sectoral principals: EUR

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Procurements relating to the upper threshold part must be published in the supplement to the official register of the European Community. Furthermore, there are publications in the Austrian publication media. Concerning the lower threshold part there is no need for a European wide publication. A national publication is sufficient.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No, according to the Austrian law, a specific legal form is not required. However, the contract shall be awarded only to an authorized, efficient and reliable company. If there is a bidding consortium, every member of this consortium must comply with these criteria.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes; both are possible.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

According to the Austrian law, a potential bidder must not have a registered office or branch office in Austria.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

According to the Austrian legal system, foreign bidders must be treated in the same way as Austrian bidders. The principal is allowed to request proof that the bidder has the necessary qualifications (*e.g.* certificate concerning the registration with the competent trade register of the country of origin), professional reliability (*e.g.* criminal records excerpts of the country of origin), financial and economical capability (*e.g.* information about the creditworthiness, confirmation of a professional indemnity insurance), technical capability (*e.g.* evidence about work performed, references).

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, multinational bidder consortia are also allowed to take part in a tender procedure.

**10. In which language do the tenders have to/can be submitted and which form is required, *e.g.*, written form, fax, e-mail or digital?**

When preparing their offers, bidders must comply with the contract documents; if not indicated otherwise in the contract documents, the offer and all enclosed documents (*e.g.* certificates) must be in German and amounts denominated in Euro. Tenders must be in paper form (in a closed envelope), if not mentioned otherwise in the contract documents.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

In the upper threshold part in the “classical” area, as in the sectoral field, there is for the receipt of tenders a minimum time limit of 52 days from the date on which the contract notice was sent. In the so-called accelerated procedure the minimum time limit must be 22 days for the classical procurement area as well as for the sectoral; also this time limit may be shortened by seven days

if electronic medias are used. But these shortened time limits require a prior information notice released to the public by the commission.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?**

As a general rule, bidders cannot ask for reimbursement of the cost of submitting a tender. However, if the award procedure is cancelled due to reasons for which the principal can request to be reimbursed. If for the preparing of the tender special work must be performed, it is possible to provide for an appropriate reimbursement; however, such reimbursement is only due if the tender complies with the tender procedure.

**13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

It is required by law that the contracting authority mentions in the public contract notice or in the publication precisely whether the award is to be given to the tender with the lowest price or to the most economically and technically advantageous tender. If the contract should be given to the tender being the most economically and technically advantageous, the contracting authority must state in the notice or in the contract document all the criteria on which he will rely and their weighting must be mentioned. If in the notice or in the documents no mentioning of the criteria for awarding the contract are stated, the tender with the lowest price will be granted the contract.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes, in Austria law provides for protection prior to the award of the contract. Until the contract is awarded, every bidder is allowed to request a review of the decision if the decision is separately appealable and if the bidder considers that the decision was unlawfully rendered with the Federal Awarding Department (BVA) and the bidder can also request that the decision of the authorities shall

be declared void, so as to prevent other bidders from obtaining the contract. In general, the time limit for appeal is 14 days; in exceptional case, *e.g.* for the accelerated procedure due to the urgency or in the case of direct awarding, the time limit is seven days. The investigation department must reach a decision within six weeks.

Because such an appeal does not have any suspensive or blocking effects, in most of the cases it is necessary when an interim measure is applied for to take up the relief thought in the main proceedings, by asking that the public authority is not entitled to grant the contract during the time period of the review. In general, the main application is combined with the request of issuing an interim measure. The authority is prohibited in such cases from granting the contract, otherwise the contract would be void. Respectively, the authority is not entitled to open the tenders. The regulation, which authority is competent for the review is complicated and regulated due to the division of power between the federal government and the regional governments. The facts mentioned above are valid for all the (regional and federal) authorities.

The decision of the review authority can be appealed before the Constitutional Court or before the highest administrative court.

The aforesaid revealed legal protection system also applies to foreign bidders.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

The system described under point 14 applies to all tender procedures in the same way. Only in the lower threshold part, the time limit for an appeal is 7 days instead of 14 days.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, *e.g.*, through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

In Austria there is – as said above – regular primary legal protection available. Furthermore, legal protection is available also for the period after the contract was awarded. This legal protection is granted in terms of declaratory claims; such declaratory claim serves to initiate damage claims before the civil courts.

A claim for damages before the civil courts is only permissible, if a positive conclusion notice by the BVA has been issued. The claimant can request to be reimbursed for the costs occurred for preparing the tender, for participating in the tender procedure from the granting authority. In addition, the claimant can also ask for specific damages, and ask to be put in much the same situation he would have been in, had he won the award (includes lost profits on contract).

### **17. Can your office**

- **give legal advice to foreign clients concern in the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- **Please name a contact person within your office for questions of public procurement law!**

Yes, our office has the competence to

- advice clients on bid preparation in Austria;
- represent foreign clients in procedures for the award of contracts before all public offices/courts in Austria; and
- contact persons within our office for questions of public procurement law are Peter Polak (p.polak@fplp.at) and Gerhard Kienast (g.kienast@fplp.at)

Austria

# **Belgium**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes. Belgium has several specific procedures for the award of contracts by contracting authorities, which are in conformity with the relevant European legislation.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be produced?**

Yes, if the object of the contract is a public contract, applicable procedures depend on the kind of goods, services and supply which are to be produced:

- For public works / supply / services contracts the common or ordinary procedure has to be applied.
- For public contracts concluded in the field of four specific sectors - water, energy (gas and electricity) transports and postal systems - a less stringent procedure exists.
- Specific procedures are established for contracts related to the military market. For example, since 2001 the “rule of industrial compensations” (compensations industrielles / nijverheidscompensatie) has been created for military supply contracts and military service contracts: since the (highly technical) requirements of military contracts do not always permit Belgian candidates to compete, foreign candidates will be required to involve Belgian subcontractors.

If the object of the contract is a concession of a public service, or a national concession, then a specific procedure has to be applied, regardless of the kind of goods, services etc. which are to be produced.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be produced (thresholds) and if so, what are the thresholds?**

Both procedures and procedural regulations depend on the value with regard to the required advertising.

Most intended contracts are brought to the knowledge of potential contractors by way of publication in the supplement to the *Moniteur Belge/Belgisch Staatsblad*, the *Bulletin des adjudications / Bulletin des Aanbestedingen* ([www.ejustice.just.fgov.be/cgi\\_bul/bul.pl](http://www.ejustice.just.fgov.be/cgi_bul/bul.pl)). However, there is an additional obligation

to publish the notice of the public contract at the European level if the value of the intended contract reaches the European thresholds of advertising:

- EUR 5 150 000 (excl. VAT) for public work contracts
- EUR 206.000 (excl. VAT) for public services / supply contracts

Furthermore, it is possible to opt for the “negotiated procedure without advertising” if the value does not exceed EUR 67.000 (excl. VAT, for public work contract) or EUR 206.000 (excl. VAT, for public services contracts).

#### **4. In what way does the contracting authority have to inform the market about the intended procurement?**

The intended procurement has to be published in the supplement to the *Mouiteur Belge/Belgisch Staatsblad*, the *Bulletin des adjudications / Bulletin des Aanbestedingen* ([www.ejustice.just.fgov.be/cgi\\_bul/bul.pl](http://www.ejustice.just.fgov.be/cgi_bul/bul.pl)). If the intended public contract reaches European thresholds, calls for tenders have to be published in the Supplement to the Official Journal of the European Union (see question 3).

European publication must be prior to domestic publication.

#### **5. Does a potential bidder who is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

Participation in tendering procedures is open to a natural or legal person or a public body or to a group of these persons or bodies which offers services, supplies or performance of works on the market.

#### **6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes, a group of persons or bodies is allowed to bid (See question 5).

However, the legislation always uses the term “a contractor”.

There is a possibility for the contracting authority to split the intended contract in several lots and allow by this way several bidders (especially middle sized companies) to submit their offer for the contract. The public contract will be considered as a whole, but it will be performed in several lots.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

For public supply / services contracts it is possible to submit a tender directly from abroad, as far as the tender is established inside the European Union.

If the tender is established outside the European Union, the candidate can submit a tender for the contract only if there is an international treaty of agreement between Belgium and the country of the candidate's establishment.

The Belgian legislator allows public authorities to open the tender to all candidates, without consideration of their nationality / country of establishment, by an express mention in the notice of the tender.

For public work contracts, only accredited contractors can participate in the award procedure.

In the European context, if the contractor has been accredited, but not in Belgium, he can be a candidate if the accreditation procedure in his original State is equivalent to that in Belgium.

If the candidate is established outside the European Union, the accreditation is possible if an arrangement exists between Belgium and the candidate's country of origin.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

No other requirements than those mentioned in question 7 are established for foreign bidders.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, it is. Indeed Belgian legislation provides for a very large definition of persons who can submit a bid and "a group of persons or bodies" is allowed to do it (See questions 5 and 6).

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Tenders must consult specifications in the public contract notice in order to know the language in which they have to submit their offers.

Either the language to use in the offer is specified in the public contract notice or it has to be the language in which the notice is written.

The use of language in the public contract notice depends on the issuing authority: Flemish, Walloon and German Regions respectively use Dutch, French and German. Brussels Region uses both French and Dutch.

The candidate must be aware of the complexity of the legislation in Belgium on languages.

The offer has to be submitted in a written form and sent by mail under a separately closed and sealed cover.

Eventually, specifications in the public contract notice provide the form to be used for the submission.

## **11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Normally, deadlines are specified in the published notice of the public contract.

The legislator only provides minimum deadlines to be respected, which are different for the open procedure (in which any interested undertaker may submit a tender) and for the restricted procedure (in which interested undertaker must pre-qualify to take part).

For the open procedure the deadline for the receipt of offers cannot be less than 36 working days (to be counted from the date of the sending of the notice of the public contract). It is possible to reduce it to 10 working days, under the condition that the notice of the public contract is advertised during at least 7 days.

For the restricted procedure, there are two distinct phases: the selection phase and the award phase. During the selection phase (starting with the publication of the notice of the public contract) candidates apply for their participation in the award phase. The minimum deadline for the submission of the candidature is 15 working days, but it could be reduced to 10 working days, under the condition that the notice of the public contract is advertised during at least 7 working days.

During the award phase (starting with the sending of a notification to selected candidates) bidders would have a minimum of 15 working days to send their offer.

For the negotiated procedure, no minimum deadlines are prescribed by the legislator. It is up to the contracting authority to fix deadlines.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?**

No reimbursement of costs for preparing the bid is provided by the legislator.

Legislation only allows for the unfairly rejected candidate to claim damages in which he may include costs for preparing the bid. Furthermore, in the procedure of award to the lowest bidder, the latter can claim 10% of his proposed price as damages should he not be selected by the public authority.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

A first selection criterion set by law is the requirement to be either established inside the European Union, or established in a non European Union country which has an international agreement with Belgium with respect to participation in the public market.

A second selection criterion is established especially for public work contracts: bidders have to be accredited (See question 7).

Selection criteria are established for contracts which reach the European thresholds: participation is impossible for contractors who were convicted for the following offences :

- Participation in a criminal organisation
- Corruption
- Fraud
- Money laundering

For all other public contracts, authorities are allowed to exclude candidates who are in the following situations:

- Bankruptcy
- Non-payment of contributions to the National Health Insurance System
- Non-payment of taxes
- Gross professional negligence

- False declarations linked to capacity of the candidate to perform the intended contract

Furthermore, according to administrative jurisprudence and guidelines, public authorities must apply financial selection criteria. They must indicate in their notices of public market the minimum financial profile required to be allowed to bid.

Public authorities may also specify technical criteria (specific technical qualifications, a certain experience, use of technical equipment...).

In order to promote social integration, all types of public markets below European thresholds may be reserved to protected workshops or to socially orientated companies.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes, such legal protection is provided.

First of all, for all public contracts, legislation provides for motivated refusal decisions to be sent to evicted bidders “as soon as possible”. In order to suspend the conclusion of the intended contract, urgent procedures may be brought before the Administrative Court (Conseil d’Etat / Raad van State) or before the judiciary judge (if the contracting public authority is not under the jurisdiction of the Administrative Court).

However, in practice the “as soon as possible” requirement is not respected, and evicted bidders are often informed on the day of the conclusion of the contract.

Therefore, more stringent rules apply for contracts reaching European thresholds: the communication of the refusal decision must then intervene “without delay” by fax or by all other electronic means. Such refusal decision is also sent by mail. Following the day of the communication of the refusal decision by fax or electronic means, the evicted bidder has only a period of 15 working days to start the said urgent proceedings in order to suspend the conclusion of the contract. Pending the end of such proceedings, the conclusion of the public contract is suspended.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

Yes, European thresholds are taken into account. Primary legal protection is more elaborated for public contracts reaching European thresholds (see question 14).

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g., through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

Even though primary legal protection is provided, it is also possible to start proceedings before the Administrative Court (Conseil d'Etat / Raad van State) in order to nullify the contract, provided that the public authority is under the jurisdiction of this court. The evicted bidder has to demonstrate his interest to act as well as the irregularity of the public contract.

It is also possible to start proceedings before the judiciary judge for damages. In this case, the evicted bidder logically has to demonstrate the fault (the irregularity of the public contract), damage and causal link between the fault and the damage.

Whereas the nullification of the contract in itself will not necessarily (and in practice, rarely) benefit the evicted bidder, it will establish the proof of the fault of the public authority before the judiciary judge during proceedings for damages.

**17. Can your office**

- give legal advice to foreign clients concern in the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- Please name a contact person within your office for questions of public procurement law!**

- No. It is mostly in the hands of specialized consultants.
- Yes, as the case may be with the help of counsels specialized in acting before the Conseil d'Etat / Raad van State.
- Johan LAMBERS, Didier RAES, Laurence VERMEIREN, Anna SUSSAROVA.

# **Brazil**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes. Brazilian law provides that construction, services, purchases, sales, concessions, permits, and leases between any Private party and Public entities must necessarily go through a public bidding procedure.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes. There is a set of rules that apply to each of the types of contracts that must be submitted to bidding procedures, as provided by Federal Law 8.666/93. For instance, different specific rules apply to: (i) construction, and services in general; (ii) professional, technical and specialized services; (iii) purchases; and (iv) sales, and concessions.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services, etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes. Depending on the type and value of the service, purchase, sales, etc., different public bidding procedure will apply.

In Brazil, bidding can be through the following categories (i) direct bidding, (ii) price appraisal; (iii) invitation; (iv) contest/exams; and (v) auction.

The law provides that, as a general rule, for construction and engineering services, the appropriate bidding procedure is the invitation, when the value of the contract is up to R\$ 150,000.00 (around US\$ 75,000.00); price appraisal if the value of the contract is higher than R\$ 150,000.00, but lower than R\$ 1,500,000.00 (around US\$ 750,000.00); and direct biddings for contracts higher than R\$ 1,500,000.00.

Also as a general rule, for purchases and services not included in the ones described above, the invitation will apply to contracts up to R\$ 80,000.00; price appraisal to contracts up to R\$ 650,000.00; and direct bidding for contracts above R\$ 650,000.00.

Contracts for technical, professional specialized services will, as a rule, be entered into after the interested parties undergo contests or examinations; and auctions are used, as a general rule, for selling real estate that is acquired through legal procedures, and suits – even though real estate (not acquired

through a suit) usually must be purchased and sold through direct biddings, regardless of the amount of the contract.

However, there are several exceptions to the rules mentioned above. For instance, Public Authorities may be released from the obligation of undergoing public bidding if the matter is considered urgent, compromising to people's safety or the government's security, or in cases of public calamities (there are close to thirty examples of cases when the Public Administration may waive the bidding procedure).

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

All Federal, State and City procurement must be public, and should be published, at least once, in the Official Gazette. The publication must have information about where the interested parties may read and obtain the full text of the provisions that apply to the specific bidding procedure.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

Not as a rule, but bidding procedures can set additional requirements to the participants, depending on the object of the procurement.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes, but the conditions and cases under which the parties may offer joint offers will have to be specified in the text of the invitation to bid. The applicable Federal Law only sets the general rules and principles; but details will come from each specific bidding procedure. In addition, every party who is a participant, even jointly, will have to present all documents necessary (i.e. certificates of compliance with tax and social security obligations) to participate on the bid, as if it were a single party.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

If the foreign company complies with all requisites set forth by the law and the bidding provisions for a participant, presenting all documentation required by the Public Authorities, they may participate in the bid, but will have to appoint a legal representative in Brazil, with powers to be served with process and act on behalf of the foreign bidder administratively or judicially.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

Yes. All documents presented by the foreign party will have to be translated into Portuguese, notarized and consularized. Domestic bidders should not receive preferences in the award of contracts as a general rule – after all, the whole idea of having a bid procedure for contracts with the public administration is to offer the authorities with the most advantageous alternative – price and quality-wise. The bidding law (Federal Law 8.666/93) specifically prohibits any kind of discrimination or different treatment between foreign and Brazilian companies.

However, as a tiebreaker, the following will have preference: (i) goods produced or services rendered by companies with Brazilian capital; (ii) goods produced in Brazil; (iii) goods produced and services rendered by Brazilian companies; and (iv) goods produced or services rendered by companies that invest in research and in the development of technology in the country.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, as long as the invitation to bid allows it, and the participant complies with all other requisites.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The specific invitation to bid for (including language and means to submit the offer) will set the terms and conditions that will apply to the procurement. The minimum information that must be contained in the bid is provided by Federal Law 8.666/93.

To qualify as a participant, the party must have and show legal aptitude, technical and economic qualifications, and must be fully compliant with their tax payments.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Yes. This information too will be part of the invitation to bid rules to be published for each specific bidding.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?**

No. The only alternative for the bidder to be reimbursed is after the contract has already been entered into by the parties, and the Public Administration has suppressed the services or purchase of goods, and the bidder has already acquired material to comply with the contract.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

This is set on a case to case basis, and will be determined depending on the object of the bidding. The contracting authority may establish additional selection criteria, as long as the rules it sets do not implicitly or explicitly show any discrimination, or favoritism towards specific participants.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so, please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes, foreign or local bidders may seek injunctions in court in order to cancel or change a bidding procedure in the event that the invitation to bid has provisions clearly advantageous to a certain bidder.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services, etc. to be procured? If so, what are the conditions?**

The invitation to bid must strictly comply with the provisions of Law 8666/93, and should not contain any discriminatory provisions.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

The aggrieved party can always seek an injunction to cancel the awarding of the contract. If the party fails in obtaining an injunction, it can always sue for damages under the torts doctrine, In other words, plaintiff must prove that defendant was at fault when it caused the damages.

**17. Can your office**

**a. Give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

Yes.

**b. Represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

Yes

**c. Please name a contact person within your office for questions of public procurement law.**

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# **Czech Republic**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes, the legal system in the Czech Republic provides specific procedures for the award of contracts. Act No. 137/2006 Coll., on public contracts (hereinafter only as “Public Contracts Act”), was enacted in 2006 and implements all EU directives relevant to the matter and thus harmonizes the Czech law with the EU legislation. It covers almost all aspects of the award of public contracts, although there are some other laws and regulations which either deal with related issues or with details of public contracts award. Another two directly applicable EU regulations shall be observed by the Czech authorities.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes, Czech law distinguishes under the influence of EU regulation three general types of public contracts:

- 1) Public supply contracts
- 2) Public works contracts
- 3) Public service contracts

All these types of public contracts are governed by the Public Contracts Act. Although they all follow almost the same regime, there are some differences arising from the EU regulations. This applies to threshold amounts which determine legal regime of the public contract and to the determination of methods for calculating the estimated value of public contracts. There are some public contracts excluded from this common regime. Just to mention the most important exclusions:

- a) Contracts which contains secret information or which require special security measures
- b) Contracts for production or purchase of guns and other military material
- c) Research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority
- d) Financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services

- e) The acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon
- f) The acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time
- g) Arbitration and conciliation services Contracting authorities may freely decide which procedure shall be used for the award of these contracts.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes, both the procedure and the procedural regulations depend on the estimated value of the public contract. Public contracts with estimated value (exclusive of value added tax – VAT) higher than certain thresholds (limits) are subject to stricter criteria for the awarding procedure. These thresholds were transferred into the Public Contracts Act from the Directives 2004/18/EC and 2004/17/EC.

The essential thresholds currently amount to

- 1) CZK 165,288,000 - for public works contracts;
- 2) CZK 4,290,000 - for supply/service contracts awarded by Czech Republic or state allowance organizations;
- 3) CZK 6,607,000 - for supply/service contracts awarded by municipalities or their allowance organizations; the same applies for public supply contracts for goods not mentioned in an executive regulation which are awarded by the Ministry of Defense
- 4) CZK 13,215,000 - for public supply/service contracts in the sector field (water, energy, and transport sectors); The public contracts are thus divided into two categories called over-limit public contracts and under-limit public contracts. There are six types of procedures which can be used by the contracting authority depending on the value of the public contract and other relevant conditions. The most valuable over-limit contracts shall be awarded in so called open procedure and restricted procedure.

The Public Contracts Act does not apply on public contracts with estimated value lower than CZK 2,000,000, even though the contracting authority may decide to use the procedure stipulated there. In this case all terms the Public Contracts Act stipulates for the selected procedure must be observed. Sector field public contracts are contracts awarded by a contractor that carries out one

of relevant businesses (e.g. in the field of gas, heating, electricity and mining industry, water supply, post and transportation services) on the basis of a special or exclusive authorization.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

The over-limit public contracts shall be announced in the Supplement to the Official Journal of the European Union (OJS) as they should be awarded EU-wide. Both over-limit and under-limit public contracts shall be announced in the public contracts information system which is an electronic database accessible by internet.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes, both are possible. In the case of joint offers an agreement is required in which all bidders assume joint and several responsibility and liability for their obligations arising from the public contract to the contracting authority and third parties. One of the members of the consortium shall be appointed as the principal partner and only he concludes the contract and represents other partners towards the contracting authority. But all members of the consortium shall be stated in the bid and the structure of the consortium shall not be changed during the award procedure.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

Potential bidders need not have a registered office or branch office in the Czech Republic and an offer may be submitted from abroad. There shall be no discrimination for foreign bidders. Only in the case of supply contracts in the sector field (water, energy and transport) bids may be rejected, if more than 50

percent of the total value of goods to be supplied under the contract originates in non-EU member states which are stated in Council Regulation (EEC) Decision No. 2913/92.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

There is no substantial difference in the procedure for foreign bidders. They shall provide basically the same evidences that they fulfill the criteria as domestic bidders. There are some criteria under the Public Contracts Act that every bidder has to fulfil to have the possibility of the public contract award. The basic qualifications conditions are the following:

- 1) The bidder or any member of his statutory body (and eventually the head of branch located in the Czech Republic) have not been convicted of certain offenses which indicate unreliability or are connected with their business – this shall be proved by an extract from Criminal Register from both Czech Republic and their country of origin.
- 2) The bidder has never committed bribery.
- 3) Bidder's applicable taxes and duties, as well as the social insurance contributions, have been duly paid – shall be proved by a certificate issued by relevant authority.
- 4) There are no bankruptcy proceedings in progress against the bidder and it is not in liquidation. The bidder shall also present an extract from the Commercial Register (Register of Companies) or similar record and his trade certification (authorization under which the bidder is allowed to carry out his business). The contracting authority may require further documents such as an insurance policy for the damage caused by the bidder to third parties, last financial statement etc.

As a rule, the documents shall not be older than 90 days and unless the contracting authority stipulates otherwise they shall be in original or a certified copy and accompanied by a certified Czech translation.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, it is possible. For more information please see above question No. 6.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The contracting authority shall make known in the public contract notice

- 1) The language or languages of the bids– mostly Czech
- 2) The required form for the bids,
- 3) The deadline for the receipt of the bids;
- 4) The minimum time the bidder is bound by conditions stipulated in his bid

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

All time limits laid down by the contracting authorities shall be determined with regard to the object of the public contract. In the case of over-limit public supply/service contracts or public works contracts awarded in open procedure the minimum time limit for bids shall be 52 days from the day of the contract notice. Under specific circumstances, when the over-limit public contract is awarded in so called restricted procedure, the minimum time limit may be shortened to 36 days, but in no case to less than 10 days running from the day after the day of the contract notice. The respective time-limits for under-limit contracts are 22, 15 and 7 days. There are different time-limits in the sector field (52, 37 and 22 days)

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

The Public Contracts Act prohibits granting reimbursement of the costs for the bids to the bidders. On the other hand there shall not be levied any fee for the participation in the award except for the common costs of the contractual documents issued by the contracting authority which contains the conditions and data of the public contract.

Costs may be claimed only in special procedures of awards which are used when the contracting authority invites bidders to propose some solution e.g. before the contracting authority awards a major contract, and where the proposal is the substantial part of service supplied. The possibility of reimburse the cost at least partially compensate high costs of making such proposals.

**13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

Yes. Both the law stipulates several groups of selection criteria which the bidders have to satisfy to take part in the competition for the award of contract. These criteria have been mentioned above in the answer A8. Thus shall be ensured that the bidders accepted in the award procedure are trustworthy and capable both economically and professionally to perform the public contract. In the case of noncompliance with these criteria the bidder shall be excluded from the procedure. It should be noted, that even formal and non-essential mistakes and omissions may end in exclusion.

The criteria under which the bid is finally evaluated are the economic advantageousness of the bid or the lowest bid price. One of these criteria shall be chosen at notifying the public contract. The criterion of economic advantageousness shall be further specified in the contractual documents and split into clearly defined sub-criteria with their weight for evaluation.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes, every bidder may complain to the contracting authority that his rights were violated by alleged non-compliance with the law governing the award of contracts. The complaint shall be in writing and shall be submitted to the contracting authority within 15 days since the bidder learned about the non-compliance or till the conclusion of public contract. It is not subject to any fee. Statement of the reasons for the complaint must be included.

Due submission of a complaint prevents the contracting authority to conclude the public contract or to cancel the proceedings. The contracting authority has 10 days to consider the complaint. If the contracting authority refuses the complaint, he must inform the complainant about the possibility to submit a plea to the Office for the Protection of Competition within 10 days. The contracting authority cannot conclude the public contract or cancel the proceedings before the expiry of this period or before the period of 45 after the motion was filed.

All bidders shall be informed immediately by the contracting authority that a complaint was submitted.

Office for the Protection of Competition exercises the control of compliance of public contract awards with the law. Its proceedings are commenced either by a motion of a bidder or out of its own initiative. Previous complaint to the contracting authority is indispensable for filling the motion. There must be deposited a surety in the amount of one percent of the value of the contract (min. CZK 50,000, max. CZK 2,000,000) which shall be devolved in the case the motion was successful.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

The above described procedure of primary legal protection may be used by every bidder in the case of both over-limit and under-limit contracts.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

Even though the Public Contracts Act does not directly deal with the possibility of damage claims the general civil regulation on the damages is to be used and the injured bidder can seek the award of damages at court. To receive a damage award is necessary for the claimant to prove (a) unlawful conduct, (b) damage incurred and (c) causality between the unlawful conduct and the damage. The last one may be difficult because the bidder would have to prove he should have been awarded the public contract. The damages claimed would amount to the costs incurred for participation in the public contract award procedure.

**17. Can your office**

- give legal advice to foreign clients concern in the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

**– Please name a contact person within your office for questions of public procurement law!**

Yes, our law firm is fully competent to provide any assistance and advice in every aspect of procurement procedure as well as to represent foreign clients seeking primary and secondary legal protection before relevant authorities and courts in the Czech Republic. The contact persons for questions related with public procurement law are Ivan Roubal and Tomas Pekarek.

Czech Republic

# **England, Wales and Northern Ireland**

## **Mace & Jones**

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## **1. Does your Legal System provide specific procedures for the award of contracts by contracting authorities?**

The Public Contracts Regulations 2006 set out specific procedures for the award of public supply, public services or public works contracts. A separate set of regulations (the Utilities Contracts Regulations 2006) apply where the works being procured relate to Utilities (see below).

The Public Contracts Regulations 2006 attempt to implement the EU directives on co-ordinating the procedures of the award of public works, supply and service contracts along with the remedies directive obliging member states to provide effective remedies at national level for breach of the procurement regulations.

The governmental agency with responsibility for setting policy and interpreting legislation is the Office of Government Commerce (OGC) which also performs an advisory function for contracting authorities.

## **2. Do the procedures for the award of contracts depend on the types of goods and services which are to be procured?**

The aim of the Public Contracts Regulations 2006 was to harmonise the procurement procedure for public supply, public services and public works contracts. These were previously dealt with under three separate sets of regulations.

The procedures for the award of contracts do not vary, but the thresholds at which they must be advertised in the OJEU does depend on whether the procurer is procuring goods, services or works.

In some sectors, particularly Education, procedures can be dictated by specific funding bodies, for example Charities, Funding bodies and Research Councils. These vary in scope and are characterised by an audit assessment on procurement compliance at the end of the project.

There are still some types of contracts to which the Public Contracts Regulations do not apply. These include:

- a) Contracts in relation to Water, Electricity, Gas, Heat, Oil & Gas extraction, Coal, Airports, Harbours, Railways, Tramways and Bus services (which are now covered by the Utilities Contracts Regulations 2006);
- b) Contracts in relation to the provision of telecommunications networks or services;
- c) Contracts classified as secret, where performance must be accompanied by special security measures or where protection of the essential interests of the UK require it (includes many defence contracts);

- d) Research and development contracts (unless the benefits are exclusively for the contracting authority in the conduct of its own affairs).
- e) Contracts for the purchase of an interest in Land.

A contracting authority may reserve the right to participate in a public contract award procedure, framework agreement or dynamic purchasing system to economic operators which operate supported factories, supported businesses or supported employment programmes.

### **3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

The application of the Public Contracts Regulations depends upon the contract in question having an estimated value that is greater than the threshold.

The current thresholds (net of VAT) are as follows:

- a) Public Works contracts € 5,150,000
- b) Public Services contracts
  - where contracting with (broadly) central government € 133,000
  - in other cases € 2206,000
- c) Public Supply contracts
  - where contracting with (broadly) central government € 133,000
  - in other cases € 206,000

The exchange rate used to determine if a contract with an estimated value in Pounds Stirling (£GBP) is covered by the regulations, is the rate published from time to time in the Official Journal of the European Union.

Below the thresholds contained in the Regulations there is no coherent system followed by the contracting authority. Each sector e.g. Health, Education etc. has its own set of accepted standards; each of which attempts to achieve value for money.

Increasingly, contracting authorities have turned to e-procurement portals to aid transparency and compliance. These portals are used to provide an audit trail of information flow between contracting authorities and bidders. Originally used in the context of procurements above the relevant threshold they are increasingly used to advertise routine / low value requirements as well.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Where the contracting authority's procurement is above the threshold, a notice must be placed in the Official Journal of the European Union, giving details of the proposed contract and inviting tenders.

Advertisement of requirements under the thresholds is an ad-hoc affair usually undertaken through trade journals in an attempt to comply with the overriding principals of openness, transparency and fairness imposed by the Regulations. The use of e-procurement portals is described in our answer to Q3.

**5. Does a potential bidder which is interested in a contract need to have a specific legal form e.g. incorporation, to submit a tender?**

A potential bidder is not required to assume a specific legal form in order to bid for a contract. A contracting authority may require a consortium to form a legal entity as a condition of it being awarded a contract under regulation 28 of the Public Contracts Regulations 2006.

Regulation 23 demands that contracting authorities do not select a bidder in certain circumstances, for example:

- a) They have committed certain types of criminal offence
- b) They are / have been bankrupt / insolvent in certain circumstances
- c) They have committed certain types of professional misconduct
- d) They have not been paying tax as required

**6. Are bidders allowed to submit joint offers, e.g. as general contractor and sub-contractor or as a bidding consortium?**

Consortiums are permitted to bid for contracts, as are general contractors and sub-contractors. The contracting authority may require a general contractor to specify how much of the contract he is likely to sub-contract when submitting his tender under regulation 45 of the Public Contracts Regulations 2006.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

It is not necessary for the potential bidder to have an office or branch in the relevant country in order to bid for work. Regulation 4 of the Public Contracts Regulations 2006 prohibits the contracting authority from treating a non-EU bidder less favourably than an EU or UK bidder.

In relation to Utilities Contracts (see Q2 above), regulation 31 of the Utilities Contracts Regulations 2006 allows contracting authorities not to accept Utilities supply tenders where over 50 % of the goods offered originate outside the EU or countries that have no treaty with the UK or EU.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

Domestic bidders do not receive preference in the award of contracts (see Q7 above).

The same regulations apply equally to UK and foreign contractors where the contracting authority is considering the economic and technical competence of the contractor. Regulation 23 of the Public Contracts Regulations sets out various grounds upon which the contracting authority can reject a tender. These include such issues as being convicted of fraud, non-payment of tax or being insolvent.

Regulations 24 and 25 of the Public Contracts Regulations give the contracting authorities the power to request those tendering for the contract to provide various information such as copies of the business' accounts, insurance certificates, bank statements, details of previous goods provided or work carried out and details of staff who will be responsible for the project.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, under Regulation 28 of the Public Contracts Regulations.

**10. In which language do the tenders have to/can be submitted and which form is required e.g. written form, fax, e-mail or digital?**

The notice published in the Official Journal of the European Union provides details of the language, form, estimated value and deadline for submission of the bid. That said, an English translation is normally provided in practice.

**11. Are there any regulations governing the time within which bids have to be submitted to the contracting authority?**

The contracting authority is required, when setting the time limit for submitting tenders to have regard to the complexity of the transaction.

Where the open procedure is used, a minimum time limit of 52 days is set between the date of notice in the Official Journal and the deadline for submitting tenders. The 52 day period can be reduced if the contracting authority has transmitted the notice or offers full and unrestricted direct access to the contract documents by electronic means.

If prior notice of the contract has been given, the tender period may be reduced to 26 days or 22 days if electronic notice and access are given.

**12. Can the bidders claim their costs for preparing their bid? If so, what are the conditions for and the maximum amount of reimbursement.**

Unless payment for the cost of preparing the tender document is specifically provided for in the notice of the Official Journal of the European Union, a bidder submitting a tender is generally not entitled to recover the costs he incurs in submitting the bid.

**13. Are there any selection criteria set by law that the bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional criteria?**

The contracting authority has the power under regulations 24 and 25 of the Public Contracts Regulations to provide that those submitting a tender must provide certain documents (see Q8 above) to satisfy the contracting authority of the bidder's economic and financial standing along with its technical or professional ability.

The contracting authority can decide to award the contract to a bidder on one of two basis' (under Regulation 30 of the Public Contracts Regulations) namely:

- a) the bid with the lowest price; or

- b) the offer which is most economically advantageous from the point of view of the contracting authority.

OGC recommends that contracting authorities adopt procedure b and this is followed in the vast majority of cases.

In line with the Regulations and an increasing body of case law, the contracting authority must state in the notice in the Official Journal of the European Union the criteria for award that it will consider and the weighting given to each factor.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

There are effectively two forms of primary legal protection open to an aggrieved losing bidder. The first is contained within Regulation 47 of the Public Contracts Regulations. This regulation provides that where a contracting authority has not complied with the regulations, the aggrieved bidder may apply to court (provided he has notified the contracting authority of his intention to do so) for an order suspending the procedure leading to the award of a contract or to set aside the decision. This right is extinguished once the contract has been entered into by the contracting authority and is replaced by a right to damages.

The second primary legal protection is in the form of an application for judicial review if the aggrieved bidder is able to show that the decision to award the contract to another party is tainted by illegality, irrationality or procedural impropriety. A claim under this head must be brought within 3 months of the decision the aggrieved bidder seeks to review and is made to the High Court of Justice in England and Wales.

**15. If primary legal protection exists in your country, does it depend on certain conditions i.e. certain thresholds or the kind of goods, services etc. to be procured? If so what are the conditions.**

In relation to option 1 in Q14 above, the remedy is dependant upon the Public Contracts Rules applying (see thresholds at Q3 above). In relation to option

2 there is no financial threshold although an aggrieved bidder would need to seriously consider the cost : benefit ratio where the value of the contract was under £50,000.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damages claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to the court in order to receive a damages award?**

Under regulation 47 the court has the power to award damages as an alternative to the remedies at option 1 in Q14 above prior to the contract being made and is restricted to awarding damages after the contact has been made.

In both cases the aggrieved bidder would have to show that there was a breach of the regulations and that as a result the aggrieved bidder suffered loss or damage. The aggrieved bidder would be under a duty to mitigate his loss and would have to show that any losses suffered were not too remote from the breach of the regulations as to render them irrecoverable.

**17. Can your office:**

- a) Give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- b) Represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- c) Please name a contact person within your office for questions of public procurement law.**

- a) Our office can advise clients on bid preparation in England, Wales and Northern Ireland.

The professional body for procurement practitioners in the UK is the Chartered Institute of Purchasing and Supply. Martin Vincent is a member.

- b) Our office can represent foreign clients in proceedings for the award of contracts before all public offices, court and tribunals in England and Wales.
- c) For advice on public procurement issues contact Martin Vincent or Charles Tomlinson. For advice on Judicial Review contact Graeme Jump.

# **European Commission**

## **O'Connor and Company**

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## **1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

The legal basis for Commission procurement is based on the EC Financial Regulation and the Rules for implementation of the Financial Regulation, namely:

- Part One, Title V (Procurement - Articles 88 to 107) of the Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended by Council Regulation (EC, Euratom) N° 1995/2006 of 13 December 2006 and Council Regulation (EC) No 1525/2007 of 17 December 2007 (hereinafter “Financial Regulation”);
- Part One, Title V (Procurement - Articles 116 to 159) of the Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended by Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005, Commission Regulation (EC, Euratom) No 1248/2006 of 7 August 2006 and by Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (hereinafter “Implementing Regulation”).

Where the procurement is for a contract under the EC’s external aid programmes, the Practical guide to contract procedures for EC external actions (hereinafter “PRAG”) is applicable. The PRAG is available on the Community web site and claims to be the authoritative guide to the application of the law. Judgments of the Court of First Instance in procurement cases also have a significant impact on procurement practices.

Most of the tender procedures are either open procedures, in which any interested economic operator may submit a tender or restricted procedures, in which interested economic operator must pre-qualify to take part. In the restricted procedure, calls for expressions of interest invite economic operators to put themselves forward as potential candidates as a first step. When these applications have been evaluated, candidates who satisfy the specified criteria are pre-selected and put on a short list. If a contract is to be awarded in this sector, the contracting authority invites all or some of the candidates on the list to tender.

All tenders must be published in the Official Journal of the European Union (hereinafter “Official Journal”). Once formally published in the Official Journal, calls for expressions of interest or tender notices are usually published on

the Commission's Internet site. However the formal notice remains that of the Official Journal.

## **2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be produced?**

According to Article 116 of the Implementing Regulation, there are four general types of contracts which determine the procurement procedure to be followed:

- buildings contracts, for the acquisition of land, existing buildings or other real estate by various means (purchase, long lease, usufruct, lease, rental or hire purchase, with or without option to buy);
- supply contracts for the acquisition of products by various means (purchase, leasing, rental or hire purchase, with or without option to buy); the delivery of products may also include siting, installation and maintenance;
- works contracts for either the execution, or both the execution and design, of works relating to one of the activities listed in Annex I to Directive 2004/18/EC or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority; a 'work' means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function;
- service contracts for all intellectual and non-intellectual services other than those covered by supply contracts, works contracts and buildings contracts; these services are listed in Annexes IIA and IIB to Directive 2004/18/EC.

The description of the various types of contract is based on the reference nomenclature established by the common procurement vocabulary (CPV) within the meaning of Regulation (EC) No 2195/2002....

## **3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, service etc. which are to be produced (thresholds) and if so, what are the thresholds?**

In line with Articles 157 and 158 of the Implementing Regulation, the estimated value of contracts also determines the type of procedure to be followed by the contracting authority.

<b>Estimated value of contract</b>		<b>Type of procedure</b>
<b>Services or supplies</b>	<b>Works</b>	<b><i>Minimum procedure applicable</i></b>
1 ≤ €500 Payments for all types of expenditure of amounts of up to €500	≤ €500	Simple payment of costs against invoices <i>Article 91 of the Financial Regulation and Article 129(4) of the Implementing Rules</i>
2 ≤ €5 000	≤ €5 000	Negotiated procedure with a single tender <i>Article 91 of the Financial Regulation and Article 129(3) of the Implementing Rules</i>
3 ≤ €25 000	≤ €25 000	Negotiated procedure with at least three candidates, without a contract notice or a call for expressions of interest <i>Article 91 of the Financial Regulation and Article 129(2) of the Implementing Rules</i>
4 ≤ €60 000	≤ €60 000	Negotiated procedure with at least five candidates, without a contract notice or a call for expressions of interest, but with adequate publication <i>Article 91 of the Financial Regulation and Article 129(1) of the Implementing Rules</i>
5 > €60 000 but less than €137 000 > €60 000 but less than €211 000	> €60 000 and less than next threshold	Restricted procedure following a call for expressions of interest <i>Article 91 of the Financial Regulation and Article 128 of the Implementing Rules</i>
6 ≥ €137 000 ≥ €211 000	≥ €5 278 000	Open or restricted procedure with publication of a contract notice in the Official Journal <i>Articles 90 and 91 of the Financial Regulation and Article 158 of the Implementing Rules</i>
7 Service contracts under Annex IIB to Directive 2004/18/EC (> €60 000 with no upper limit)		Negotiated procedure following publication of a contract notice in the Official Journal <i>Restricted procedure following a call for expressions of interest</i>

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Formally, the contracts which require notice must be published in the Official Journal. Subsequent to this publication, the notice may be listed on the contracting authority's web site or on the general European Commission web site (or even by direct notice). The secondary form of publication must refer to the formal notice in the Official Journal and may not introduce any change or form of discrimination vis a vis the formal notice.

Where the contracting authority is using the open procedure, a contract notice describing the characteristics of the contract has to be published in the S series of the Official Journal. In response to a request from an economic operator, the contracting authority sends out the call for tenders — which defines in detail the content of the contract, its terms and conditions and the various award criteria — and invites a tender on that basis.

Similarly when the contracting authority is using the restricted procedure, a contract notice describing the characteristics of the contract and indicating the criteria to be used for selecting candidates has to be published in the Official Journal. Only the pre-selected candidates then receive the call for tenders and are allowed to tender.

There are certain exceptions to the publication rule i.e. in the case of buildings contracts, which can be concluded by negotiated procedure without publication of a contract notice, after the local market has been prospected.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form e.g. corporation to submit a tender?**

Participation in tendering procedures is open on equal terms to all natural and legal persons coming within the scope of the Treaties and to all natural and legal persons in a third country which has a special agreement with the European Communities in the field of public procurement (on the conditions laid down in that agreement).

**6. Are the bidders allowed to submit joint offers e.g. as a general contractor and subcontractor or as bidding consortium?**

Consortia of economic operators are authorised to tender or be candidates. Tenders from consortia of firms or groups of service providers (or contrac-

tors or suppliers, depending on the type of contract) must specify the role, qualifications and experience of each of the members or of the group, proof of eligibility, and a declaration that there are no conflicts. The lead firm is then designated by the other partners to act on their behalf for the purposes of the contract and is the only one authorised to commit the consortium. The only valid contacts for contractual purposes are contacts with the lead firm.

Court judgments have established the rule that subcontracting is allowed. The contracting authority is entitled, however, to demand that the selection and exclusion criteria be applied not just to the tenderer but also to any subcontractors proposed (whether in the tender or during performance of the contract). In practice, the contracting authority is therefore validating the subcontractors proposed for performance of a contract.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

Where the Multilateral Agreement on Government Procurement concluded within the WTO applies, the contracts are also open to nationals of the countries that have ratified this Agreement and thus the potential bidders do not need to have an office or branch in the EC. Operators in third countries which have signed a bilateral or multilateral agreement with the European Communities in the field of public procurement must be allowed to take part in the tendering procedure on the conditions laid down in this agreement.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

The participation of foreign bidders has to comply with bilateral or multilateral agreement with the European Communities in the field of public procurement. Where the Multilateral Agreement on Government Procurement concluded within the WTO applies, the participation of foreign bidders has to comply with its terms.

In line with the PRAG, all supplies and materials purchased under a contract financed under a Community instrument must originate from the Community

or from an eligible country. The term “origin” is defined in the relevant Community legislation on rules of origin for customs purposes.

**9. Is a multinational bidding consortium allowed to submit a bid?**

See questions 6 and 7.

**10. In which language do the tenders have to/can be submitted and which form is required e.g. written form, fax, email or digital?**

Tenders may be drafted in any of the official languages of the European Union. The arrangements for the submission of requests to participate are determined by the contracting authority, which may choose an exclusive method of submission. Requests to participate are sent by post, fax or e-mail. Where necessary for the purposes of legal proof, contracting authorities may demand that requests to participate submitted by fax must be confirmed by letter or electronically as soon as possible thereafter and in all events before the final date for the submission of the tender.

In practice, the English language is the main language used in EC tendering procedures as it is often the common language among the administrators and the tender evaluation committees.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Minimum time limits

		<b>Open procedure</b>	<b>Restricted procedure</b>	
		Tenders	Applications	Tenders
<b>Without pre- information notice</b>	Ordinary	52	37	40
	Electronic access	47	37	35
<b>With pre- information notice</b>	Ordinary	36	37	36
	Electronic access	31	37	31

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?**

The bidders submitting tenders are in general not entitled to recover the costs they incur in submitting the bid. Where there is a claim that the tender procedure has not been properly conducted, a disappointed tenderer can claim the cost of the tender as part of a damages claim usually before the EC Court of First Instance. An award of damages in the EC Court of First Instance is difficult to obtain and the quantum is usually significantly lower than in national courts.

**13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of contract and can the contracting authority establish its own additional selection criteria?**

Both the Financial and the Implementing Regulation set out the general rules relating to the selection and award criteria. Selection and award criteria for particular tenders are drawn up by the contracting authority. The Financial Regulation provides that these criteria shall be applied in every procurement procedure for the purpose of assessing the financial, economic, technical and professional capacity of the candidate or the tenderer.

The contracting authority may lay down minimum capacity levels below which candidates may not be selected. The contracting authority also specifies in the contract notice or in the call for expressions of interest or the invitation to submit a tender, the references chosen to test the status and the legal capacity of tenderers or candidates. The information requested and the minimum capacity levels demanded may not go beyond the subject of the contract and the legitimate interests of economic operators must be respected, especially as regards protection of companies' technical and business secrets.

The contract can be awarded either by the automatic award procedure or by the best-value-for-money procedure. In the first procedure, the contract is awarded to the lowest bid that is in order and satisfies the conditions laid down. In the best-value-for-money procedure, the contract is awarded to the tender with the best price-quality ratio, taking into account criteria justified by the subject of the contract, such as price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, etc; this is the method most frequently used by the Commission.

- 14. Does your legal system provide legal protection against the proposed award of contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Tenderers believing that they have been damaged by an error or irregularity in the award process may petition the contracting authority (whether the Commission or another contracting authority) directly. According to the PRAG, the contracting authority must reply within 90 days of receipt of the complaint.

If an institution of the EC is the contracting authority, the tenderer can appeal to the Court of First Instance. European citizens or residents, including legal entities with a registered office in the European Union, also have the right to complain to the European Ombudsman, who investigates complaints of maladministration by the European Community institutions.

If an institution of the EC is not the contracting authority (often aid contracts are financed by the EC but the contracting authority is a third country government) an appeal may be made to the European Commission. Once it is informed of such a complaint, it must communicate its opinion to the contracting authority. Should a contracting authority fail to adhere to the procurement procedures applicable, the European Community reserves the right to refuse to finance the contract or to suspend, withhold or recover funding for the contracts concerned; if the above procedure fails, the tenderer may have recourse to procedures established under the beneficiary country's national legislation.

- 15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds of the kind of goods, services etc to be procured? If so, what are the conditions?**

No.

- 16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g., through damage claims etc (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

After the contract has been awarded, tenderers can apply for the annulment of the decision taken on the basis of the tender procedure and claim damages before the Court of First Instance, in accordance with Articles 230 EC and 288 EC. However, the legal standard to be achieved for the award of damages is very high and the quantum very low.

**17. Can your office:**

- Give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- Represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- Please name a contact person in your office for questions of public procurement law!**
  
- Our office can advise clients on the preparation of tenders for contracts awarded by the Community institutions;
- Our office can represent clients seeking primary and secondary legal protection before the European Institutions or the European Courts;
- For advice on public procurement issues contact Bernard O'Connor.

# **Finland**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes. The award of contracts by contracting authorities is regulated by the new Public Procurement Act (Laki julkisista hankinnoista 30.3.2007/348) and the Act on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (Laki vesi- ja energiahuollon, liikenteen ja postipalvelujen alalla toimivien yksiköiden hankinnoista 30.3.2007/349; hereinafter called the “Utilities Act”) which have entered into force on the 1 June 2007. These two new acts implement directives 2004/18/EC (the “Public Sector Directive”) and 2004/17/EC (the “Utilities Directive”) and replace the old Public Procurement Act (Laki julkisista hankinnoista 23.12.1992/1505) which is, however, still applied to procurement procedures started before 1 June 2007.

This questionnaire has been completed following only the new acts currently in force.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes. First of all there is a division pursuant to the EC directives so, that the services in the fields of water and energy supply, transport and postal services fall outside of the scope of the general Public Procurement Act and regulated by the Utilities Act (except for certain exceptions regulated in the Utilities Act).

Also, some services fall additionally outside of the scope of Public Procurement Act, namely those which are allowed by the Public Sector Directive.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes. In Finland, there exist two sets of thresholds: national and EU thresholds. The national thresholds determine the scope of the act; i.e. procurements below the threshold fall outside of its scope. The EU thresholds in turn set additional requirements to procurements exceeding them, such as EU-wide announcement.

The national thresholds, which cover both the Public Procurement Act and the Utilities Act, are:

- EUR 15.000 for supply/service contracts and design contests and service concessions
- EUR 50.000 for certain health and social services
- EUR 100.000 for public works contracts and public works concessions

The EU thresholds regarding the Public Procurement Act are the thresholds defined in the Public Sector Directive:

- EUR 133.000 for supply/service contracts awarded by the state's central authorities
- EUR 206.000 for all other public supply/service contracts
- EUR 5.150.000 for public works contracts

#### **4. In what way does the contracting authority have to inform the market about the intended procurement?**

A notice concerning the intended procurement is required for all procurements exceeding the national thresholds. For procurements below the thresholds, a notice may be given, but it is up to the contracting authority to decide upon this. An electronic database (HILMA) upheld by the Ministry of Trade and Industry has been created for procurement notices. Also a journal called Suomen julkiset hankinnat (The Finnish Public Procurements) is published containing the notices on procurements.

For procurements exceeding the EU thresholds, the provisions of the Directives apply. These are notified in the Supplement to the Official Journal of the European Union as well as in the TED database. These procurements were included in the HILMA database as of 1 June 2007.

#### **5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No. No specific legal form is required to submit the tender. However, the bidding consortium selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

#### **6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes, both are possible. Certain proof of the bidder's or the consortium's abilities to complete the contract may be required. A bidding consortium needs also to keep in mind the competition rules on bidding cartels.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

It is possible to submit a tender directly from abroad.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

It may be required from the bidder to prove that they have the right to perform such services in their state of origin. No preferential treatment should be given to domestic bidders.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes. The countries of origin companies participating in bidding consortiums are not limited.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Written form is required by law. The tenders need to be submitted in strict obedience of the invitation to submit tenders (i.e. a direct invitation to possible bidders and the public notice). The use of electronic means shall be regulated in a future decree, which has not yet been enacted.

The two official languages in Finland are Finnish and Swedish. A tender can always be submitted in either one of these languages. If other languages (presumably this could be English) are permitted in the invitation, a tender may be submitted in such languages.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

The tenders must be submitted by the exact time required in the invitation to tender. Any tender submitted later than the set time is left unopened.

The legal provisions governing the time limits correspond to article 38 of the Public Sector Directive. In the case of open procedures and concession works, the minimum time limit for the receipt of tenders is 52 days from the date on which the contract notice was sent. In the case of restricted procedures, negotiated procedures and the competitive dialogue the minimum time limit for receipt of requests to participate is 37 days from the date on which the contract notice is sent; and in the case of restricted procedures, the minimum time limit is 40 days. Under certain conditions, an expedited procedure may be used. There are also rules which allow to shorten or lengthen the time limits.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

The bidders bear their own costs for preparing their bid. The invitation to tender may allow costs to be compensated especially for the competitive dialogue procedure.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

There are formal reasons set in Public Procurement Act for which a bidder are to be excluded (the compulsory grounds for exclusion). These reasons concern the general reliability of the bidder (for example if the bidder has committed certain crimes) and its capabilities to complete the contract. A bidder which does not fulfill these requirements is not allowed to participate in the evaluation of the tenders.

Additional requirements (voluntary grounds for exclusion) may be set by the contracting authority as long as they relate closely to the capabilities of the bidder to complete the contract. These requirements need to be objective and non-discriminatory.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes. A petition may be lodged at the Market Court for all decisions pertaining to the status of a bidder in the procurement procedure. The Court may upon this petition forbid the contracting authority to pursue the incorrect procedure.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

If the procurement is in the scope of the relevant act, no additional thresholds exist. Only the decision, for which the petition is lodged, needs to be such that it influences the status of the bidder in the procurement procedure.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

The decision awarding the contract may be appealed to the Market Court. The Market Court may:

- 1) wholly or partly set aside a decision of a contracting entity;
- 2) forbid the contracting entity to apply a section in a document relating to the contract or otherwise to pursue an incorrect procedure;
- 3) require the contracting entity to correct its incorrect procedure; or
- 4) order the contracting entity to pay a compensation payment to a party who would have had an actual chance of winning the contract if the procedure had been correct.

Additionally, a claim for damages may be lodged in a general civil court. Damages will be awarded to a party who would have had an actual chance of winning the contract if the procedure had been correct.

**17. Can your office**

- **give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

Yes, we can.

- **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

Yes, we can.

- **Please name a contact person within your office for questions of public procurement law!**

The contact persons in our office for questions of public procurement law are:

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Finland

# France

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

The award of contracts is in France regulated by national specific procedures but is also influenced by European regulations like the latest law adopted in France in 2006, legislated according to the requirements of the EU directives. In any case, the EU relevant standards of the procurement procedures are enforced in the French legal system. Even if the EU directives are not entirely implemented in the French legislation, the national rules will always be interpreted regarding European regulations.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. Which are to be procured?**

Yes, the procedures for the award of contracts are in France different according to the type of performances: services, public works or supplies contracts. All the procedures are regulated in France by the public procurement contracts Code, but special industries like financial market (purchase or sell market of assets), work of art market or commodity market, specified in articles 136 to 139 of the code are excluded of his application in accordance with EU Directives 2004/17/EC and 2004/18/EC of 31 March 2004.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. Which are to be procured (thresholds) and if so, what are the thresholds?**

Yes, the value of the goods or services determines in France the legal procedure to use for the award of contracts. The article 26 of the French public procurement contracts Code establishes the following essential thresholds:

- (i) EUR between 206.000 and 5.150.000 for public works contracts; For these contracts, the adjudicator is free to chose among all the procedures precised by the article 26 of the public procurement contracts code.
- (ii) EUR 5.150.000 - for public works contracts;
- (iii) EUR 133.000 - for supply/service contracts awarded by the french State;
- (iiii) EUR 206.000 - for supplies and services contracts of local authorities.
- (iii) public supply/service contracts for professional services; same limits as (ii) – (iii)

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

The contracting authority has to notice public contracts in Official French newspapers or in the Supplement to the Official Journal of the European Union (OJS) each time the contract's value exclusive of value added tax (VAT) is equal or greater than the thresholds listed in answer (A3).

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No, a potential bidder has no obligation to have a specific legal form. But the bidder has a possibility according to the article 51 of the public procurement contracts Code, to submit application as a joint group. However, in general the potential bidder is required to keep during the execution of the contract the legal form he has at the moment of the submission.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes, both are possible. The Public authority may require the creation of a joint group (consortium, co-contractors) but can also forbid bidders to use subcontracts for specific reasons. Local authorities have also the power to prohibit any subcontracts.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

The French law allows submission directly from abroad. It does not require a registered office or branch office in France from the bidder or its sub-contractor but it could be more convenient from a practical point of view.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

In France, the documents required from domestic and foreign bidders are established by the article 45 of the public procurement contracts Code. None other condition of admissibility than those stipulated in said article can be required from the prospective bidder. In support of applications and according to the article 45, prospective bidders are required to produce the following documents:

- Information which facilitates evaluation of the prospective bidder’s professional and technical capabilities and financial standing, and documents attesting the powers conferred on the person authorised to commit the prospective bidder and, where defence contracts are to be awarded, they must give their nationality.
- Information concerning the prospective bidders’ know-how in regard to environmental protection. Compliance with the employment obligation regarding specific rules of French Labour Code, like the law on handicaps adopted the February, 11<sup>th</sup> 2005, can also be required.
- In order to prove its professional and technical capabilities and financial standing, the prospective bidder may request that the professional and technical capabilities and financial standing of one or more subcontractors also be taken into account. In which case, it must prove the capabilities and standing of the said subcontractor(s) and show that they are available to perform the contract.
- If the prospective bidder is under receivership, a copy of the judgement(s) rendered to that effect;
- A sworn statement, duly dated and signed by the candidate, to the effect that:
- It has met its obligations in terms of tax, contributions and social-security obligations;
- It has not been barred from tendering;

Bidders established in a State other than France must produce a certificate issued by the institutions of the country concerned. If that country does not issue such certificates, it may be replaced with a sworn statement, or, in States in which such statements do not exist, with a solemn declaration made by the person concerned before the relevant judicial or administrative authority, a notary or a qualified professional body in that country.

## **9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, a multinational bidding consortium is allowed to submit a bid if all its members are stated and if one of them has been given specific powers from the others to contract and execute the contract.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Even if most of the time, the submission will have to be written in French, the language and the form required to submit are always indicated in the public contract notice.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

The deadline for the receipt of the bids, as the language and the form to submit, is precised in the public contract notice. The minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent, and 37 days for limited procedures. When notices are drawn up and transmitted by electronic means the time can be shortened.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?**

No, the bidders can not claim their costs for preparing their bid, except if the bidders answer to a specific request of the public authority. It can be the situation of a public contract which needs architects' advise for example, to proceed to an evaluation. In such a case, the public authority will reimburse adequate costs of these fees for all bidders.

**13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

As already said in question (8), the bidders are required to produce information which facilitates evaluation of the prospective bidder's professional and technical capabilities and financial standing, and documents attesting to the powers conferred on the person authorised to commit the prospective bidder. To get a chance to receive the award of the contract, bidders must produce official documents but also references. The most interesting economic offer must be chosen according to the sole criteria established in the call for bids. However, in order to allow small, medium and new companies to have access to public contracts,

the references and financial capacity criteria are not the only ones retained to select the final bidder.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

The French legal system provides legal protection for bidders. The most current situations of bidder's rights violations concerns the general aspects of the procedure (documents required, time limit etc..) and the obligation of the adjudicator to inform at least 10 days before the award of the contract about its intention to proceed to a new selection, and to inform as soon as the final bidder is selected, all the others bidders of the refusal of their applications. In France, the bidder will have to go to the administrative Court in order to institute proceedings. If the administrative Court receives the claim, it could required from the public authority to modify or to set aside the unlawful measures. If the subject of the tenderer's claim is the intended award to a competitor, the contracting authority must not award the contract as originally intended before the conclusion of the proceedings. If notwithstanding the contracting authority awards to contract, said award is void. Both sides may file an appeal subject to a time limit against the decision of the administrative Court of appeal and even the State Council (Supreme Administrative Court).

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

In France the legal protection depends on the value of the contract which have to be greater than certain thresholds. There is no specific regulations concerning primary legal protection when the value is smaller.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

The secondary legal protection exists in France in situations where the value of the goods or services is smaller than the thresholds. Like in the primary legal protection, the bidder has to institute proceedings with the administrative Court. Receive a damage award is very rare because the administrative Court must be convinced of the evidence of an act contrary to public procurement law, a violation of the bidder's legal protections which affected the bidder.

### **17. Can your office**

- give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- Please name a contact person within your office for questions of public procurement law!**

Yes, our office has the competence to advise clients on bid preparation in FRANCE and represent foreign clients in procedures for the award of contracts before all public offices/courts in the State of France.

Contact in our office is the Public Affairs department,  
Contact: Carine Chaix,  
e,sq.

France

# Germany

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## **1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes, the legal system in Germany provides specific procedures for the award of contracts. In Germany, as in all member states of the EU, there are several national regulations concerning the different procurement procedures and their details to be followed in the respective member state. However, the domestic legislation still has to observe multiple standards given by EU directives for awards of contracts with EU-wide relevance. As a consequence, national regulations for the award of contracts are legislated or adapted according to the requirements of the EU directives. Unless the EU directives are entirely implemented in German legislation, the relevant EU standards have to be considered for the interpretation of German laws.

## **2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes, German law – subject to the EU regulations – distinguishes according to the type of goods/services that are to be procured. Thus, several national ordinances are effective, which mostly differ very little. The following national ordinances apply to the following goods/services:

- i. Public works contracts are governed by the “Vergabe- und Vertragsordnung für Bauleistungen (VOB/A)” [official contracting terms for the award of works contracts]
- ii. Other public supply and service contracts are governed by the “Verdingungsordnung für Leistungen (VOL/A)” [official contracting terms for the award of supply contracts]
- iii. Public service contracts concerning professional services (e.g., lawyer, architect) are regulated by the “Verdingungsordnung für freiberufliche Leistungen (VOF)” [official contracting terms for the award of service contracts concerning the freelance professions]
- iv. Contracts in the water, energy, and transport sectors are regulated by special sector provisions, VOL/A section 3. These specific regulations reflect the strong influence of the public authorities by granting specific and exclusive rights to entities operating in these sectors.
- v. Public supply contracts in the field of defense (arms, munitions, war material)
- v. 1. are governed by the VOL/A (as to (ii)), unless

- v. 2. German essential security interests are concerned, in which case the VOL/A does not apply (exemption subject to Art. **296 of the EC Treaty**), but national budget laws, which contain only fragmentary provisions governing the procedure or no provisions at all, control these procurements.
- vi. Public supply/service contracts in specific fields (e.g. if contract demands secrecy or special security measures, also services concerning research and development) are controlled by national budget laws, which contain only fragmentary provisions concerning procedures or no provisions at all.

The aforesaid regulations are closely based on the latest relevant EU Directives of 31 March 2004 (2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors). Both EU Directives are lastly amended by Regulation (EC) No 213/2008 of 28.11.2007 – OJL 1 of 15.03.2008 – and Regulation (EC) No 1422/2007 of 4.12.2007 – OJL 317 of 5.12.2007. The remedies of bidders have been recently regulated in the Directive 2007/66/EC of 15.11.2007 to improve rights of rejected bidders

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes, both depend on the estimated value of the public contract. For public contracts which have a value greater than specific thresholds as laid down in the Directives 2004/18/EC and 2004/17/EC. To contracts with a value greater than these thresholds apply strict criteria for the awarding procedure, furthermore there are special rules concerning primary legal protection. The essential thresholds currently amount to

- i. EUR 5.150.000 - for public works contracts;
- ii. a. EUR 133.000 - for supply/service contracts awarded by federal public institutions;
- ii. b. EUR 206.000 - for all other public supply/service contracts;
- iii. public supply/service contracts for professional services; same limits as (iia) – (iib)
- iv. EUR 412.000 - for public supply/service contracts in the sector field (water, energy, and transport sectors);
- v. for public supply contracts in the field of defense (arms, munitions, war material), same as (iia) – (iib); if VOL/A applies (see above Answer 2.v.).

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Public contracts which have a value exclusive of value added tax (VAT) estimated to be equal to or greater than the above thresholds have to be awarded EU-wide, i.e. they have to be announced in the Supplement to the Official Journal of the European Union (OJS) ([http://simap.europa.eu/index\\_en.html](http://simap.europa.eu/index_en.html)). The contracts in principle have to be awarded by applying the “open procedure”, i.e. for an unlimited number of bidders.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g. corporation, to submit a tender?**

No, in order to submit a tender, a bidding consortium may not be required by the contracting authorities to assume a specific legal form; however, the bidding consortium selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract. This is normally not the case.

**6. Are bidders allowed to submit joint offers, e.g. as general contractor and subcontractor or as bidding consortium?**

Yes, both are possible.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

Legally it is not required that a bidder or its sub-contractor have a registered office or branch office in Germany, therefore, a bidder theoretically can act completely from abroad. From experience, it makes sense for the award of a contract and for the satisfactory performance of the contract to have a temporary office in Germany, at least on the occasion of the award of the contract.

Regarding contracts in the sector field (water, energy and transport, see above Answer 2.iv.), bids may be rejected, if more than 50 percent of the total value of goods to be supplied under the contract originate in non-EU member states or countries that have no international treaty with Germany or the EU. [§ 12 VgV Vergabeverordnung (Procurement Ordinance)].

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

In Germany contracting authorities may – as far as the object of the contract requires – request evidence from domestic and foreign bidders:

- i. that the bidder does not employ a person who is convicted of certain offenses which indicate the unreliability of the person and, therefore, of the bidder;
- ii. concerning registration of the bidder in its country of origin;
- iii. that applicable taxes and duties, as well as the social insurance contributions, have been duly paid by the bidder;
- iv. bank inquiry;
- v. concerning liability insurance;
- vi. concerning financial statements or an abridgement of it, if a publication is provided in the country of origin;
- vii. concerning declarations overall turnover of the tending undertaking as well as the turnover in the special field, which is matter of the award of the contract;
- viii. that the bidder deposits an amount as security to guaranty the proper performance of the contract

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, that is possible. All members of a bidding consortium have to be stated. One of the members needs to be appointed as proxy representative to contract and to operate the contract.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The contracting authority shall make known in the public contract notice, at the latest when sending the specifications to the potential bidders which requested to participate et al.,

- i. the language or languages in which the bids must be drawn up – mostly in German –;
- ii. the required form for the bids;
- iii. the deadline for the receipt of the bids;

iv. the minimum deadline for the validity of bids, (see also below).

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

All bidders are to be provided “adequate” time, so that all receive a fair chance to calculate their bid and to fulfill the formal requirements of the award of the contract. In the case of open procedures for public supply/service contracts or public works contracts, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent (see Answer 2 (i), (ii) and Answer 3 (i), (ii)). Under specific circumstances the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days, but in no case to less than 22 days running from the date on which the contract notice was sent. Further shortening of time limits may be allowed where notices are drawn up and transmitted by electronic means and/or where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents (cp. § 18a VOL/A).

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?**

As a general rule, bidders can not claim reimbursement for the cost of submitting a bid. This may be different if the contracting authority shall demand drafts, designs, drawings, calculations etc. as part of the bid which are typically asked only for value. In this case an adequate reimbursement will be set in the specifications valid for all bidders and each candidate who has submitted a bid together with the required supplementary documents may claim this compensation.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

Yes. The contracting authority may only take into account those bidders who demonstrate their suitability to perform the contract in terms of their economic and financial standing, as well as their professional and technical knowledge and ability. For this purpose, the contracting authorities may ask several questions which are to be answered by bidders, oftentimes supported by references.

When preparing a bid the bidder must be sure to submit all required answers, references/documents concerning suitability criteria completely and as requested. Otherwise, the bidder might be excluded due to formal reasons. The contracting authority may not show any tolerance even in case of only small nonconformities. German jurisdiction calls this “formal competition“.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes, every bidder may complain to the contracting authority that its rights were violated by alleged non-compliance with the provisions governing the award of contracts. The non-compliance might concern general aspects of the procedure, aspects of the specifications or other supplementary documents, but especially the duty of the contracting authority to inform every bidder at least 14 days before the award of the contract about the intention to select another bidder.

Unless the contracting authority takes remedial action concerning the claimed unlawful measures, the bidder may institute proceedings (so called proceeding to control compliance with the procedure of the award of contracts), by filing a formal application with a special tribunal (Public Procurement Tribunal). The Public Procurement Tribunal shall review the bidder’s claims. If the Public Procurement Tribunal is convinced that the claimed aspect is intended to protect the bidder and furthermore might restrict the rights of the claiming bidder, the Public Procurement Tribunal may serve the claim on the authority and may order the authority to set aside the unlawful measures and to take certain lawful measures. If the subject of the tenderer’s claim is the intended award to a competitor, the contracting authority must not award the contract as originally intended before the conclusion of the proceedings. If the contracting authority still makes the award, the award is void. Both sides may file an appeal subject to a time limit against the decision of the Public Procurement Tribunal with the Higher Regional Court (Oberlandesgericht), senate for the award of contracts. The senate is the court of last resort and therefore, its judgement is final unless the senate intends to overrule a judgement of another senate or of the Federal Supreme Court (Bundesgerichtshof), the overruling aspect is to be submitted to the Federal Supreme Court for final judgement.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

In Germany specific regulations concerning legal protection via review procedures exist only regarding procedures for the award of contracts concerning goods or services with a value that is estimated to be equal to or greater than certain thresholds. For contracts with a value that is estimated to be smaller than the thresholds, there are no specific regulations concerning primary legal protection. If and to what extent primary legal protection exists according to general German, but particularly to European Law, is a controversial issue.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

If there is not granted primary legal protection in Germany or in certain cases if primary legal protection was not effective for certain reasons and a damage is caused, secondary legal protection exists, in principle. To the extent a bidder suffers damages due to an irreversible act contrary to public procurement law he can claim for damages at civil court. The claim might be successful provided that (i) there is evidence of an act contrary to public procurement law, which is a violation of (ii) a provision that protects bidders and (iii) through this the bidder who is supposed to be protected by the provision is affected. In practice, it is very difficult to prove causation between the violation and the damage.

**17. Can your office**

- i. give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- ii. represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- iii. Please name a contact person within your office for questions of public procurement law!**

Yes, our office has the competence to

- i. advise clients on bid preparation in Germany and

- ii. represent foreign clients in procedures for the award of contracts before all public offices/courts in the Federal Republic of Germany.
- iii. Contact persons within our office for questions of public procurement law are
  - Markus Jakoby, jakoby@jakobyrechtsanwaelte.de,
  - Anette Prasser, prasser@jakobyrechtsanwaelte.de,
  - Lotte Herwig, herwig@jakobyrechtsanwaelte.de.

Germany

# **Hong Kong**

## **Charltons**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes, Government procurement is conducted under the Stores and Procurement Regulations (SPR) issued by the Financial Secretary under the Public Finance Ordinance. These Regulations are supplemented by Financial Circulars issued by the Secretary for Financial Services and the Treasury from time to time. The procurement rules in the SPR are binding on all government bureaux and departments except financially autonomous public bodies such as the Airport Authority, the Housing Authority, the MTR Corporation Limited and the Examination Authority, which are empowered to define their own procurement procedures. The regulatory framework covers the entire procurement process including needs assessment, specification of corresponding tender requirements to contract management and monitoring. It covers the procurement of goods and services as well as engineering services and construction works.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes, the procedures laid down in these Regulations and Circulars are fully consistent with the provisions in the World Trade Organisation Agreement on Government Procurement (WTO GPA).

- i. For purchase of goods and services, the Government Logistics Department (GLD) acts as the purchasing agent for specific stores and equipment required by user departments and a few non-government organisations. The user departments will pay for these stores from their own account but rely on GLD for expertise in sourcing, tendering, negotiations and contract administration. The goods purchased by GLD on behalf of user departments are diverse: they include aircraft for the Government Flying Service, electronic parking devices for Transport Department, arms and ammunition for the Police, chlorine for water treatment plants and gases for medical and industrial purposes.
- ii. Construction services are procured by the individual works departments concerned, under the general supervision of Development Bureau. In addition to giving general guidance and technical advice on tendering procedures and contract administration matters in respect of works contracts, Development Bureau maintains a register of approved works contractors and a central works contractors performance report system and provides financial vetting support where necessary.

iii. Services procured by Government also include consultancy services on financial or management aspects as well as other types of service contracts. Typical examples of service contracts tendered by Government are cleaning, property management, management of parking meters, and operation of transport and waste management facilities.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes, both depend on the value of the contracts. The procedures laid down in these Regulations and Circulars are fully consistent with the provisions in the WTO GPA. In general, the departments of Hong Kong Government are entitled to conduct their own procurement up to a certain value. For purchases of goods and services (excluding engineering and construction services), this threshold is set at 130,000 SDR<sup>1</sup> (about HKD\$1.51 million); for engineering and construction services it is set at 5,000,000 SDR (about HKD\$58.1 million). For purchases beyond these limits, to ensure the proper conduct of the procurement and to avoid intra-departmental collusion, departments have to seek the approval of particular tender boards before entering into a contract with the successful bidder. For non-Government public bodies including the Housing Authority and Housing Department, the Hospital Authority, the Airport Authority and the MTR Corporation Limited; the threshold for contracts of a value of not less than 400,000 SDR (around HKD\$4.65 million). For procurement of goods and specified services<sup>2</sup>, the threshold is set at 5,000,000 SDR (about HKD\$58.1 million) for construction services.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Pursuant to s325(a)(ix) SPR, government procurement exceeding HKD\$1.3 million (for goods and general services) and HKD\$3 million (for construction and engineering services) in value is normally done by the use of open and competitive tendering procedures (e.g. Government Gazette, Newspaper advertisements, Internet and overseas journals for the particular trade or product) so as to provide the existing service providers and new contractors an equal chance to bid on every project. Limited or restrictive tendering procedures are, in line with the WTO GPA provisions, only employed under specified excep-

tional circumstances. Where the nature of the contract (such as a contract that is time critical or one that requires particularly high levels of skills and proven reliability) dictates that tenders have to be invited from qualified suppliers/contractors, this may be done by selective tendering or prequalified tendering.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No specified requirement in SPR, however, it is worth noting that the government policy encourages open and fair competition.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

No specified requirement in SPR. However, with reference to the specimen provided in Appendix III (c) SPR, for pre-qualification of tenderers, it provides a trace of hint that ‘joint ventures with other firms will be considered.’ Therefore, by analogy, bidders are allowed to submit joint offers.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

There is no relevant legislation or regulation with regard to such policy. However, with reference to the wordings set out in the Financial Services and the Treasury Bureau website ([www.fstb.gov.hk/tb/eng/procurement/tendero4.html](http://www.fstb.gov.hk/tb/eng/procurement/tendero4.html)): ‘We treat all tenderers on an equal footing. We do not discriminate between products on the basis of their country of origin. In drawing up tender specifications for the goods or services to be procured, we ensure that the characteristics laid down for the goods or services will not create unnecessary obstacles to international trade. We ensure that all potential tenderers are given the same information for them to prepare their bids.’ Therefore, it is possible to submit a tender for the contract directly from abroad without having a registered or branch office in the Country.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain**

**additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

With reference to s320(c) of SPR, the qualification criteria and assessment method shall not discriminate among foreign contractors/suppliers or between domestic and foreign contractors/suppliers, therefore, neither domestic nor foreign bidders shall receive preferences in the award of contracts. Additional supporting documents are needed as required by the tender documents.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Please refer to Q6 & Q7

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

In both Traditional Chinese and English. With reference to s340(a) SPR, for contracting authority wishing to publish tender notices in the Government Gazette, three copies of draft notices in Chinese and English have to be forwarded to Official Languages Division of Civil Service Bureau of which will forward to the Assistant Clerk to the Executive Council after vetting the Chinese translation. Both Written form and Electronic Tendering System are available for submitting tenders: <https://www.ets.com.hk/English/LoginLogoff/logon.asp>.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Yes, s340(d) SPR stipulates that, adequate time shall be provided to allow both local tenderers and tenderers outside Hong Kong to prepare and submit tenders. A minimum of three weeks is normally required. For procurements covered by WTO GPA, at least 40 days shall be allowed for receipts of tenders and no less than 25 days for applications to be prequalified to tender.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

Pursuant to s360 SPR, a tender deposit is not normally required. However, where a tender is required as a pledge of bona fide tenderer, the tender docu-

ments shall specify the amount of the deposit and the methods of payment. Tender deposits will be refunded to unsuccessful tenderers without interest.

**13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

Yes, as for the selection criteria, with reference to s370 (b) SPR, the assessment panel shall examine tenders against the technical specifications, terms and conditions laid down in the tender documents to determine whether the criteria are fully conformed. The contracting authority should take into account the followings in the evaluation, inter alia:

- i. Technical and financial capability of the tenderers and their past performance records;
- ii. Timely delivery or completion;
- iii. Compatibility with existing or planned purchases;
- iv. After sale support and service including maintenance and spare parts provisions, warranty and/or guarantees;
- v. Running and maintenance costs; and
- vi. Fair market prices.

On the contrary, if prior approval is obtained for the use of marking scheme<sup>3</sup> in the evaluation of tenders, usually the tenders which attains the highest overall score shall be recommended.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes, the independent Review Body on Bid Challenges was set up on 30 December 1998 to deal with complaints from suppliers/contractors on alleged breaches of the WTO GPA Agreement. A challenge shall be lodged in the prescribed form within 10 working days after the supplier/contractor knew or reasonably should have known the basis of the challenge. A 'Notification of Receipt of Bid Challenge' shall be issued to the complainant by the Secretariat once the formality of complaint is completed. The Chairman of the Review Body shall decide within

7 working days from the issue of the ‘Notification of Receipt of Bid Challenge’ whether a prima facie case is established for the challenge to be accepted for inquiry and a Panel to be appointed to consider the challenge. The Chairman shall take into consideration the following conditions in respect of the challenge:

- i. The challenge is made in respect of a procurement covered by the WTO GPA;
- ii. The complainant is a supplier or a potential supplier who has or has had an interest in the procurement concerned;
- iii. The information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with the provisions of the WTO GPA;
- iv. The challenge is filed with the prescribed time limits; and
- v. The complainant has filed sufficient information.

The Chairman, on the basis of the information provided in the complaint form, may come to the view that the challenge should not be accepted for inquiry or he/she may request for further investigation with regard to the complaint. ([http://www.tid.gov.hk/english/trade\\_relations/tradefora/reviewbody/reviewbody.html](http://www.tid.gov.hk/english/trade_relations/tradefora/reviewbody/reviewbody.html))

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

The independent Review Body on Bid Challenges will deal with all relevant procurements covered by the WTO GPA and referred to in Appendix I thereto of estimated contract value not less than the relevant thresholds specified in Annexes I and 3 of Hong Kong, China’s schedule of commitments under the WTO GPA. However, no relevant provision governing the procurement which falls outside the thresholds set out in WTO GPA. Appendix I: Government Entities which Procure in Accordance With the Provisions of this Agreement Threshold: 130,000 SDR for goods and services other than construction services 5,000,000 SDR for construction services Appendix 3: All other entities which procure in accordance with the provisions of this Agreement Threshold: 400,000 SDR for supplies and services other than construction services, 5,000,000 SDR for construction services ([http://www.wto.org/english/tratop\\_e/gproc\\_e/appendices\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm))

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (sec-**

**ondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

There is no time limit on filing the challenges before the complainants knew or reasonably should have known the basis of the challenge. The Chairman, nevertheless, may receive and consider a late challenge (i.e. a challenge which is not lodged within 10 days), if he finds that there is a reasonable cause for such delay.

However, a challenge shall not be considered if the complaint is filed later than 30 working days after the complainants knew or reasonably should have known the basis of the challenge.

**17. Can your office:**

- i. give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- ii. represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- iii. Please name a contact person within your office for questions of public procurement law!**

Yes, our office has the competence to

- i. Advise clients on public procurement law in Hong Kong and;
- ii. Represent foreign clients in relation to litigious matter through associated firm BOASE, COHENS & COLLINS Contact: Mr. Colin Cohen – colin@boasecohencollins.com
- iii. Ms. Julia Charlton, Partner, CHARLTONS – juliacharlton@charltonslaw.com Telephone: (852) 2905 7688/ (852)9101 5282

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<sup>1</sup> Special Drawing Rights (SDR) is an international currency unit set up by the International Monetary Fund. The current US dollar equivalent to 1 SDR is about US\$1.49.

<sup>2</sup> Specified Services stipulated in Annex 4 of Appendix I in Hong Kong, China's Offer WTO GPA ([http://www.wto.org/english/tratop\\_e/gproc\\_e/hkc4.doc](http://www.wto.org/english/tratop_e/gproc_e/hkc4.doc)) include computer and Related Services, Rental/Leasing Services without operators, Other business services, Courier Services, Telecommunications Services, Environmental Services, Financial Services and Transport Services.

<sup>3</sup> s350(f) SPR: Departments may consider adopting a marking scheme in the tender evaluation in accordance with the Guidelines for Adopting a Marking Scheme for Tender Evaluation. The use of a marking scheme for tender evaluation requires the prior approval of the relevant tender board.

# **Hungary**

## **SzecsKay Attorneys at Law**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes, the legal system in Hungary provides for specific procedures for the award of contracts. The main legal source regulating the different procurement procedures is the Act CXXIX of 2003 on Public Procurement Procedures (the “Public Procurement Act”), which has been legislated and adapted according to the requirements of the EU Directives for the award of contracts.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes, Hungarian law - subject to the EU regulations - distinguishes according to the type of goods/services (the subject) that are to be procured. The possible subjects of public procurement are as follows:

- (a) supply contracts,
- (b) public works contracts,
- (c) service contracts,
- (d) concession for construction
- (e) concession for services

Furthermore, the Public Procurement Act sets forth specific rules regarding special procurement procedures of entities operating in the water, energy, transport and postal services sectors.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes, the purchase of specific goods and services attached to the predetermined value limits is subject to public procurement procedures as set forth in the Public Procurement Act. Different provisions apply to procurements over the value limits set by the European Communities, the ones below the community limit and above the national limit, and to those below the national limit.

As regards the public procurement procedures over the value limits set by the European Communities, the essential thresholds currently amount to

- (a) EUR 5,150,000 for construction investments / concession for construction,

- (b) EUR 133,000 for supply/service contracts awarded by ministries, the Prime Minister's Office and the central purchasing entities authorized to conduct centralized procurement procedures,
- (c) EUR 206,000 for all other public supply/service contracts,
- (d) EUR 412,000 for public supply/service contracts in the sector field (water, energy, and transport sectors)

As regards the national limits, these are determined by the Budgetary Act of the current year.

#### **4. In what way does the contracting authority have to inform the market about the intended procurement?**

Contracting authorities may prepare and publish a preliminary prospectus before the beginning of each fiscal year, for the year or for the following period of maximum 12 months concerning:

- (a) all public supply contracts planned for the year (other than those subject to any exemption and the value of which is not less than the community limits) with an estimated contract value of not less than EUR 750,000;
- (b) all public service contracts under Annex 3 of the Procurement Act planned for the year (other than those subject to any exemption and the value of which is not less than the community limits) with an estimated contract value of not less than EUR 750,000.

Furthermore, open procurement procedures must be commenced by the publication of a tender notice.

In case of negotiated procurements, an invitation for participants shall be published both in community level and national level procedures.

In case of community level procurements, tender notices and invitations for participants shall be published in the Official Journal of the European Union and in TED data bank. In case of national level procurements, tender notices and invitations for participants shall be published in the official gazette of the Council of Procurements (In Hungarian "Közbeszerzési Értesítő").

#### **5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

As a rule, the contracting entity may not render the submission of tenders conditional upon the establishment of a business association or an entity with legal personality. However, the contracting entity may require the establishment of a

business association or an entity with legal personality if the contract is awarded to a consortium of bidders and such requirement regarding establishment is justified by the interest of fulfilling the contract. Bidders shall be notified of this clause in the tender notice.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes, both are possible.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

The Public Procurement Act provides that bidders established in the European Union and community goods shall be granted national treatment in public procurement procedures. National treatment to non-Community bidders and non-Community goods shall be granted in procurement procedures in harmony with the international commitments of the Republic of Hungary and the European Communities in the field of public procurements.

With respect to the above, bidders registered in one of the member states of the European Union may participate in procurement procedures under the same conditions as the Hungarian bidders. Bidders registered outside of the territory of the European Union shall be treated according to the international commitments of Hungary and the EU.

In light of the above, an entity registered in any of the member states of the EU is not required to have a registered office or branch office in Hungary and may submit a tender directly from abroad. As far as a potential bidder registered outside the territory of the EU, special rules might apply depending upon the applicable international or bilateral treaty.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

Yes, it possible for foreign bidders to submit a bid for contract to a contracting authority directly from abroad.

As explained above, the Public Procurement Act provides that bidders established in the European Union and community goods shall be granted national treatment in public procurement procedures. National treatment to non-Community bidders and non-Community goods shall be granted in procurement procedures in harmony with the international commitments of the Republic of Hungary and the European Communities in the field of public procurements.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes. As explained under questions no. (6) and (8), bidders established in the European Union and community goods shall be granted national treatment in public procurement procedures. National treatment to non-Community bidders and non-Community goods shall be granted in procurement procedures in harmony with the international commitments of the Republic of Hungary and the European Communities in the field of public procurements.

With respect to the above, bidders registered in one of the member states of the European Union may participate in procurement procedures under the same conditions as Hungarian bidders. Bidders registered outside of the territory of the European Union shall be treated according to the international commitments of Hungary and the EU.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The contracting entity must publish in the tender notice, among others, the language (languages) of the tender, which is mainly Hungarian. Bidders shall prepare their tenders in accordance with the formal and content requirements defined in the tender notice and in the tender documentation.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

The tender notice shall also contain the final deadline for submission of bids. The Public Procurement Act sets forth minimum periods to be taken into account by the contracting entity during the determination of the deadline for submission. The term of the minimum periods depends on the type of the pub-

lic procurement procedure. A deadline indicated in the tender notice shall commence on the day that follows the publication of the tender notice (invitation to tender).

In case of open procedures, the contracting entity may not set the time limit for the receipt of bids (final deadline for submission of bids) at less than 52 days from the date of sending the notice containing the tender notice. The time limit for receipt of bids may be replaced by a shorter period if the conditions defined in the Public Procurement Act are fulfilled.

In other types of public procurement procedures the final deadline for submission can be shorter (e.g. in accelerated procedures, the minimum time limit, generally, cannot be less than fifteen days following the publication of the tender notice).

In addition, please note that the time limit for receipt of bids may also be reduced if the contracting entity has drawn up and transmitted the tender notice by electronic means in accordance with the format and procedures laid down in specific other legislation.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

Generally, bidders cannot reclaim the costs for preparing their bids. However, civil actions may be initiated in connection with any infringement involving public procurements procedures if the infringement is established by final ruling of the Public Procurement Arbitration Committee, or by the court in the course of the review of a decision of the Public Procurement Arbitration Committee.

If a bidder's claim for damages is limited to recover from the contracting entity the expenses incurred in connection with the preparation of the bid and the participation in the public procurement procedure, it is sufficient to provide proof to the extent:

- (a) that the contracting entity has breached any provision of the legal regulations on public procurement procedures;
- (b) that the bidder had a real chance to win the contract; and
- (c) that the infringement had a direct impact on the bidder's chances for winning the contract.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

The Public Procurement Act defines the grounds of exclusion (e.g. the bidder shall be excluded if it is being wound up, or is under bankruptcy or liquidation proceedings, it has not fulfilled any obligation relating to the payment of taxes, customs duties or social security contributions etc.).

In addition, on the basis of the Public Procurement Act, the contracting entity may prescribe in the tender notice additional grounds of exclusion (e.g. the bidder can be excluded if it has been convicted of a misdemeanor offense concerning his economic or professional conduct by a judgment rendered within five years to date; it has been sanctioned by a final administrative or court ruling for any breach of obligation in connection with a public procurement contract within the preceding five years, etc.)

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

In the event of any illegal conduct or infringement in public procurements or contract award procedures, review procedures may be initiated by the bidders. Subject to certain conditions, review procedures can be initiated even before the award of the contract takes place.

(Please be advised that a conciliation procedure may also be requested in all cases subject to remedy under the Public Procurement Act. The objective of the conciliation procedure is to resolve any dispute between a contracting entity and a bidder or any other interested party by settlement in conformity with legal regulations. Participation in a conciliation procedure is voluntary. If either party to the dispute refuses to participate in the conciliation procedure, it may not be initiated. Applying the conciliation procedure shall have no effect on using any other form of remedy provided for in the Public Procurement Act; however, a review procedure may not be initiated before the conclusion of the conciliation procedure.)

Actions initiated in connection with any infringement involving public procurements and contract award procedures shall fall within the competence of the Public Procurement Arbitration Committee (the “Committee”).

A petition for review may be submitted by the contracting entity, by the bidder or any other interested party, whose right or lawful interest is violated or jeopardized by any unlawful conduct or infringement of the Public Procurement Act. The petition shall be filed within 15 days of the occurrence of the infringement, or within 8 days of the announcement of results where the decision adopted upon conclusion of the award procedure is unlawful. If the petitioner gained knowledge of the infringement after the fact, these deadlines shall commence upon gaining knowledge. No petition shall be accepted after 90 days following the infringement. Failing to comply with such deadlines shall constitute a waiver of the respective rights.

Firstly, the Committee shall check whether the petitions are in compliance with the formalities prescribed by laws. If the petition does not meet the requirements of the Public Procurement Act, the Committee may oblige the petitioner to submit additional data or documents. If the petitioner fails to do so, the petition is to be refused.

Generally, the Committee shall conclude the proceedings within 15 days of the date of commencement of the proceedings if no hearing has been held. If a hearing was held, the Committee shall conclude the proceedings within 30 days of the date of commencement of the proceedings. Under specific circumstances, the above deadline may be extended once by 10 days.

The Committee shall adopt a decision in the course of the review of the public procurement procedure in which decision the Committee may declare that the public procurement procedure was unlawful and cancel the result of the public procurement procedure and may impose a fine. The Committee may file a civil suit in accordance with the general provisions on civil procedures for annulment of a contract concluded in violation of the regulations governing public procurements or contract award procedures.

The court review of the decision of the Committee may be initiated in accordance with the Public Procurement Act.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

The form and the procedure of the legal protection and the remedies in case of the infringement of the provisions of the Public Procurement Act do not depend on such conditions in Hungary.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

Civil actions may be initiated in connection with any infringement involving public procurements and contract award procedures only if the infringement has been established by a final ruling of the Committee, or by court following the review of a decision of the Committee.

As indicated under question no 12 above, if a bidder's claim for damages is limited to recover from the contracting entity the expenses incurred in connection with the preparation of the bid and the participation in the award procedure, it is sufficient to provide proof to the extent:

- (a) that the contracting entity has breached any provision of the legal regulation on public procurements and contract award procedures; and
- (b) that the bidder had a real chance to win the contract; and
- (c) that the infringement had a direct impact on his chances for winning the contract.

**17. Can your office**

- i. give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- ii. represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- iii. Please name a contact person within your office for questions of public procurement law!**

Yes, our office can advise on the matters as described in question no 17 above. Our office has advised numerous clients in connection with various aspects of public procurement procedures in Hungary and has a considerable experience in regard of such procedures in Hungary.

The members of our law firm who have worked on public procurement matters are as follows: dr. András Szecskay, dr. Judit Gulás, dr. Judit Budai, dr.

Hungary

Katalin Grósz, dr. Anikó Keller, dr. Zoltán Balázs Kovács, dr. László Pók and dr. János Vajda. In case of a possible new assignment, please send all information to our managing partner, dr. András Szecskay and kindly copy dr. Judit Gulás on the message.

# **India**

## **Luthra & Luthra Law Offices**

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## **1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

There are no specific binding procedures for award of a public procurement contract in India that are applicable to the bidders themselves. However, certain rules and directives have been laid down which provide guidance for procurement by government departments and ministries. It is in this regard that the central government has notified the General Financial Rules, 2005, (“GFR”) as a compendium of general provisions in the form of executive instructions to be followed by all offices of Government of India (“GOI”) while dealing with matters of financial nature including procurement of goods and services.

Rules regarding the procurement of goods required for use in public service and contract management are provided in Chapter 6 and Chapter 8 respectively of the GFR. Every authority, delegated with financial powers for procurement is required to act in such manner so as “to bring efficiency, economy, transparency in matters relating to public procurement and for fair and equitable treatment of suppliers and promotion of competition in public procurement”. In this regard, it may also be noted that Article 14 of the Constitution of India guarantees equality before law and equal protection of law. Award of contracts by the government or its instrumentalities are required to provide equal opportunity to all persons and any unreasonable and arbitrary act in awarding such contracts would be set aside as being violative of Article 14 of the Constitution of India.

As per Rule 140 of the GFR, all the central ministries and departments have been delegated full powers to make their own arrangements for procurement of goods. In case, however, a ministry or department does not have the required expertise, it may request the central purchase organization (i.e. Director General of Supplies and Disposals or the DGS&D) to make the procurement on its behalf, with the approval of the competent authority in the ministry/department.

In addition to the GFR, a manual on policies and procedures for purchase of goods has been published by Department of Expenditure, Ministry of Finance, to assist the procuring entities and their officers in the procurement of goods and services. Further, the Central Vigilance Commission (“CVC”) which was set up by the GOI in February, 1964 has the primary responsibility of exercising a general check and supervision over vigilance and anti-corruption work in ministries and departments of the GOI and other organisations to which the executive power of GOI extend. From time to time, the CVC issues circulars

which are required to be followed during procurement of goods and services by the ministries and the departments. Circulars issued by the CVC are also aimed to increase transparency and objectivity in public procurement supplementing the GFR.

In addition to the central rules, the State governments too have enacted their respective state financial rules, applicable to procurements by the departments of the state governments. These rules are primarily in line with the GFR.

Also, the Supreme Court of India has laid down that, where many parties are interested in undertaking any work, then a fair mode of selection is to be adopted to select one or several persons from amongst those interested in undertaking the work. Therefore, any award of contracts for public procurement in India, ordinarily has to be through a competitive bidding or tendering process. Any other method, especially nomination, shall be a breach of the fundamental right of equality before law (Article 14 of the Constitution of India) except where such is expressly provided in the applicable rules. The court has however recognised that in rare and exceptional cases, having regard to the nature of the trade or largesse or for some other valid reason, a contract for public procurement may have to be granted by private negotiation.. The CVC has prescribed tendering to be a mandatory process of public procurement vide its Office Order No.23/7/07 and CIRCULAR No.15/5/06 and mandates that all nomination and single tender should be posted on the website of the procuring entity ex post facto.

Hence, though there is no specific overarching regulation of the bidders, the contracting authorities are required to follow the regulations that have been laid down as mentioned above, as well the principles enshrined in the Constitution of India.

## **2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Public procurement in India can happen at the union (central) level and at the state levels. Most of the states have enacted procurement rules in line with GFR and procurement at the state level is guided by such rules. Typically, public procurement in India is inter alia based on the following factors:

### **A. Union or state level procurement:**

The Constitution of India creates two levels of governance within the country - one at the central level and the other at the state level. Accordingly, there are

identified subjects which are within the powers of the central government and there are certain subjects which are exclusively assigned to the states to legislate upon. Certain subjects are also identified in the concurrent list, i.e, both the centre and the states may make laws in relation to these subjects. Therefore, if the procurement relates to any of the union subjects then the rules applicable to GOI and its ministries shall apply. Consequently, the rules such as those laid down in the GFR and the CVC circulars would become relevant. On the other hand, if the procurement is by any instrumentality of the state government, then laws made by the state would apply to such procurement.

#### B. Ministry or department procuring

Procurement by certain ministries and/ or department may be subject to different rules for procurement. For e.g., National Highway Authority of India, which is the nodal agency for national highways in India, has developed a specific framework for public procurement. Also, the Defence Procurement Rules, 2006 has been enacted expressly dealing with procurement by ministry of defence. In case of the defence sector even the GFR endorses that procurement of goods required on mobilisation and/or during the continuance of military operations shall be regulated by special rules and orders issued by the central government on this behalf from time to time.

In addition to the above, sector specific laws like the Electricity Act, 2003, Petroleum and Natural Gas Board Act, 2006, Telecom Regulatory Authority Act, 2000 also guide public procurement in relation to the respective sectors to which they are applicable.

#### C. Goods and services to be procured

With the intention of developing small and medium enterprises, certain goods such as handloom textiles have been reserved by the central and the state governments to be manufactured and sourced from Small Scale Industries (“SSI”) and Small and Medium Enterprise (“SME”). The government also prefers to employ local population for performing unskilled or semi-skilled works.

Also, there may be certain directions that are sector specific. For instance, the ministry of power has issued the Mega Power Policy as per which domestic manufacturers would be given preference for locally manufactured goods. Accordingly, the kind of goods and services being procured shall be one of the factors to be considered while inviting bids for public procurement.

D. Estimated value of the goods/ services required

The estimated cost of goods and services to be procured also determines the procedure for procurement. GFR provides different procedure to be adopted for procurement of goods depending upon the value. Brief details of the same have been discussed herein below.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes, the procedure for procurement varies depending upon the value of the goods or services being procured. As mentioned earlier, GFR provides that all government procurements have to be made in a transparent, competitive and fair manner, to secure best value for money, so as to enable the prospective bidders to formulate and send their competitive bids with confidence.

As per the GFR, if the goods are up to the value of Indian Rupees (“INR”) 15,000/- then the same can be procured without inviting quotations or bids by GOI departments and ministries. Such a purchase may be undertaken after a certificate has been obtained from the competent authority confirming the quality, specification and the reliability of the supplier.

Further, GFR provides that if the value of procurement is for a value between INR 15,000/- and INR 100,000/- then the procurement can be done by a committee of three persons (“Panel”), one of whom has to be the head of the relevant department. The committee is required to undertake the survey of the market to “ascertain the reasonableness of rate, quality and specifications and identify the appropriate supplier”. The Panel would then issue a certificate stating that they are satisfied that the goods recommended for purchase are as per the proposed specification, are priced at prevailing market rate and supplier recommended is reliable and competent to supply the good.

It may be pertinent to note that the CVC has specifically mandated that, in case of procurement on nomination basis/ limited tendering by a public sector undertaking (“PSU”), the formation of the Panel shall be done in a transparent manner. Further, the contracts awarded on nomination and limited tender basis are required to be presented to the board of the PSU for scrutiny and post facto approval. The body responsible for the audit of the concerned PSU is required to review at least ten percent of such contracts and a report with respect to awards of such contracts have to be submitted to the board every quarter. The CVC has, however, clarified that such post facto approval cannot be deemed to

be permitting procurement by nomination, but it shall resorted to only in case of inevitability of situation.

If the procurement is for a value higher than INR 2,500,000/- then procurement has to be through advertised tender enquiry system. The publication of advertisement(s) and minimum time for submission of the bids must be in accordance with the GFR. However, there are certain exceptions to this rule which are discussed in Question 4 below.

If the procurement is for a value less than INR 2,500,000/- then the procurement may be made by sending notices directly to the suppliers registered with the department as per the GFR. The department is required to make efforts to identify higher number of bidders so as to receive competitive bids and is obliged to send notices to and shortlist at least three bidders.

If high value plant and machinery is required to be procured, then the two tier bidding system (technical and financial bids) is required to be followed. The technical and the financial bids are to be kept separately and the financial bids of only technically qualified bidders are to be opened. The bids received after the prescribed date and time of receipt are not to be opened.

These general rules however are subject to certain recognized exceptions, such as:

- (a) in case of exigency, even procurement of value more than INR 2,500,000/- may be done through limited tender;
- (b) if the user department is aware that only a particular firm is the manufacturer of required goods then, it may procure from such manufacturer.

Some states have also laid down certain pecuniary thresholds to decide on the applicable procedures. For instance, under the Kerala Store Purchase Rules (“Kerala Rules”), purchase of specific goods of a value lesser than the amount prescribed requires no quotations/tender and no budget provision in favour of such transaction. Further, the Kerala Rules requires that quotations be invited if the estimated value of the store is below INR 20,000/- and tenders are to be invited if the estimated value of the stores to be purchased is INR 20,000/- or above. Different state rules provide for different threshold for mandating tendering in procurement.

Certain states like Tamil Nadu have enacted legislations governing the tendering process, like the Tamil Nadu Transparency in Tenders Act, 1998. This legislation prohibits specified entities (which include government departments, local bodies in the state, co-operative institutions in the state, universities, societies formed by the government) from procuring goods without tendering.

Under the Tamil Nadu Transparency in Tenders Act, 1998, public procurement can happen only by way of tenders and such procedure is exempted only in certain specified cases. Further, as per the Tamil Nadu Transparency in Tenders Rules, 2000 the tender inviting authority is required to decide the method of tendering to be followed in each case having regard to the category, size and complexity of the procurement.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

GFR clearly provides that, procurement may either be by:

- (A) Advertised Tender Enquiry;
- (B) Limited Tender Enquiry; or
- (C) Single Tender Enquiry.

**A. Advertised Tender Enquiry:**

The invitation to tender by advertisement should be used for procurement of goods having an estimated value INR 2,500,000/- and above. Advertisement in such a case should be given in the Indian Trade Journal (“ITJ”), published by the Director General of Commercial Intelligence and Statistics, Kolkata, and at least in one national daily having wide circulation. Further, an organization having its own website should also publish all its advertised tender enquiries in its own website and provide a link with a specified GOI website ([www.tenders.gov.in](http://www.tenders.gov.in)). It should also give its website address in the advertisements in the ITJ and newspapers. The organization should also post the complete bidding document on its website. If such a downloaded bidding document is priced, there should be clear instructions for the bidder to pay the amount by demand draft etc., along with the bid. Where the relevant ministry or department feels that the goods of the required quality, specifications etc., may not be available in the country and it is necessary to also look for suitable competitive offers from foreign countries, the concerned ministry or department may send copies of the tender notice to the Indian embassies abroad as well as to the foreign embassies in India. The selection of the embassies will depend on the possibility of availability of the required goods in such countries.

As per GFR, the minimum time to be allowed for submission of bids should be three weeks from the date of publication of the tender notice or availability of the bidding document for sale, whichever is later. Where the department

also contemplates obtaining bids from foreign countries, the minimum period should be kept as four weeks for both domestic and foreign bidders.

#### B. Limited Tender Enquiry:

When the estimated value of the goods to be procured is up to INR 2,500,000/-, procurement may be made by limited tender enquiry. If the procurement is by limited tender enquiry, then copies of the bidding document should be sent directly by speed post/ registered post/ courier/ e-mail to firms who are registered suppliers for the goods to be procured. The procuring entity is required to shortlist the maximum number of suppliers in order to arrive at a competitive range of quotes. However, the number of supplier firms in a limited tender enquiry should be more than three. Further, internet based publicity should be given for the tenders. Efforts are required to be made to identify a higher number of approved suppliers to obtain more responsive bids on a competitive basis. Purchase through limited tender enquiry may be adopted even where the estimated value of the procurement is more than INR 2,500,000/- in the following circumstances:

- (a) the competent authority in the ministry or department certifies that the demand is urgent and any additional expenditure involved by not procuring through advertised tender enquiry is justified in view of the urgency. The ministry or department should also put on record the nature of the urgency and reasons why the procurement could not be anticipated.
- (b) there are sufficient reasons, to be recorded in writing by the competent authority, indicating that it will not be in public interest to procure the goods through advertised tender enquiry.
- (c) the sources of supply are definitely known and possibility of fresh source(s) beyond those being tapped is remote.

Sufficient time should be allowed for submission of bids in limited tender enquiry cases.

#### C. Single Tender Enquiry

If the user department is aware that only a particular firm manufactures a good, then procurement from a single source may be resorted to. Also, in case of an emergency, if the required goods are necessarily to be purchased from a particular source, then reasons for such decision has to be recorded and approval of the competent authority obtained. Further, procurement by single tender system can be done for standardization of machinery or spare parts which have to be compatible to the existing sets of equipment (on the advice of a compe-

tent technical expert and approved by the competent authority), and hence the required item is to be purchased only from a selected firm. In such cases no fixed method has been prescribed by GFR for informing the market about the procurement.

In case of DGS&D procurements, if it is an advertised/global tender or a limited tender, the procedure outlined in guidelines 8.3.2 and 8.3.1 respectively of the DGS&D manual should be followed. This document which guides the DGS&D is similar to the procedure mentioned in GFR but wider in terms of publicity to the tender document. In the case of advertised/global tender enquiries, these guidelines state that the tender notices must be advertised in the ITJ. For purchases above INR 500,000/- they must be advertised in a national daily along with the ITJ. In the case of limited tender enquiries, the tender sets have to be sent directly to supplier to respond.

Similar procedure has been prescribed to be followed by most of the state governments, especially since they too are required to obtain such services and goods via open tenders and bidding.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

The rules applicable at the central and state levels do not mandate any specific legal form for potential bidders for them to be eligible for submitting bids. However, the relevant contracting entity may prescribe a form which would have to be complied with by the interested bidders.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Although applicable laws do not contain any prohibition on joint offers to be submitted, typically sub-contracting and bidding as consortium is permitted if the bids invited by the procuring agency do not prohibit the same. It may be noted that the GFR or the applicable state acts/ rules only provide a broad policy for inviting and publication of procurement. Specific details about each procurement are provided by the specific procuring entity. Permitting or prohibiting consortium bidding or sub-contracting or providing details about sub-contractors may be specific to each individual procurement by the procuring entity.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

There are no precise specifications about the registered office of the potential bidder for submitting a bid. However, at times, the bid documents provide that the successful bidder shall be required to establish a presence in India for performing the obligations as laid down in the bid document. This is a usual specification found in cases where the duration of performance is long. Also, in cases where government or other agencies are inviting bids for selecting a joint venture partner for undertaking certain activities, the successful bidder may be required to establish its presence in a particular state or place as specified.

As per the GFR, Indian agents, who desire to quote directly on behalf of their foreign principals are required to register with DGS&D under the Compulsory Enlistment Scheme of the Department of Expenditure, Ministry of Finance.

To avail rate contracts facility under the DGS&D, and also be eligible for the limited tender system under DGS&D and the GFR, a bidder must be compulsorily registered with the DGS&D or the procuring ministry or department as per Rule 142 of the GFR and Chapter 5 of the DGS&D manual. A foreign manufacturer may also get itself registered (if it does not have an Indian agent) once it is established that it has necessary arrangements for after-sales service where required in India. Under the same provision, foreign manufacturers can also be registered along with their Indian agents, the latter also being enlisted by the DGS&D. In this case, direct bidding by foreign firms is possible in relation to a global tender floated by DGS&D or under the limited tender system.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

There is no specific prohibition against foreign bidders submitting a bid directly from abroad. Further, there does not appear to be any additional requirements that a foreign bidder is required to comply with under law. However, the contracting agency may set down certain additional qualifications to be complied with by the bidders.

As to preferential treatment of domestic bidders over foreign ones, it may be noted that if any person is favourably treated amongst a group of similarly placed bidders (irrespective of their nationality) then the same may be viewed to be in conflict with Article 14 of the Constitution of India, which guarantees equal protection of law to all who are required to be treated as equals. It may be noted that prospective bidders registered with DGS&D are required to submit earnest money as security while submitting a bid and this applies equally to both domestic and foreign bidders.

Earlier PSUs were given preference, however, the Department of Public Enterprises vide its circular DPE OM No.DPE/13(15)/2007 dated November 21, 2007 provided that purchase preference policy for products and services of public sector enterprises will be terminated with effect from March 31, 2008. However, the said circular permitted specific ministries to independently have purchase preference policies favouring procurement from PSUs in relation to their respective purchases. Accordingly, under sector specific regulations the ministry of power, GOI has prescribed that all public sector mega power projects shall give preference to the domestic manufacturers of capital goods to be used in the projects.

Also, as mentioned in Question 2 above, it may be noted that procurement of certain goods and services have been reserved by the central and state government for SSIs and SMEs. Foreign bidders will not be eligible to provide these items for procurement by the ministries and departments of the government.

### **9. Is a multinational bidding consortium allowed to submit a bid?**

There is no specific prohibition to bidding by a multi-national consortium either in the GFR or any state Procurement rules. However, as has already been pointed out, the restrictions on the qualification of the entities involved in a bid may be laid down by the procuring entity for valid reasons.

### **10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Most notices inviting tenders are published both in regional and English language. Further, as required by applicable law, the tender is also to be advertised on the website of the tendering authority and other relevant government web sites. Most bids, especially those conducted as national competitive bidding or international competitive bidding require all submissions to be in English.

As to the form, the GFR does not expressly provide a format for submitting bids. In the two tier bid system (technical and financial stages), the bidder is required to submit bids in two separate sealed envelopes.

Many government departments and state governments are steadily moving towards e-procurement. States like Andhra Pradesh and government instrumentalities like Gas Authority of India Limited mandate procurement to be conducted online and bids submitted are required to be digitally signed and uploaded on to the website of the procuring entities.

## **11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

The GFR, guidelines within the DGS&D manual and state procurement rules, along with notifications thereunder, provide the minimum time required to be given for inviting tenders in response to advertised tender enquiry.

### **A. The GFR**

The GFR prescribes the following schedule:

- (i) For Advertised Tender Enquiries: Ordinarily, the minimum time to be allowed for submission of bids should be three weeks from the date of publication of the tender notice or availability of the bidding document for sale, whichever is later. Where the department also contemplates obtaining bids from abroad, the minimum period should be four weeks for both domestic and foreign bidders.
- (ii) For Limited Tender Enquiries: Sufficient time should be allowed for submission of bids in such cases. Discretionary powers have been given to individual departments to set timelines within the prescribed framework.

### **B. DGS&D manual**

As per the guidelines prescribed by the DGS&D Manual, the time to be permitted for submission of bids is as follows:

- (i) Global tenders - Not less than 8 weeks;
- (ii) Advertised tenders - Not less than 6 weeks;
- (iii) Limited tenders - Not less than 4 weeks.

Under the DGS&D Manual there are certain additional considerations that would be taken into account while calculating the above periods:

- (x) A period of 10 days is to be added to the above time schedules where the firms have to obtain specifications/drawings from outside parties. A margin of 15

days is also to be allowed by the contracting entity to enable them to send the tender notice in time for publication in the ITJ.

- (y) While allowing the above period for submission of tenders or in fixing the tender opening date the purchase officer should ensure that it does not fall on a Monday or a day following a holiday or a series of holidays or on the pay day of the month. The latest hour for receipt and opening of tenders will be indicated in the Form DGS&D-242-Schedule to Tender Enquiry.
- (z) In the event of the specified date for tender opening being or is declared as a holiday for Government offices then the tender will be opened on the following working day at the same time. The tender enquiry should contain a clause to this effect.

### C. State procurement rules

The state procurement rules too lay down timelines for submission of bids, though they vary from state to state. For instance, as per Kerala Rules, sufficient time is to be given to the bidders to submit the tender, the minimum period being 1 month. In case of the U.P. State Procurement Rules, no specific time period is mentioned, but it is directed that all tender notices shall mention the time, date and place where the tenders are to be submitted and will be opened.

## **12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

The GFR and the DGS&D Manual neither provide for, nor prohibit the payment of costs to the bidders for the preparation of their bids. It may be noted that, most bids documents clearly provide that the bidder shall meet its own costs for the preparation of bid, and tender inviting authority shall not be under any obligation to reimburse any cost of bid preparation to the successful and/or unsuccessful bidder. However, there are exceptions such as in the case of bidding under the ‘Swiss challenge’ route where the original project proponent is usually entitled to recover the cost of preparation of proposal if it refuses to accept the most competitive bid arrived at in the bidding process.

## **13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

There is no specific evaluation criteria laid down by law which a bidder must satisfy before it is eligible to be awarded the contract. It may be noted that GFR and other applicable rules provide that in case of procurement of high value plant and machinery, a two stage bidding process has to be adopted and commercial bids of only technically qualified bidders are to be opened. The guidelines on qualifications are laid down by the contracting authorities themselves. However, no restriction which is unreasonable and/ or arbitrary can be imposed on any bidder by the bid document issued by the contracting agency.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Legal protection shall be available to bidder even before the award of contract to a competitor, if the bidder can establish that the procuring entity has not complied with mandatory conditions of tender and/ or applicable law. It is open to a bidder to oppose a tender and resist the award of a contract to another bidder by obtaining an injunction from the courts against the award of the bid, if it can be shown that the actions of the contracting entity was contrary to applicable law.

Any sort of arbitrariness or departure from the rules set down by or for the contracting agencies, which is considered an instrumentality of the state, can be challenged, at the preliminary stage, in the High Court of the relevant state or the Supreme Court of India citing violation of rights such as Articles 14 (which prescribes the right to equality) and 21 (into which the courts have read in the right of opportunity) of the Constitution of India. A decision of the High Courts can be challenged by an appeal to the Supreme Court.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

The primary legal protection is not qualified by the threshold value or kind of goods or services to be procured.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

Apart from the primary legal protection available, an award of tender by government or its instrumentalities may be challenged to be an arbitrary exercise of power by the procuring entity even after the contract has been awarded. Depending on the merits of case, the courts may set aside the bid or uphold a claim for damages or allow for any other remedial measures to be taken depending on the relief sought and other surrounding circumstances. Though the High Courts and the Supreme Court are slow to interfere with award of contract, if the claimant can show that the contracting authority acted unreasonably or acted arbitrarily or that there was a clear bias in favour of one bidder or against the claimant, then an appropriate relief may be forthcoming from the relevant court.

**17. Can your office**

- **give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- **Please name a contact person within your office for questions of public procurement law!**

Our office can assist foreign clients with all aspects of Indian law in preparation of bids and rendering assistance in any legal protection required with regards public procurement.

For any assistance you may contact:

Mr Rajiv K. Luthra [rajiv@luthra.com](mailto:rajiv@luthra.com) or

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India

# **Indonesia**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes.

The legal system in Indonesia provides specific procedures for the award of public or government contracts. Such procedures are provided in the Presidential Decree No. 80 of 2003 on Government Goods/Services Procurement Implementation Guidance, which has been amended 6 times and last amended by Presidential Regulation No. 85 of 2006 (collectively, “PD80”).

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

PD 80 divides the types of goods or services to be procured into two general types, consisting of (i) goods and (general) services and (ii) consultancy services.

Goods and (general) services procurement shall be carried out in either one of the following procurement procedures, as provided under the PD80:

- (i) Public Tender;
- (ii) Limited Tender;
- (iii) Direct Selection; and
- (iv) Direct Appointment.

PD80 provides a separate procedure for the procurement of consultancy services as follows:

- (i) General Selection;
- (ii) Limited Selection;
- (iii) Direct Selection; and
- (iv) Direct Appointment.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Certain procurement procedures are subject to the value of the goods or services.

Direct Selection for goods/general services and consultancy services can be carried out in a procurement valued up to Rp. 100.000.000 (one hundred million Rupiah).

Direct Appointment can be carried out in procurement, having the specific criteria as determined in PD 80, among others, small scale work with maximum value up to Rp. 50.000.000 (fifty million Rupiah).

Those are exceptions to the general requirement that all procurement shall be conducted through a public tender (for goods and (general) services) or general selection (for consultancy services). However, in the case that the number of available competent suppliers for a certain procurement is limited, such procurement can be conducted through a limited tender (for goods and (general) services) or limited selection (for consultancy services).

#### **4. In what way does the contracting authority have to inform the market about the intended procurement?**

Article 4 of the PD80 determines that as a government public policy in goods and (general) services procurement, the contracting authority shall publicly announce goods and (general) services procurement activity through a nationally circulated and/or provincially circulated newspaper.

Confidential goods and (general) services procurement plan for Departments/Institutions/Commissions/Bank Indonesia/Regional Government/State Owned Legal Entity/State Owned Enterprise/Regional Owned Enterprise are obliged to be publicly announced as well, by way of announcing it on the national procurement website [www.pengadaannasional-bappenas.go.id](http://www.pengadaannasional-bappenas.go.id) and/or at the website of the Departments/Institutions/Commissions/Bank Indonesia/Regional Government/State Owned Legal Entity/State Owned Enterprise/Regional Owned Enterprise, which is integrated to the national procurement website.

#### **5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

PD80 does not determine or stipulate a specific legal form requirement for a potential bidder to submit a tender. However, Article 11 of the PD80 provides certain requirements for the goods and (general) services provider in commencing its procurement. One of the requirements is that the goods and (gen-

eral) services provider must comply with the provisions of the law to carry out business/activities as a goods and (general) services provider.

Notwithstanding that, the tender form (which format is attached in the PD80) only recognizes the following entities:

- (i) Limited Liability Company;
- (ii) Limited Partnership;
- (iii) General Partnership;
- (iv) Cooperatives; and
- (v) individuals.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes, both are possible. However, subcontracting is subject to certain limitations as governed under the PD80 (e.g., restrictions to subcontract the whole work).

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

PD80 does not expressly specify any requirements to have a registered office or branch office in Indonesia, but Article 11 Paragraph 1 of the PD80 specifically requires that the provider must comply with all prevailing regulations to carry out the businesses or activities as a goods and (general) services provider. In this regard, potential bidders may be required to have a registered office or branch office, whereby the relevant regulatory governing the type of business of such bidder requires so.

However, please note that it may be required to have a registered office or branch office during the performance of the contracts.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

Yes, pursuant to Article 42 Paragraph 1 of the PD80, foreign bidders may participate in goods and (general) services procurement, although subject to the following values of procurement:

- (i) for contract of works (pemborong) above Rp. 50.000.000.000 (fifty billion Rupiah);
- (ii) for provision of other goods and (general) services above Rp. 10.000.000.000 (ten billion Rupiah);
- (iii) for consultancy services above Rp. 5.000.000.000 (five billion Rupiah).

Paragraph 2 also provides that foreign companies carrying out the aforementioned works must cooperate with the local companies in a form of a partnership, subcontract and others, if there are local companies having the capabilities in the relevant field.

The above provisions may be waived in the event of procurement specifically for defense materials and equipments for the Department of Defense/Indonesian Armed Forces which shall be determined by the Minister of Defense/Commander-in-chief of the Indonesian Armed Forces/Forces Chief Staff, as explained in Article 42 Paragraph 3 of the PD80.

#### **9. Is a multinational bidding consortium allowed to submit a bid?**

There are no restrictions for a multinational bidding consortium to submit a bid; however, such consortium must take into account of the minimum value of the works and special terms as stated in number (8) above.

#### **10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Tenders can be submitted through either by (i) conventional/manual means or (ii) electronic means.

Conventional/manual means shall be carried out by submitting the tender documents in written form to the contracting authority. The standard format of the form is provided in Attachment II of the PD80.

Tenders submission by electronic means shall be submitted through the national procurement website, [www.pengadaannasional-bappenas.go.id](http://www.pengadaannasional-bappenas.go.id).

In general, submission process shall be carried out in Indonesian language. However, it may also be carried out in English language, provided that the pro-

curement is an international procurement, whereby foreign entities are allowed and/or invited to submit tenders.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Article 12 of PD80 provides that, the goods and (general) services user are obliged to allocate an “adequate” amount of time to publish the announcement, provide the opportunity to obtain the relevant documents, provide the opportunity to review the documents and prepare the bidding documents. PD80 does not provide the specific amount of time which needs to be allocated, but its Attachment I provides the minimal amount of time required for each step in each type of procedure. For instance, in a public tender with pre-qualification, the public announcement shall be published for at least 7 (seven) working days, the deadline for submission of the procurement documents shall be at least 3 (three) working days as of the end of the announcement. The period between announcement day and deadline of obtaining the procurement documents shall be at least 7 (seven) working days.

The bidding documents shall be available 1 (one) day as of issuance of the tender invitation up to 1 (one) day before submission of the bidding documents. The briefing shall be done in at least 7 (seven) days as of the announcement of the pre-qualification date. The bidding documents submission period shall be at least 7 (seven) working days as of the briefing.

Subject to the above, it would be mandatory for the contracting authority to provide the goods and (general) services provider no less than approximately 31 (thirty one) working days between the announcement for procurement and submission of bids, in public tender with pre-qualification.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

In general, bidders may not claim reimbursements for the cost of submitting a bid.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

Article 11 Paragraph 1 of PD80 provides general requirements which shall be fulfilled by the goods and (general) services provider through the pre-qualification or post-qualification process by the contracting authority, as follows:

- (i) compliance with prevailing regulations in carrying out businesses/activities as goods and (general) services provider;
- (ii) owns the skill, experience, technical capabilities and managerial skill to provide the goods and (general) services;
- (iii) is not under a court supervision, not in bankruptcy, its business activity is not terminated and/or the Board of Directors acting for and on behalf of the company is not currently undergoing a criminal sanction;
- (iv) legally owns the capacity to execute contracts;
- (v) as a taxpayer had fulfilled tax obligations of the preceding year, which shall be proven by submitting a copy of receipt for the Annual Return for the preceding year, and copy of the Article 29 income tax payment form;
- (vi) within the last 4 (four) years had obtained assignments providing goods and (general) services either from the government or from a private sector including subcontract experience, except for goods and (general) services providers which have only been established for less than 3 (three) years;
- (vii) owns the human resources, capital, equipments and other facilities required in goods and (general) services procurement;
- (viii) not enlisted in the black list;
- (ix) owns a permanent and clear address and within reach of mail;
- (x) individual goods and (general) services provider shall fulfill the same requirements as stated above except for point (vi).

Article 11 Paragraph 2 of PD80 provides that, specialists which will be assigned in carrying out consultancy services must fulfill the following requirements:

- (i) owns a Taxpayer Registration Number (Nomor Pokok Wajib Pajak or NPWP) and proof of settlement for tax obligations;
- (ii) graduated from an accredited state or private university or graduated from state examination or foreign university, which diploma have been legalized/approved by a government authority, having the authority in higher education matters;
- (iii) experienced in its relevant business sector.

The contracting authority may establish additional selection criteria and requirements for procurement, with the limitations that it shall be indiscrimina-

tive and objective, as governed under Article 16 Paragraph 3 of the PD80, which elucidation provides examples of criteria or requirements deemed indiscriminative and objective, such as:

- (i) requirements that obstructs fulfillment of a healthy competition, e.g., requirements to become a member of a certain association;
- (ii) requirements that obstruct participation of goods and (general) services provider from other regions, e.g., obligation to own a bank account in a local bank.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes, Article 27 of PD80 provides a primary legal protection against a bidders before the contract is awarded. The said primary legal protection is the right of a goods and (general) services provider to submit a protest letter to the goods and (general) services user, subject to the following:

- (i) if there is a violation towards the provisions and procedures which have been determined in the documents for the goods and (general) services provider;
- (ii) if there is certain conspiracy which implicates an unhealthy competition;
- (iii) misuse of authorities by the contracting authority and/or other authorized official;
- (iv) if there is an element of corruption, collusion and nepotism amongst the attendants of the goods and (general) services provider selection;
- (v) if there is an element of corruption, collusion and nepotism amongst the member of the contracting authority and/or with other authorized official.

The goods and (general) services user must provide a response at the latest in 5 (five) working days as of the protest letter is received.

The protesting goods and (general) services provider may submit an appeal if the response is not satisfactory. Such appeal shall be submitted to the Minister/Commander-in-Chief of the Indonesian Armed Forces/Chief of the Police Force of the Republic of Indonesia/Head of the Institution/Governor/Regent/Mayor/Board of the Governor of the Bank Indonesia/Head of the State Owned Legal Entity/Board of Directors of the State Owned Enterprise/Region Owned Enterprise at the latest in 5 (five) working days as of the response over such protest had been received.

The Minister/Commander-in-Chief of the Indonesian Armed Forces/Chief of the Police Force of the Republic of Indonesia/Head of the Institution/Governor/Regent/Mayor/Board of the Governor of the Bank Indonesia/Head of the State Owned Legal Entity/Board of Directors of the State Owned Enterprise/Region Owned Enterprise must provide a response at the latest in 15 (fifteen) working days as of the appeal is received.

The goods and (general) services provider selection shall still proceed. If the appeal turns out to be true then the whole procurement process shall be re-evaluated or a re-selection process or contract cancellation shall be conducted. Each protest must be processed by the authority receiving the protest, in accordance with the prevailing laws.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

Kindly refer to No. 14.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

The procedure and conditions for the secondary legal protection are the same as the ones for the primary legal protection, and damage claims can always be submitted as a matter of civil law procedure.

**17. Can your office**

- i. give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- ii. represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- iii. Please name a contact person within your office for questions of public procurement law!**

Yes, our office has the competence to:

Indonesia

- (i) provide legal advice and assist foreign clients in the procurement procedure in Indonesia;
- (ii) represent foreign clients seeking primary and secondary legal protection before all public offices/courts in Indonesia;
- (iii) Please contact Christian Teo or Dhanadyaksa Narendrasuta from our office for questions of public procurement law.

# **Ireland**

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## **1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

The legal system in Ireland provides specific procedures for the award of contracts by contracting authorities. The two EU Directives which currently regulate the award of public contracts in Ireland are:

- (1) the Public Sector Directive (Directive 2004/18) which was transposed into Irish law under Statutory Instrument 329/2006 (European Communities (Award of Public Authorities' Contracts). Regulations, 2007) (the "Public Sector Regulations") in June 2006; and
- (2) the Utilities Directive (Directive 2004/17) which was transposed into Irish law under Statutory Instrument 50/2007 (European Communities (Award of Contracts by Utility Undertakings). Regulations, 2007) (the "Utilities Regulations") in March 2007.

The Department of Finance has published Guidelines on Public Procurement. The Department of Finance (the "Department") Guidelines (the "Guidelines") outline the procedures that Government departments, local and regional authorities and other bodies dependent on State funding must follow in awarding public sector contracts. The Guidelines also set out the requirements specified by the EU public procurement Directives. The Department has also published a Code of Practice for the Governance of State Bodies which requires all State Bodies to comply with the Department Guidelines and EU public procurement rules.

## **2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes. Irish law distinguishes according to the type of goods/services that are to be procured. The Public Sector Regulations covers the procurement procedures of public sector bodies and only applies to contracts entered into by the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law.

The Utilities Regulations covers the procurement procedures of entities operating in the water, energy, transport and postal services sectors and applies to contracts entered into by public authorities and undertakings operating in the utilities sector and private entities which operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

There is a legal obligation to tender for contracts above EU thresholds and reward them in accordance with the procedures set out in the EU public procurement directives. Both the Public Sector Regulations and the Utilities Regulations provide that the thresholds applicable are adjusted in accordance with any changes in the EU thresholds. The value thresholds set out in the Directives are broken down by reference to what exactly is to be purchased and are revised from time to time and are currently as follows:

Public Sector Regulations

Works	€ 5,150,000	Government departments and offices, local and regional authorities and other public bodies
Supplies and Services	€ 133,000	Government departments and offices
	€ 206,000	Local and regional authorities and public bodies outside the Utilities sector

Utilities Regulations

Works	€ 5,150,000	For entities in the utilities sector
	€ 412,000	For entities in the utilities sector

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Public contracts which have a value exclusive of value added tax (VAT) estimated to be equal to or greater than the above thresholds have to be advertised by the contracting authority on an EU wide basis in the Official Journal of the European Union. Such advertisements must be drawn up in accordance with the standard forms set out in EU Directive 2001/78/EC of 13 September 2001 or any revised version published on the EU public procurement website [simap.eu.int](http://simap.eu.int). All public contracts above € 50,000 and some below this value should be published on the Irish government procurement website, [etenders.gov.ie](http://etenders.gov.ie); this website is the main point of reference for entities interested in public sec-

tor contracts. The € 50,000 threshold for advertising on etenders.gov.ie is not intended to be prescriptive it is merely a guide for contracting authorities. The advertisement should include the selection and award criteria and certain other information relating to the contract to be awarded. The advertisement also needs to be drafted carefully to ensure compliance with the EU law principles, particularly those of transparency, non-discrimination and equal treatment. A contracting authority must allow a specified minimum number of days for interested parties to respond to the contract notice. Parties in all member states are therefore given an equal opportunity to bid for and win the contract to be procured. In certain circumstances, the time which must be allowed to respond to a contract notice, and some of the other applicable timelines laid down by the Directives, may be reduced; thus enabling the procurement process to be accelerated.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

A contracting authority may not require a potential bidder to assume a particular legal form as a condition of being allowed to submit a tender or a request to participate in a tender. However, if the authority awards the contract to such a group, it may require the group to assume such a form, but only if it is of the opinion that the imposition of this requirement is necessary for the satisfactory performance of the contract.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Bidders are permitted to submit joint offers or as bidding consortium (see Q5 above). In the contract documents that it gives to bidders, the contracting authority is entitled to ask each bidder to state in its tender whether it intends to subcontract any share of the contract to subcontractors should the contract be awarded to it. The expression of such an intention in a tender does not affect the successful bidder's primary liability under the contract.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

It is not required that a bidder or its sub-contractor have a registered office or branch office in Ireland. A bidder can act from abroad. From a practical perspective, it makes sense however for the bidder to have a temporary presence in Ireland.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

The only additional document a non-Irish resident bidder may be asked for is a statement from the Irish Revenue Commissioners that they are satisfied of its suitability to be awarded the contract.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes though all members of a bidding consortium must be named.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The contracting authority shall make known in the public contract notice, at the latest when sending the specifications to the potential bidders which requested to participate et al.

- (i) the language or languages in which the bids must be submitted – usually English or Irish;
- (ii) the required form for the bids; and
- (iii) the deadline for the receipt of the bids.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

For contracts below the EU thresholds, there are no prescribed time limits but sufficient time must be allowed for preparation and submission of tenders. The complexity of a project and other relevant factors relating to the preparation of tenders should be taken into account.

The Directives set out the time limits for submission of tenders and requests to participate. The applications depend on the procedure used:

Open procedure - there are no time limits for tenders placed through the open procedure.

Restricted procedure - 37 days, or 30 days if notice drawn up and sent electronically, or 15 days (or 10 days if notice sent electronically) in accelerated restricted procedures.

Negotiated and Competitive Dialogue Procedures - 37 days, or 30 days if notice drawn up and sent electronically, or 15 days (or 10 days if notice sent electronically) in accelerated negotiated procedures).

Time-limits will be extended where tenders can be made only after a visit to the site or if it is necessary to inspect documents in relation to the tender.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

Bidders cannot claim reimbursement for the cost of submitting a bid unless the contracting authority specifically requests materials from all bidders in circumstances where it agrees to discharge the reasonable costs of the bidders.

**13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

The contracting authority may request confirmation of the applicant's: turnover; ability to put insurance in place to a requisite sum, technical capacity and completion of projects of similar size and scope.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

There are no specific procedures to contest awards or proposed awards within the Public Contracts Regulations or the Utilities Regulations. While every bidder may complain to the contracting authority, it is necessary to apply to the

courts if a competing bidder believes that its rights were violated by alleged non-compliance with the provisions governing the award of contracts. The complaint must be made by way of “judicial review” which is the process by which the High Court reviews the decisions made by administrative bodies. An application for judicial review can include an application for interim measures such as an injunction to preventing the contracting authority from proceeding with the award of the contract.

Judicial review does not, in principle, involve the re-evaluation of the merits of the award. Instead the High Court is concerned with how the award was made rather than whether it was the “right” decision. The court will examine whether the contracting authority took all the relevant considerations into account, or whether it had regard to irrelevant considerations, as well as issues of bad faith, bias or other impropriety. The outcome of a successful judicial review is that the award is usually set aside. This means that the decision to award the contract will be sent back to the contracting authority to be decided again.

This form of primary protection is available to foreign bidders without any restriction but there may be certain procedural or administrative restrictions applied to the foreign bidder if it does not have assets within the jurisdiction. As the High Court will invariably award the costs of the judicial review against the unsuccessful party, the contracting authority could apply to court at a preliminary stage for an order requiring the foreign bidder to provide security against costs in the event that the award is upheld. Similarly the application for an injunction requires the applicant to give an undertaking as to damages i.e. an injunction is granted in favour the applicant to give it protection in the interim is done on the basis that if the court ultimately decides against the applicant, it undertakes to pay damages to any party that has suffered loss by reason of the grant of the injunction.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

There are the time limits and other restrictions that could be applied at a preliminary stage as set out in Q14 above

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

Yes. The judicial review process can include a claim for damages and a bidder can sue the contracting authority for damages in respect of any loss it has suffered as a result of the contracting authority's failure to correctly observe the procurement procedures.

**17. Can your office**

- give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

Yes our office can advise clients on bid preparations in Ireland;

- represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

Yes our office can represent foreign clients in procedures for the award of contracts before all public offices/courts in Ireland.

- Please name a contact person within your office for questions of public procurement law.**

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# Italy

## **Bevilacqua Doria Lener & Partners**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes. In Italy, the majority of rules are contained in a Legislative Decree enacted in 2006, n. 163 which provides a Code of Public Procurement, by implementing specific European Directives 2004/17/EC and 2004/18/EC.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes. The Code of Public Procurement provides different procedures depending on the goods or services needed, as follows:

- Public works contracts;
- Other public supply and service contracts;
- Public service contracts concerning professional services (e.g., lawyers, architects, engineers);
- Contracts related to water, energy, postal and transport sectors, which are regulated by special sector provisions;
- Public supply contracts by the Ministry of Defense;
- Public supply/service contracts in others specific fields (e.g. contracts which require secrecy or special security measures, services concerning research and development, and exemption subject to Art. 296 of the EC Treaty, whenever national security interests are concerned).

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes, both depend on the estimated value of the public contract. Those thresholds are generally the same in all Europe, considering the implementation of European Directives (see above point. 1). The essential thresholds - exclusive of value added tax (VAT) - for contracts estimated to be equal to or greater currently are equal to:

- i. 5.150.000 Euros for public works contracts and public works concessions;
- ii. a. 133.000 Euros for supply/service contracts, and for professional services to central government authorities;
- ii. b. 206.000 Euros for public supply/service contracts, and for professional services, to all others public authorities;

iv. 412.000 Euros for public supply/service contracts in specific fields (water, energy, development of a geographical area, postal and transport sectors).

Different thresholds are provided for supply by the Ministry of Defense.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Contracting authorities have to announce by means of notice in the Supplement to the Official Journal of the European Union (OJS) ([http://simap.europa.eu/index\\_en.html](http://simap.europa.eu/index_en.html)). The contracts in principle have to be awarded by applying the “open procedure”, i.e. for an unlimited number of bidders.

Notices are also published in the Official Gazette of the Italian Republic (GURI) (<http://www.gazzettaufficiale.it/>) special series on public contracts, on section “profilo di committente”, and two working days later, on the website of the Ministry of Infrastructures (<http://www.infrastrutture.gov.it>).

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

Generally, are eligible to participate in procedures for the award of public contracts the following subjects:

- a) individual entrepreneurs, companies, and cooperatives;
- b) consortium of cooperatives for production and employment;
- c) consortium of companies;
- d) temporary groupings of competitors which prior to submit the bid, needs to appoint one of the members as proxy representative to contract;
- e) persons who have concluded the contract of the European Group of Economic Interest Grouping (EEIG);
- e - bis) operators, established in other Member States, constituted under the existing legislation in their respective countries.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes, they are.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

It is possible to submit a tender for the contract directly from abroad.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

To all bidders apply the same rules and there are no preferences to domestic bidders.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The call for tenders, to negotiate/participate in the competitive dialogue contains, the language or languages other than Italian, which may be drawn up. The autonomous province of Bolzano, due to its special statute, accepts tender submitted in German. The form and content required for application could vary depending on the instruction notice of the tender.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Contracting authorities shall allow to all bidders time to submit the bid, taking into consideration complexity of the contract and time needed to prepare the offer. Nonetheless, the minimum time limit for the receipt of tenders is fixed in 52 days in case of public works contracts or supply/service contracts. The term, in specific situations, could be abbreviated to 36 days, but in no case less than 22 days. Time limit runs from the date on which the contract notice is sent.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

Only in few cases there is reimbursement of costs incurred for the offer: (i) in competition planning projects, the regulation shall determine the amount of the prize for the winner and the amounts to be allocated to other projects deemed worthy, by way of reimbursement costs; (ii) on project finance it is provided the reimbursement of expenses incurred by the developer who is not awarded in the procedure; (iii) for public works tenders a reimbursement - as partial costs recovery - could be added to the best classified winner presenting the most economically advantageous offer.

The reimbursement shall be limited to expenses actually incurred and documented and can be granted for a total amount of one point five per cent of the basis of a tender relating to public works, and to zero point sixty percent, in case of most economically advantageous bid.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

Yes. The contracting authorities have to choose the best bid among two alternative criteria: (i) by the lowest price or (ii) by the criterion of the most economically advantageous tender.

Therefore, in relation to characteristics of the contract, it is selected the best offer together with the most appropriate bidder, taking into consideration track record, professional and technical abilities, economic and financial standing. Contracting authorities may even decide to make no award if none of bid is convenient or appropriate in relation to the contract.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Italian legal system provides a form of legal primary protection, by giving to bidders the opportunity to appeal the award decision before the TAR (Tribunale Amministrativo Regionale). Against that decision is also possible to appeal be-

fore the Consiglio di Stato, within the time limits of 60 or 120 days, depending on whether the sentence has been served or not.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

No

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

In the event that, following the award of the contract, the bidder considers that it suffered an injury, it may take legal action to obtain damages, provided that it is able to prove the unlawfulness of the conduct by the administration, the damage suffered and the causal connection between the illegal conduct and the damage.

**17. Can your office**

- i give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- ii represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- iii Please name a contact person within your office for questions of public procurement law!**

Yes, our office has the competence to:

- i. give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in Italy.
- ii. represent foreign clients seeking primary and secondary legal protection before all public offices/courts in Italy.
- iii. Contact person within our office for questions of public procurement law are:
  - Pierre Fortin, pierre.fortin@bdl-lex.com;
  - Giorgio Lener, giorgio.lener@bdl-lex.com

# Japan

## **Chuo Sogo Law Office, P.C.**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Procurement procedures of the national government in Japan are generally regulated by the Accounts Law (Law No.35 of 1947), the Cabinet Order concerning the Budget, Auditing and Accounting (Imperial Ordinance No.165 of 1947) and the Contract Management Regulations (Ministry of Finance Ministerial Ordinance No. 52 of 1962). Procurement procedures of local governments are generally regulated by the Local Autonomy Law (Law No. 67 of 1947) and Local Autonomy Law Enforcement Ordinance (Government Ordinance No.16 of 1947).

Japan is a signatory party to the WTO Agreement on Government Procurement (“GPA”), and to implement the provisions of GPA, special provisions are provided in the Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services (Government Ordinance No.300 of 1980), the Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services in Local Government Entities (Government Ordinance No.375 of 1995) and other ministerial ordinances for government procurement subject to GPA.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be produced?**

In Japan, the same laws and regulations apply, regardless of the kind of goods or services procured.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be produced (thresholds) and if so, what are the thresholds?**

Special regulations are provided for goods and services with a value of the threshold amount stipulated in the Annexes of GPA. The threshold amount and the current value in yen is as follows:

(1) National Government Entities		
(i) Supplies	130,000 SDR	(22,000,000 yen)
(ii) Construction Services	4,500,000 SDR	(790,000,000 yen)

(iii) Architectural, engineering and other technical services	450,000 SDR	(79,000,000 yen)
(iv) Other Services	130,000 SDR	(22,000,000 yen)
(2) Local Government Entities		
1 Supplies	200,000 SDR	(35,000,000 yen)
2 Construction Services	15,000,000SDR	(2,630,000,000 yen)
3 Architectural, engineering and other technical services	1,500,000SDR	(260,000,000 yen)
4 Other Services	200,000SDR	(35,000,000 yen)

Further, voluntary measures to lower the thresholds stipulated in GPA have been introduced by the national government for procurement of supply and services (except for construction services and architectural, engineering and other technical services related to construction services). Under the voluntary measures, the threshold amount is lowered to 100,000 SDR (17,000,000 yen). The voluntary measures are not applied to local government entities. In addition, different voluntary measures have been implemented in the field of telecommunications, medical technology and computers.

#### **4. In what way does the contracting authority have to inform the market about the intended procurement?**

For government procurements subject to GPA, the procuring entity is required to publish a notice in the official gazette (kampo) or its equivalents at the local level, for the invitation to tender at least 40 days in advance of the closing date of receipt of tenders. Other publication method is allowed for government procurement to which GPA is not applicable. A notice of invitation to tender will include the information indicated below.

- Subject matter of the contract;
- In case of a series of contracts, the nature and quantity of the products or services to be procured under all the remaining contracts after one of the series of contracts, the estimated date of the subsequent tender notices and the date of the notice to invite to the first tender;
- Qualifications required to participate in the tendering procedures;
- Place and time-limits set for the submission of tenders;
- Place in which contract provisions are available;
- Place and procedures for the delivery of tender documentation;

- Name and department of the official in charge of the contract;
- Place, date and time of opening tenders;
- Language and currency to be used for the contract;
- Information on tender guarantee fee and contract guarantee fee;
- Obligations of tenderers;
- Confirmation that tenders made by non-qualified suppliers and tenders violating conditions for tender are invalid;
- Whether a written contract is required or not; and
- Method for determining the successful tenderer.

In the official gazette, the nature and quantity of products or services to be procured, deadlines set for the submission of tenders, and the name and department of the official in charge of the contract are stated in English. Public notices on the Selective Tendering Procedure contain, in addition to the above information, the requirements to be designated to participate in tenders. An electronic data base containing the information published in the official gazette is available, either at such places as local branch offices and Business Support Centers of Japan External Trade Organization or through on-line information and data base retrieval services (<http://www.jetro.go.jp/>). The national government entities provide on their respective websites the procurement information published in the official gazette.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes. Bidders are allowed to submit a joint offers.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

It is not necessary that a bidder has a registered office or branch office in Japan. However, as a condition to participate in the bid, the bidder may be required

to have a relevant license to supply goods or services under Japanese law such as the Construction Business Law and Pharmaceutical Affairs Law. These laws generally require that a foreign national to have a branch office in Japan to obtain a license.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

To participate in open tendering procedures or selective tendering procedures, suppliers need to be certified by the procurement entity about its qualifications for participating in tenders, and registered in the list of qualified suppliers. Application for certification of qualification can be made by anyone regardless his nationality. Each procuring entity publicizes information concerning certification of qualifications through the official gazette. Those who intend to obtain certification of qualifications must submit necessary documents to the procurement entity. In most cases, submission of the following documents is required for certification.

- Application form for certification of qualifications to participate in open and selective tendering procedures;
- Certificate of registered matters of the applicant or other identification documents equivalent to it;
- Historical record of the applicant;
- Financial statements;
- Tax payment certificate or other equivalent document.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, a multinational bidding consortium is possible, as long as all of the bidders satisfy the requirements for participation in the bids.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The procurement entity will specify the form for submission of bids. For procurements subject to GPA, bid may be submitted in person, by a proxy or by

post. Some procurement entities allow bid by Internet. In most cases, bids must be prepared in Japanese language.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

For procurements subject to GPA, generally there must be a period of at least 40 days between the date of public notice for invitation to tender and the deadline for submission of tenders. This period will be extended to 50 days in most cases. For procurements to which GPA is not applicable, this period is 10 days.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?**

Bidders cannot claim their cost for preparing their bid.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

The contracting authority may establish its own criteria for each tendering process, and may request in the notice for invitation of bids that the bidders submit necessary materials to prove that they satisfy such criteria before submission of a bid. The contracting authority can make the bid submitted by those who do not meet such criteria invalid.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Japan has established a system to provide non-discriminatory, timely, transparent and effective procedures to file complaints in relation to government procurement as required by GPA. The national system explained below will handle complaints about procurements by the national government and related entities. Complaints about procurements by local governments and related

entities are handled by each local government. The rules of challenge procedures of the national system have been established under the authority of the Cabinet.

Under the rules, any supplier who believes that a specific case of government procurement has breached the provisions of GPA and other prescribed stipulations may file a complaint with the Government Procurement Challenge Review Board. The complaint must be filed within 10 days from the date when the supplier knows or should have known the basis of the complaint. The board will review the complaint within 7 office days and may dismiss the complaint if (i) the complaint was not filed within the prescribed period, (ii) the complaint is not related to GPA, etc., (iii) the complaint is meaningless or the illegality is de minimus, (iv) the complaint is not filed by a supplier, or (v) the complaint is not appropriate for review by the board. If the board has decided to accept the complaint for review, the board will notify the complaining party and the procurement entity thereof, and publicly announce the filing of the complaint. The procurement entity is required to participate in the proceeding. Any supplier interested in the government procurement subject to the complaint can participate in the proceeding by notifying thereof to the board within 5 days of the public announcement.

If a complaint is filed before making a contract for the procurement, the board will as a rule make a request to the governmental entity not to make a contract promptly within 10 day of filing of the complaint. If a complaint is filed within 10 days of the making of a contract for the procurement, the board will as a rule make a request to suspend the performance of the contract promptly. Within 14 days of the date of the receipt of a copy of the complaint, the government entity is required to file a report containing tender documents, and explanation in response to the complaint and additional information necessary for the resolution of the complaint. The board will ask the complaining party and the government entity to submit assertions, explanation and evidence, and review the complaint. The board may call a witness or expert or have public hearing on the contents of the complaint. The board will prepare a report on its findings within 90 days (50 days in case of a complaint involving public construction work). The board may expedite the proceeding on application by the complaining party or the procurement entity.

In the report, the board will make a decision on whether all or part of the complaint is upheld and whether the procurement was made in breach of GPA, etc. If the board finds that the procurement was made in breach of GPA, etc. the board will prepare its recommendation for remedial actions such as award-

ing a contract to another supplier, terminate the contract, taking into account of such circumstances as the degree of defect in the procurement procedures, the degree of disadvantage caused to the suppliers, the degree of breach of GPA, etc., the extent of the performance of the contract already made, the degree of the burden on the government, urgency of the procurement and effect on the business of the procurement entity. The procurement entity, as a rule, is required to follow the recommendation by the board. If the procurement entity will not follow the recommendation, it must notify the board thereof with a reason within 10 days (60 days in case of public construction work) of the receipt of the recommendation.

In addition to the above proceeding, the complaining supplier may file a formal lawsuit against the procurement entity to invalidate the tendering procedures and apply for a court order to suspend award of the contract to other supplier; however, generally it is very difficult to obtain such a court order because the plaintiff is required to prove significant irreparable injury.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

The above system is only available for procurements to which GPA is applicable (i.e., construction services with a value of 4,500,000 SDR (790,000,000 yen) and supplies and other service with a value of 100,000 SDR (17,000,000 yen)).

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g., through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

If a bidder suffers loss due to an intentional act or negligence of the public officer in charge of the bidding procedures, the bidder can file a lawsuit against the government to seek compensation for the loss based on the Government Liability Law. The plaintiff is required to prove that (i) the public officer intentionally or negligently violated the provisions of the law, (ii) the plaintiff has suffered loss, and (iii) the causation between the intentional act or negligence and the loss.

**17. Can your office**

- **give legal advice to foreign clients concern in the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- **Please name a contact person within your office for questions of public procurement law!**

Our office can give advice to foreign clients concerning bid preparation in Japan and represent foreign clients in procedures before Government Procurement Challenge Review Board and the courts. For inquiries on government procurement, please contact Chiyu Abo, [abo\\_c@clo.gr.jp](mailto:abo_c@clo.gr.jp).

Japan

# **Kuwait**

## **The Law Offices of Mishari Al-Ghazali, MMG**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes. In Kuwait, all governmental procurement contracts amounting to more than KD5,000, approx. €12,800, must be awarded through the Central Tenders Committee, (“CTC”).

CTC was formed and empowered pursuant to Law No. 37/1964, to register qualified bidders, procure goods and services on behalf of all governmental authorities, other than the Ministry of Defense and Security Forces, and award contracts to bidders.

**2. Do the procedures for the award of contracts depends on the kind of goods, services etc. which are to be procured?**

No. The said Law has set the same procedures for all public procurement contracts regardless of their subject, i.e. goods or services.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services, etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Although the procedures are the same for all public procurement contracts, the criteria however for awarding certain contracts to certain contractors depend on the classifications of the contractors and the value of the contracts as follow:

- Category 1: consists of contractors qualified to undertake major construction projects of high international engineering standards with initial value of more than KD1 million, approx. € 2.56 million.
- Category 2: consists of contractors who enjoy technical and financial capabilities, and who are qualified to undertake contracts with value of less than KD1 million.
- Category 3: consists of contractors permitted to bid for contracts the total value of which during the same time period should not exceed KD500,000, approx. €1.28 million.
- Category 4: consists of contractors permitted to bid for contracts the total value of which during the same time period should not exceed KD250,000, approx. €640,000.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

The Law requires CTC to announce all public procurements in the official Gazette and post them also on CTC's flyer boards located at its premises. CTC has recently launched a website for that purpose at <http://www.ctc.gov.kw/>, currently in Arabic language, but it has tremendous information about public procurements.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

Yes. Article 5 of the Law specifies the main qualifications of bidders, to be eligible to bid, as follow:

- They must be Kuwaiti merchants, whether individuals or companies, registered with the Commercial Registrar and the Chamber of Commerce, i.e. establishments or companies of whatever formation.
- They could be foreigners only if they have Kuwaiti partners or agents through officially registered partnership or agency agreements, and provided that CTC sets the requirements for their participations in major construction contracts.

Therefore, bidders must have legal entities; although, the structure of which is irrelevant, i.e. whether establishments, limited liability companies or corporations. The criterion is that they must be classified and qualified technically and financially to undertake the relevant projects.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Joint offers are not allowed generally unless the Terms of Reference, ("TOR"), of the procurement documentations permit it. Recently, it has been a common practice by government authorities to call for consortiums in major projects, and the lead company must name accordingly the financial partner, legal partner, technical partner and international partner depending on the scope of the project.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

As stated in our answer to question 5, bidders must be Kuwaiti merchants or foreigners who have Kuwaiti partners or agents, thus, naturally having an address in Kuwait. Accordingly, as the Law does not explicitly require a physical address in Kuwait for bidders, it is nevertheless required de facto due to the stated requirements.

- 8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

N/A.

- 9. Is a multinational bidding consortium allowed to submit a bid?**

Generally yes if the consortium is led by a Kuwaiti company and the TOR of the procurement call for foreign or multinational participation.

- 10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Arabic is the official language of the State; accordingly, all bids and documentations should be submitted in Arabic and in writing or typed depending on the forms provided by CTC or the concerned government authority. However, it is permitted in some circumstances to submit bids or enclosed documents in English.

- 11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Yes, and bidders must submit their bids during the time frame specified by CTC, after which no bid will be accepted.

- 12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

No they cannot recover whatever costs realized for preparation. Bidders will not also be reimbursed the initial fee they pay to CTC for receiving the procurement and TOR documentations. The only reimbursement a bidder receives is whatever insurance or guarantee it deposits with CTC if the contract is not awarded to it. If the contract is awarded to a bidder however, the initial insurance or guarantee deposit will be kept as a performance guarantee during the entire time of performance.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

Yes and depending on the value, size and requirement of the project. Bidders are classified as explained in our answer to question 3.

What happens in practice is that entities interested in public procurements register with CTC and get classified according to their financial and technical capabilities as well as expertise in the relevant projects. Therefore, when CTC announces for a certain tender, it will list under its description the list of all contractors qualified to bid.

This is an example of a tender announced by CTC on behalf of Kuwait Oil Company, which is 100% owned by the government of Kuwait.

RFP 120-1526 MBOPD EARLY PRODUCTION FACILITY FOR RATQA AND ABDALI – NORTH KUWAIT

Submission Fee: KD 5,000

Bank Guarantee: KD 1,000,000

Duration of Bidding: 90 days

[Description omitted]

Invited companies to bid:

1. PETROFAC INTL. LTD.
2. GULF DRILLING & MAINTENANCE CO.
3. SNAMPROGETTI S.P.A.
4. AL – KHORAYEF COMMERCIAL CO.
5. KELLOG BROWN & ROOT INC
6. TECHNICAS REUNIDAS SA.
7. PROCESS UNLIMITED. INC.
8. LITWIN

In some tenders however, CTC will permit other entities to register and be added to the list of contractors if so qualified within a specified period.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Bidders whether local or foreigners have the utmost legal protection against any unjust or unfair action they encounter during the course of bidding for a government contract. First, bidders can appeal any decision rendered by CTC to the committee itself, which if the majority of its members see a ground for the appeal, it should thereafter submit the matter to the Cabinet, since CTC reports to it.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

No. Legal protection is secured regardless of the kind of goods or services intended to be procured.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

Bidders can also resort directly to the Administrative Court, within 60 days after the rendering of a decision or the occurrence of the unjust act. The Administrative Court is the competent court in Kuwait formed especially for hearing all matters related to government legal undertakings with private parties, and has the power to compensate the damaged party due to any harmful act taken by a government authority. In order to be compensated by court, the claimant needs to establish a) any unfair, bias, ill founded and/or arbitrary decision by CTC or the concerned government authority, and b) sustaining damages due to such a decision.

## **17. Can your office**

- **give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

Yes, and actually our office was hired in many major procurements to review, advice on and prepare all documents and answers related thereto. Furthermore, the firm was chosen recently as the legal partner in two tenders that were submitted under a consortium.

- **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

Indeed, as the firm’s Litigation Department is staffed with experienced consultants and litigators in all areas of government and administrative legal matters, and enjoy substantial experience in this area.

- **Please name a contact person within your office for questions of public procurement law!**

Please feel free to contact Ammar Al-Fouzan, the Director of Corporate & International Department for any matter of this nature.

Finally, it worth noting that the stated Public Procurements Law has exempted the Ministry of Defense and Security Forces from the application of its provisions. In other words, all what was stated herein do not apply to military and security related contracts!

Kuwait

# **Mexico**

## **Capin, Calderon, Ramirez y Gutierrez-Azpe, S.C.**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes. There are both Federal and Local laws that provide rules for the award of public contracts. At the Federal level the applicable laws are the following: (i) Law of Acquisitions, Leases and Services of the Public Sector (Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público), (ii) the Law of Public Works and Related Services (Ley de Obras Públicas y Servicios Relacionados). Furthermore, Free Trade Agreements such as NAFTA may apply.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

In general, the procedure for award is the same. Nevertheless there are special rules for certain goods i.e. wood, office furniture and office supplies which require that the supplier is certified by third parties authorized by the Environmental Authorities. For example, for the acquisition of paper goods, the law requires that it has 50% of recycled material. Furthermore when the acquisition refers to perishable goods, military equipment, works of art, and irreplaceable goods, a different procedure called “by invitation” applies. Under such procedure, the government entity must invite at least three suppliers (thus only these “prechosen suppliers may compete among themselves) and the final selection is made under the same criteria as for public bidders.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds.**

The law grants the award to the bidder who offers the lowest price and adjusts to the technical requirements.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

The essential terms and conditions of the procurement are contained in a call for tenders which is published in the Official Gazette of the Federation (Diario Oficial de la Federacion) as well as through “compranet” web site.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No. All individuals in legal age to contract or legal entities are entitled to submit tenders (corporations, limited liability companies, etc.)

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

The law allows bidding consortium as long as it does not affect free competition and antitrust trade practices (article 39) and as long as it is allowed in the bidding documents. In such cases the bidders must appoint a person who will represent all of them in the bidding process. Furthermore, the Law does not allow subcontracting.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

Public bids can be national or international, subject to international treaties, such as NAFTA. In cases where international bids are accepted, usually the foreign bidders are permitted to submit a bid directly from abroad through the electronic system compranet. However, in the bid specifications for contracts in which performance of the contract will take place in Mexico, the contracting authority usually requests that the bidders be registered under Mexican law. Moreover, the authority may request that the bidder have majority of Mexican capital.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

Legally, there are no additional requirements for foreign bidders than those established by the contracting authority in the bid specifications. Normally, the additional requirement is that the documents presented be duly translated into Spanish and notarized. Indeed, a Principle of Non Discrimination due to

nationality applies to participants. However, CCGA's experience has rendered that, in certain public works contracts the authority can request that a certain percent of the materials used be of Mexican origin.

**9. Is a multinational bidding consortium allowed to submit a bid?**

YES. Multinational bidding consortiums are allowed to submit a bid BUT ONLY in international bids.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The language in which the tenders have to submit their documents is Spanish, however the contracting authority may authorize another language in addition to Spanish (e.g. submission of technical information). Furthermore, the public contract notice shall contain the manner in which the proposals are to be accepted which are usually written or e-mail. In the case of electronic filing, certain restrictions may apply. Our advice in case of electronic filing, is to present the documents additionally in writing. Furthermore, the authority may request that an electronic file be also presented.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

The governing law establishes a minimum time limit of twenty (20) days, as of the publication of the bid, for international bids. For national bids, the law establishes a minimum time limit of fifteen (15) days as of the publication of the bid. However, the corresponding authority may increase the time limits in the bid specifications.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

As a general rule they cannot. In some exceptional cases when the authority requests special technical studies which could result in benefit of the contracting authority, some expenses could be reimbursed in a limited manner. In addition,

in the event that the contracting authority awards a contract and does not sign the contract in the time limit of

**13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

Yes, Article 31 of the Law for Acquisitions, Leases and Services of the Public Sector establishes that the specific rules for each public bidding (known as “The Basis” of the Bidding) must be issued by the government or private entities and shall be available to all interested parties, as of the date of publication of the corresponding call, (which must be published in the Federal Official Gazette). This law establishes administrative, technical, and economic requirements that must be met by the bidders. Once the bidder meets the administrative requirements, they are qualified to meet the technical conditions established by The Basis. It must be mentioned that in case of default of any of the requirements established is cause for disqualification, as well as the prove that any bidder has agreed with other or others bidders to raise the prices of the good and services, or any other agreement that has as outcome to obtain an advantage over the other bidders.

Article 36 of the Law establishes the procedure through which the government or private entities evaluate the propositions, verifying that these comply with the requested requirements in The Basis.

Once the evaluation of the propositions is performed, the agreement shall be adjudicated to: a) The bidder which proposition results solvent because it reunites, in accordance with the adjudicating criteria established in The Basis, the legal, technical and economic conditions requested by the caller and if said bidder guarantees full compliance of the respective obligations, b) In the event two bidders satisfy the requirements and guarantee the obligations in the same manner; the agreement shall be adjudicated to the bidder which proposition establishes the lower price, and c) the proposition which has the best evaluation combined in terms of cost-benefits criteria.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes. Every party involved in the procedure is entitled to appeal every stage of such procedure before the Public Function Ministry. Such appeal is called “Inconformity Recourse” and can be exercised: (i) against the procedure of published call, against the content of The Basis, or against the Explanation Meeting within 10 business days after the last Explanation Meeting (ii) against events occurred during the presentation of the proposals as well as during the award, within the following 10 business days; (iii) against acts or omissions of the corresponding Governmental Authority that could affect the execution of the contract, as ever it is proved legal violations to the procedure. In such case the action is exercised only by the party who won the procedure, within the following 10 business days. The Inconformity Recourse can be presented either in writing or by the electronic means approved by the authority. The Public Function Ministry shall evaluate the recourses and may investigate the facts alleged by the parties and its resolution shall: (i) nullify the irregular acts in order to repair them; (ii) nullify the entire procedure; (iii) reject the recourse or (iv) establish the terms in order to execute the contract.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

Primary Legal protection is not subject to any special conditions. Every bidder whether national or foreigner has the faculty to file before the Public Function Ministry an Inconformity Recourse established by law. Furthermore, the Mexican legal system provides for a Nullifying Procedure that may also operate after the contract has been awarded, which must be presented before the Federal Courts within forty-five (45) days after the Inconformity Recourse was denied. Moreover, if the Nullifying Procedure Resolution is not favorable, there is an ultimate recourse- the Constitutional Procedure of “Amparo Judgement”.

Furthermore, certain international treaties may provide for right to claim damage(s) when the grieved Party can demonstrate “less favorable treatment”(i.e. NAFTA). In the event of a dispute under NAFTA, the grieved bidder may present his or her claim through a binding arbitration process in his/her home State.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (sec-**

**ondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

This does not apply since our legal system does provide for primary legal protection after the contract has been awarded. See sections 14 and 15 above.

**17. Can your office**

- give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- Please name a contact person within your office for questions of public procurement law!**

Yes, Capin, Calderón, Ramírez y Gutierrez-Azpe, S.C., Law Firm, has the knowledge and expertise necessary to assess national and foreign clients throughout the full bidding process of contract awarding within Mexico, whether public or private, national or international.

Our Chief Experts in the award of public contracts are José Luis Gutiérrez-Azpe (jose.gutierrez@ccrga.com ) and Luis Capin López ( luis.capin@ccrga.com ).

Mexico

# **New Zealand**

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## **1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

While New Zealand does not have any legislation or regulations governing public sector procurement, there is a framework based on policy, rules and guidelines that set out expectations and constraints. Individual departments or agencies are ultimately responsible for their own purchasing decisions.

The rules and guidelines that direct departments in terms of their obligations with respect to advertising open tenders and notifying the awards of contracts are:

### *Government Mandatory Rules for Procurement by Departments (the "Rules")*

The Rules set out mandatory standards and procedural requirements for the conduct of procurement by government departments. The Rules reflect and reinforce New Zealand's established policy of openness and transparency in government procurement.

The Rules were endorsed by the New Zealand Cabinet on 18 April 2006 and are based on New Zealand's treaty obligations under the Trans-Pacific Strategic Partnership Agreement (TPSEPA) with Brunei, Chile and Singapore. The Rules promote competition (including full and fair opportunity for domestic industry) through prescribed open tendering and prequalification procedures, centralised advertising on the Government Electronic Tenders Service (GETS), post-award transparency, and publication of Annual Procurement Plans.

The Rules are applied by departments in their procurement globally to facilitate competitive participation by domestic and foreign suppliers in New Zealand's government procurement market.

Exclusions from mandatory coverage of the Rules are set out in Appendix 1 to the Rules. Appendix 1 states that departments are not required to apply the Rules to:

- (a) the purchase or acquisition of goods and services by a department from another department, except where tenders are called, in which case the Rules apply;
- (b) non-contractual agreements, or any form of assistance to persons or governmental authorities, including foreign assistance, grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements, sponsorship arrangements and governmental provision of goods and services;

- (c) purchases funded by international grants, loans or other assistance, where the provision of such assistance is subject to conditions inconsistent with these Rules;
- (d) procurement of goods and services (including construction) outside the territory of New Zealand, for consumption outside the territory of New Zealand;
- (e) acquisition of fiscal agency or depository management services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
- (f) hiring of government employees;
- (g) any procurement in respect of contracts for construction, refurbishment or furnishing of chanceries abroad; or
- (h) procurement of public health, education and welfare services.

A general exception is security. That is, nothing in the Rules is to be construed as preventing the New Zealand Government from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

In exercising their discretion not to apply the Rules to the above categories of procurement, departments must still, where appropriate and to the extent possible, have regard to the principles of the government procurement policy and good practice framework (referred to below).

The Government expects its departments to conduct all their procurement within the framework of the policy principles set out in the “Policy Guide for Purchasers” issued by the Ministry of Economic Development, and the good practice guidelines set out in “Procurement: a Statement of Good Practice” issued by the Office of the Auditor-General.

#### *Procurement – A Statement of Good Practice*

This document, produced by the Office of the Controller and Auditor-General, is not a set of rules but rather a statement of good practice. It suggests that each public entity use the Statement as a benchmark for its own procurement policy and procedures, and as a guide to what its own procurement manual should contain. The Statement is dated June 2001 and is currently being reviewed.

#### *Treasury Guidelines for Contracting with Non-Government Organisations for Services Sought by the Crown*

These Guidelines, produced in 2003, form part of the overall governing framework for public sector procurement in New Zealand. They are for departments and Crown entities as they manage their contracting and other funding arrangements with non-government organisations (NGOs). The guidelines are aimed at contracting for the provision of services (“outputs”) with NGOs, or otherwise providing funding to NGOs. They are not intended to cover the routine purchase of inputs.

### *Government3 (Govt3)*

Govt3 is a programme for agencies to improve the sustainability of their activities. The programme works with agencies to give practical effect to the government’s sustainability policies such as the Sustainable Development Programme of Action, the National Energy Efficiency and Conservation Strategy, the Climate Change Programme and the New Zealand Waste Strategy.

While not currently part of the governing framework on procurement in the same way as the above policy, rules and guidelines, many government departments have signed up to Govt3 and are integrating the objectives of this programme into their own agency procurement policies and practices. This will result in increased consideration of sustainability and sustainability measures in the purchase of goods and services.

## **2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

In general the procedures and framework in New Zealand for the award of contracts (other than construction related contracts) do not distinguish between the type of goods/services that are to be procured.

For construction procurement, the Auditor-General encourages the use of a document titled “Principles of Best Practice: Construction Procurement in New Zealand”, issued by the New Zealand Construction Industry Council.

## **3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

The Rules must be applied by government departments to procurement:

- (a) by any contractual means, including purchase and rental or lease, with or without an option to buy, build-operate-transfer contracts, public works concessions

contracts, and contracts accessed via third party commercial supply brokerage arrangements;

- (b) with contract values at or above the following thresholds:
  - (i) Goods and services: NZ\$100,000 (plus GST)
  - (ii) Construction services: NZ\$10 million (plus GST)

In determining whether contract values are at or above the thresholds, departments must base the contract valuation on the maximum total estimated value of the procurement over its entire duration, including optional purchases, premiums, fees, commissions, interest and revenue streams or other forms of remuneration provided for in the contract. All forms of remuneration, including payments to an agent or supply broker, must be declared in the contract.

The Australia New Zealand Government Procurement Agreement (ANZGPA) establishes a single Australia/New Zealand market for government procurement, without limitation by value threshold. While the Rules have general application, they must not be interpreted as reducing the scope of departments' wider obligation under the ANZGPA to accord Australian suppliers non-discriminatory treatment and equal opportunity to compete, on a value for money basis in their procurement generally.

New Zealand has similar non-discriminatory obligations to Singapore under the existing bilateral Closer Economic Partnership Agreement (CEP). In this case however, a value threshold applies, as under the Rules. Departments conducting their procurement within the existing policy and good practice framework and applying the Rules will generally meet New Zealand's CEP obligations to Singapore.

#### **4. In what way does the contracting authority have to inform the market about the intended procurement?**

Promptly following the award of any contract in excess of NZ\$100,000 the contracting department must publish a notice on Government Electronic Tenders Service (GETS) setting out the name and address of the successful supplier, the description of the good or services supplied, the term of the contract and the value of the contract award.

The Ministry of Economic Development administers the Government Electronic Tendering Service "GETS" ([www.gets.govt.nz](http://www.gets.govt.nz)). GETS is a free service designed to promote open, fair competition in the New Zealand government market and meet international trade agreement commitments.

GETS is a password-protected website listing current government tenders and opportunities.

The website is split into the following areas:

- (a) Basic Tendering Information - contains information on opportunities currently available.
- (b) Strategic Procurement Outlooks - contains information on the overarching objectives and goals of purchasing entities.
- (c) Indicative Annual Procurement Plans - contains information on purchases or areas of spending that may potentially be undertaken by purchasing entities in the year ahead. These are not legal or binding commitments of any sort and are merely intended to provide the market with a level of advanced notice and assist purchasing entities take a more strategic approach to their purchasing activities.
- (d) Registered/qualified (preferred) supplier lists – contains information on firms that may be in a preferential position in relation to a specific purchasing entity’s purchasing activities and sets out the conditions a potential supplier will need to meet to gain a listing in given categories of that entity’s spend. Purchasers utilising these lists that fall within the Mandatory Rules for Procurement by Government Departments will still be notified on GETS and contain an invitation to join the list being used.

Exceptions to the open tendering requirement are set out in Appendix 2 to the Rules. Departments may award contracts by means other than open tendering procedures, providing that the procedure is not used to avoid competition, protect domestic suppliers or discriminate against any domestic or foreign supplies and only in a limited number of prescribed circumstances. Those circumstances are:

- (a) where, in response to a prior notice, invitation to participate, or invitation to tender under open tendering procedures:
  - (i) no tenders were submitted,
  - (ii) no tenders were submitted that conform to the essential requirements in the tender documentation, or
  - (iii) no suppliers satisfied the conditions for participation, and
  - (iv) the department does not substantially modify the essential requirements of the procurement in the contract as awarded;
- (b) where, for works of art, or for reasons connected with the protection of exclusive rights, such as patents or copyrights, or where there is an absence of

- competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
- (c) for additional deliveries by the original supplier which are intended either as replacement parts, extensions or continuing services for or upgrades of existing equipment, software, services or installations, where a change of supplier would compel the procuring department to procure goods or services not meeting requirements of interchangeability with existing equipment, software, services or installations, or conditions under original supplier warranties;
  - (d) for goods purchased on a commodity market (commodity market means a market in which commodities are bought and sold for future delivery at a specific price through an exchange);
  - (e) in so far as it is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the department, the goods or services could not be obtained in time by means of an open tendering procedure, and the use of such procedure would result in serious injury to the department, the department's programme responsibilities or the New Zealand Government. For purposes of this subparagraph, lack of advance planning by a department or its concerns relating to the amount of funds available to it do not constitute unforeseeable events;
  - (f) for purchases made under exceptionally advantageous conditions that only arise in the very short term, including public auction or unusual disposals, such as those resulting from liquidation, bankruptcy or receivership. This provision is not intended to cover routine purchases from regular suppliers.

Departments must not, except to the extent required by law, disclose confidential information that would prejudice legitimate commercial interests of a particular supplier or might prejudice fair competition between suppliers, without the written authorisation of the supplier that provided the information.

In all procurement activities, government departments are held accountable for observing the relevant minimum standards of behaviour (e.g. in relation to integrity and confidentiality of information) required by law or government direction (e.g. the Code of Conduct issued by the State Services Commissioner).

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No, under the Rules departments must consider for a particular procurement process those suppliers that request to participate and are not yet registered or qualified, provided there is sufficient time to complete the registration or qualification procedures before the award of the contract.

During the course of the open tendering procedure any interested supplier may submit a tender or apply to meet conditions for participation in a procurement process. However, conditions for participation may include any registration, qualification or other pre-requisites and interested suppliers must meet such conditions in order to participate in the procurement process i.e. to be invited to tender or to have submissions considered.

Departments must limit any conditions for participation, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, to those which are essential to ensure the potential supplier's capability to fulfil the contract in question.

Departments must judge the financial, commercial and technical capacity of a supplier on the basis of both that supplier's global business activity and its activity in New Zealand, taking due account of the legal relationship between the supply organisations (e.g. in assessing resources available to the supplier). Nothing in the Rules precludes a department from excluding a supplier from a procurement on grounds such as bankruptcy, liquidation or insolvency, false declarations relating to a procurement, or significant deficiency in the performance of any obligation under a prior contract.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

Potential bidders interested in the contract do not need to have a registered office or branch office in New Zealand and it is possible to submit a tender for the contract directly from abroad.

Any potential supplier may proceed to register by completing an on-line application that provides the potential bidder with access to the Government

Electronic Tenders Service (GETS) secure information. GETS is open to the international market.

Information provided by the bidder when registering is used only for the purposes of matching that bidder's capabilities with government contracts and major projects in New Zealand and Australia. This may include discussions with government purchasers and putting the bidder on "TenderWatch" for automatic advice of opportunities. The bidder's name and e-mail address will be visible to other users registered under the same business entity.

The more information provided by the bidder, the better GETS can match the potential supplier with government opportunities

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

No, foreign bidders do not have to consider additional aspects such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts.

The non-discrimination requirement of the Rules obliges departments to accord all potential suppliers equal opportunity and equitable treatment. It further requires departments to make procurement decisions on the basis of value for money of goods and services to be supplied, and not on the basis of their place of origin or the degree of foreign ownership or affiliation of the supplier.

New Zealand has a *Buy Kiwi* initiative but this initiative does not mandate preference for New Zealand suppliers, rather it promotes policies that will bring them up to a level where they can be selected on merit. Therefore, public sector agencies can support the *Buy Kiwi* initiative by leading through good competitive procurement procedures that provide full and fair opportunity for domestic suppliers and setting clear expectations around standards of performance. The Industry Capability Network (ICN) can assist agencies to identify and better understand the capabilities of firms in New Zealand and Australia.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Although it is not a stated requirement anywhere that tenders be submitted in English, for all practical purposes tenders should be submitted in English.

In terms of which form of communication is required, Article 11.21 of the TPSEPA is titled “Encouraging Use of Electronic Communications in Procurement”. It states that contracting authorities should seek to provide opportunities for government procurement through the internet or a comparable computer-based telecommunications network. Similarly the use of electronic means for the provision of tender documents and the receipt of tenders is encouraged.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Article 11.12 of the TPSEPA requires the contracting authority to publish in advance a notice of intended procurement which, amongst other things, must include the time limits for submission of tenders. Article 11.12 further states that contracting authorities shall provide no less than 10 days between the date on which the notice of intended procurement is published and the final date for the submission of tenders.

The tender documents should state whether late tenders will be received, and on what basis.

As a general rule, a public entity should accept late tenders only if:

- (a) it can be certain that there is no possibility of collusion or the late tenderer having knowledge of other tenders; and
- (b) the late tender conforms to the criteria set out in the tender documents.

The procedure for dealing with late tenders may include:

- (a) labelling an accepted tender as a ‘late tender’, time and date stamped;
- (b) keeping a late tender which does not meet the criteria on the tender file with the accompanying envelope, so that it is not considered further; and
- (c) advising a tenderer if its tender was received late.

The Rules themselves are silent on whether late tenders will be considered, however, the general requirement of “fairness and impartiality” in procedures for receiving, opening and evaluating tenders apply (see paragraph 43 of the

Rules). This does not rule out discretion to take account of exceptional circumstances resulting in a late tender, beyond the control of the tenderer.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

Bidders cannot claim reimbursement for the costs of preparing their bid.

In the context of a complaint from a potential bidder, compensation for any breach of measures implementing government procurement may be awarded but such compensation is limited to the costs for tender preparation reasonably incurred by the supplier for the purpose of the procurement (Article 11.20.4 of the TPSEPA). The procedure for supplier complaints is set out in greater detail in the answer to question 14 below.

**13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

There is no selection criteria set by law that bidders have to satisfy in order to receive the award of a contract. Contracting authorities can establish their own additional selection criteria (for example, cost, quality, or ability to deliver on time).

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

There is some limited primary legal protection in New Zealand.

See our comments on ANZGPA and CEP in paragraph 3 above in terms of Australia and Singapore respectively.

In addition the New Zealand Government has adopted the Rules which are based on TPSEPA. Relevantly, Article 11.20 of TPSEPA, titled “Domestic Review of Supplier Complaints”, obliges the New Zealand Government to ensure that its contracting authorities accord impartial and timely consideration to any complaints from potential bidders regarding alleged breaches of measures in

place to implement government procurement. Where appropriate the Government may facilitate the resolution of such complaints.

The procedure for complaints and for appeals relating to the award or proposed award of a contract depends on the nature of the complaint or appeal. Generally, bidders are encouraged in the first instance to seek to resolve any issues with the purchasing department involved. A department may be required to provide information about its purchasing decisions (possibly under the Official Information Act 1982), and the Office of the Ombudsmen may also be called upon.

Under the Rules, compensation for any breach of measures implementing government procurement may be limited to the costs for tender preparation reasonably incurred by the supplier for the purpose of the procurement.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

Information on the conditions for the limited primary protection available to a potential supplier may be found at [www.procurement.govt.nz](http://www.procurement.govt.nz) in the Policy Guide for Purchasers (Appendix 1: Role of the Ministry of Commerce and Appendix 2: International Agreements) and in the Frequently Asked Questions on Procurement Rules: Coverage and Compliance / What Sanctions Apply. Further information can be found on New Zealand's government procurement page on the APEC website:

[http://www.apecsec.org.sg/apec/apec\\_groups/committees/committee\\_on\\_trade/government\\_procurement/resources/new\\_zealand.html](http://www.apecsec.org.sg/apec/apec_groups/committees/committee_on_trade/government_procurement/resources/new_zealand.html)

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

Before a contract is awarded, there is doubt as to whether a government agency intended to create legal relations or was simply reflecting a possible policy change. For simple contracts for the sale and purchase of goods or other property, it will be presumed that the agency intended a binding legal arrangement.

Once the contract has been awarded, the government agency is as liable to prosecute or defend breach of contract claims awards as any private citizen. A breach of contract claim can be established by proving the existence of the relevant contractual term and its breach. Remedies include damages awards. A general way to estimate damages awards is to consider what would be required to put the aggrieved party in the position they would be in if the contractual term was fulfilled.

**17. Can your office:**

**(a) Give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

Yes.

**(b) Represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

Yes.

**(c) Please name a contact person within your office for questions of public procurement law!**

Mark Lowndes

New Zealand

# Norway

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## **1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes, the legal system in Norway provides specific procedures for the award of contracts. Through the EEA Agreement Norway is obliged to follow the EU regulations for award of contracts with EU-wide relevance. In Norway, as in all member states of the EU, there are several national regulations concerning the different procurement procedures. However, the domestic legislation still has to observe multiple standards given by the EU directives. As a consequence, national regulations for the award of contracts are legislated or adapted according to the requirements of the EU directives and the relevant EU standards have to be considered for the interpretation of Norwegian law.

## **2. Do the procedures for the award of contracts depends on the kind of goods, services etc. which are to be procured?**

The Norwegian law on public procurements applies to all kinds of goods and services and is superior to secondary law, which regulate the different procedures for the award of contracts. The secondary law distinguishes according to the type of goods/services that are to be procured. The following national regulations apply to the following goods/services:

- i. Public procurements regulation ("Forskrift om offentlige anskaffelser") applies to goods, services and the carrying out of building and construction works.
- ii. Purchase regulations for the utilities sector apply to contracts in the water, energy, transport and postal services sectors. ("Forskrift om innkjøpsregler i forsyningssektorene (vann- og energiforsyning, transport og posttjenester)").
- iii. Procurement regulations for the defence sector ("Anskaffelsesregelverk for forsvarssektoren") apply to goods, services, and material contracts, and to contracts related to construction and building. The regulations also apply to contracts on competitive tendering of business, hire, leasing and industrial and commerce co-operation.
- iv. In addition there are some distinct procedure rules in fields of less practical interest

## **3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes, both depend on the estimated value of the public contract. The different thresholds are laid down in the Public procurements regulation ("Forskrift om offentlige anskaffelser") and the Purchase regulations for the utilities sector ("Forskrift om innkjøpsregler i forsyningssektorene (vann- og energiforsyning, transport og posttjenester)"). The essential thresholds currently amount to (exclusive VAT):

- i. Public procurements regulation part I apply to all public contracts with a value minor than 500.000 NOK, regardless of contract value or type.
- ii. Public procurements regulation part I and II apply to contracts with a value greater than 500.000 NOK but minor than 1,65 million NOK for goods and services, and minor than 41 million NOK for building and construction works.
- iii. Public procurements regulation part I and III apply to contracts with a value greater than 1,65 million NOK for goods and services, and greater than 41 million NOK for building and construction works. However, for governmental public authorities the Public procurements regulation part III apply for goods and service contracts with a value greater than 1,05 million NOK. The threshold for part III is in accordance with EU threshold.
- iv. The Purchase regulations for the utilities sector base on the same system. Part I apply to all contracts under the regulations regardless of contract value or type. Part II apply to all contracts with a value greater than 3,3 million NOK for goods and service contracts, and 41 million NOK for building and construction work contracts.

#### **4. In what way does the contracting authority have to inform the market about the intended procurement?**

Public contracts with a value greater than 500.000 NOK are to be announced nationally. Contracts with a value greater than 1,65 million NOK for goods and services, and greater than 41 million NOK for building and construction works (part III of the Public procurements regulation), are to be announced EU-wide. For the utilities sector, contracts with a value greater than 3,3 million NOK for goods and services, and 41 million NOK for building and construction work, are to be announced EU-wide.

Norway has an official website where all public contracts are announced when obliged by the national regulations. The website is for both nationally and EU-wide annunciations and is called Doffin. The EU-wide annunciations are in addition forwarded to the official European database for notifications.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No, in order to submit a tender, a bidding consortium may not be required by the contracting authorities to assume a specific legal form; however, the bidding consortium selected may be required to do so when it has been awarded the contract, to the extent that this is necessary for the satisfactory performance of the contract.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and-subcontractor or as bidding consortium?**

Yes, both are possible.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

It is not required that a bidder or its sub-contractor have a registered office or branch office in Norway, therefore, a bidder theoretically can act completely from abroad. From experience, it makes sense for the award of a contract and for the satisfactory performance of the contract to have a temporary office in Norway, at least on the occasion of the award of the contract.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

In Norway contracting authorities may – as far as the objective of the contract requires – request evidence from domestic and foreign bidders. There are no general additional aspects that foreign bidders have to consider.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, that is possible.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The contracting authority shall state in the contract notice which language(s) they accept for the tenders.

Tenders have to be in writing, signed, enclosed and labeled, and handed in directly or by post. The tender may also be submitted electronically or by fax, provided that the contract notice allows it.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

All bidders are to be provided “adequate” time, so that all receive a fair chance to calculate their bid and to fulfil the formal requirements of the award of the contract. In the case of open procedures for public supply/service contracts, the minimum time limit for the receipt of tenders shall be 45 days from the date on which the contract notice was announced. In the case of restricted and other procedures for public supply/service contracts, the minimum time limit for the receipt of tenders shall be 30 days.

Other time limits may apply under specific circumstances and in urgent cases when it is not possible to use the principal time limit.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

As a general rule, bidders can not claim reimbursement for the cost of submitting a bid. This may be different if the contracting authority demands drafts, designs, drawings, calculations etc. as part of the bid. If this is the case it will be stated in the contract notice or in the specifications valid for all bidders.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

Norwegian bidders are obliged by law to hand in tax certificates for tax and for value added tax (VAT).

For work that will be carried out in Norway the bidders are obliged by law to present a personal statement guaranteeing the fulfillment of Norwegian requirements according to health, environment and safety set by law.

In addition the contracting authority may establish its own selection criteria to select those bidders who demonstrate their suitability to perform the contract in terms of their economic and financial standing, as well as their professional and technical knowledge and ability.

When preparing a tender the bidder must be sure to submit all required answers, references/documents concerning the selection criteria completely and as requested. Otherwise, the bidder might be excluded due to formal reasons. These rules are very strict and even small nonconformities may lead to exclusion of the tender.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes, all bidders may complain to the contracting authority that its rights were violated by alleged non-compliance with the provisions governing the award of contracts. The non-compliance might concern general aspects of the procedure, aspects of the specifications or other supplementary documents.

The contracting authority is obliged to inform all bidders before signing the contract, and to give them a reasonable time limit to complain against the award of the contract. There is no fixed time limit but it should be at least 10 days.

Unless the contracting authority takes remedial action concerning the claimed unlawful measures, the bidder may take legal proceedings against the contracting authority to stop the signing of the contract.

If the contract is already signed or the complainant has sufficient time before the signing, a possibility is to complain to The Complaints Board (Klagenemnda for offentlige anskaffelser). This board is only an advisory body but in most cases the contracting authority live up to their decisions. Regardless of the bidder complaining to this board or not, the bidder may take legal actions to establish if the contracting authority has violated the existing provisions or not. The legal proceedings may include an indemnity claim against the contracting authority.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

Bidders that don't satisfy the selection criteria and get excluded from the contest can complain against the decision. If the complain is not accepted the excluded bidders can complain to The Complaints Board or take legal actions. If necessary, the complainant may – under certain legal conditions – request the court of justice for temporary precautionary measures to postpone the signing of a contract until the exclusion question is settled. For the utility sector it is not possible for the court of justice to postpone the signing of a contract, but the court may sentence a conditional fine to try to prevent a potential infringement.

The same legal protection exists after the contract has been awarded. The competitors get more or less 10 days to complain after receiving the award letter.

This primary legal protection does not depend on criteria such as certain thresholds or the kind of goods, services etc.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

After the contract has been signed, the only two options are either to complain to The Complaints Board or to take legal actions. In case of a lawsuit the plaintiff may claim for compensation.

In order to receive compensation, it has to be proven that the contracting authority has infringed the regulations and that the plaintiff has been inflicted a financial loss as a result of the infringement.

**17. Can your office**

- **Give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

Yes, at our office we have a number of lawyers with extensive experience in the field of public procurement, both from the contracting authority and the supplier's point of view.

- **Represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

Yes, our office has the competence to represent foreign clients in procedures for the award of contracts before all public offices/courts in Norway.

- **Please name a contact person within your office for questions of public procurement law!**

Contact person: Per O. Bjørnsen, [bjornsen@bd.no](mailto:bjornsen@bd.no)

# **Panama**

## **Rosas y Rosas**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Indeed. A new Law on Public Contracting was enacted in 2006 with the purpose to improve on the previous legislation regarding public procurement and to adapt to changes in the technological sector by using the Internet to publicize public bids.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

The differences in the procedures are mainly based on the amount of the bid, rather than the type of products.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

The thresholds are the following:

- For purchases of up to US\$30,000, minimal formalities;
- The Ministry of Economy and Finance approves direct purchases of up to US\$300,000, rather than through a public act;
- The National Economic Council (certain Ministers of the Cabinet) between US\$300,000 and US\$3,000,000;
- The Cabinet approves direct purchases over US\$3MM.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Via Internet. The site is <http://www.panamacompra.gob.pa/>

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

There is no distinction between natural and juridical persons in Panama. However, in practice the requirements of past experience, size of the purchase, or other conditions are sometimes met only by established enterprises.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Bidders can submit offers as part of a consortium or loose joint venture, created only for the purpose of submitting their proposal, in which each will contribute specific qualifications to complement the other members. It is established that each member will be individually responsible for the obligations arising out of the proposal or the contract itself. The members shall designate a person who will represent them in the different instances of bidding and formalization of a contract.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

While there is not an obligation to potential bidders to have a registered office or branch office in the country, they shall provide the documentation that reflects their existence abroad and appoint a representative who will sign and submit the proposal, as there is a formal act in which the proposals will be received and opened.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

As commented above, proposals cannot be submitted from abroad and there is typically no preference to domestic bidders.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Bids from multinational consortia are allowed and in cases of complex projects encouraged according to the conditions of a bid.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The official language in Panama is Spanish, but the authorities will allow, especially in the prequalification stage, that documents pertaining to experience and previous performance of the bidder be submitted in English language. It is submitted in text along with a digital copy.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

The place and time for prequalification documents, or the bid itself, are clearly expressed in the procurement documents.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

Bidders cannot claim for reimbursement of the costs involved in preparing their bid except for the fee that was paid to obtain the terms and conditions of the bid, but only if a proposal is submitted.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

There are general selection criteria established by law, and specific ones that the contracting authority will include in the terms and conditions prepared for a particular bid.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

There are legal actions that can be filed before the contract is awarded, or afterwards. In the first case (Accion de Reclamo) it will be a more straightforward procedure before the Directorate of Public Contracting, and in the second case, (Recurso de Impugnacion) before the Administrative Tribunal of Public Contracting (formed by several Magistrates). In both cases, the party that alleges wrongdoing will submit evidences and arguments that sustain its allegation. In

the case of the latter a bond equal to 10% of the proposal – without exceeding US\$100,000 -, will be required.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

The primary legal protection (Accion de Reclamo), is not subject to any particular condition, besides the need to be filed prior to the granting of the contract.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

For the filing of secondary legal protection (Recurso de Impugnacion), there are no further conditions beyond the posting of a bond, as explained above.

**17. Can your office**

- **give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

We are in position and do provide legal advise on a regular basis to foreign clients in the steps leading to the submitting of proposals in public bids.

- **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

We have represented clients seeking legal remedies after a proposal has been submitted, or a public contract has been granted, as well as during the execution of a contract for claims submitted by any of the parties.

**– Please name a contact person within your office for questions of public procurement law!**

Juan Carlos Rosas

Rolando Guevara

# **Peru**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes it provides for specific procedures for award of contracts by contracting authorities. In effect the Peruvian Constitution establishes that contracting of public works, services and acquisition of goods must be carried out by bidding process. It abides by a specific bill of law and its regulation, which provides for each process at different levels and items, requirements and procedures to be followed, and the content of the contracts, guarantees and mechanisms to solve disputes. The law also contemplates exemptions to this principle, based fundamentally in cases of emergency, national defense, amounts and other punctual cases.

Government procurement is subject to a Law on State Contracting and Procurement and its regulations.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes, in general terms yes. However, the law provides for different requisites and guarantees depending on whether the procurement is of goods, services, consultancy and public works.

Also, in case of commodities or standard services, the procurement can be made by an auction either in presence or through internet.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes it will depend on the value of goods and services, as outlined in the Annual National Budget, which will establish the range of values to be considered to apply the different procedures to be applied.

Each year the Budget Law provides for the thresholds of government procurement. Under the Budget Law for 2008, Law N° 29142 the acquisition of goods and supplies require a tender if the amount exceeds USD 161,724.00 and direct award if less. For services and consulting, “public competition” will be required if the referential value exceeds USD 72,414.00. direct award may be made for lesser amounts.the contracting of public works require a “public ten-

der” when the referential value is equal to or higher than US USD 410,345.00 and direct award if the referential value is less than USD 410,345.00.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

The way to inform the market will be at the time of announcing public the bidding basis which will follow the provisions of the law and regulation, unless direct awards when there is an exemption to the process.

The announcement is made by the SEACE the Electronic System for the Procurement and Contracting of the State and any other means available and provided for by the tender documents.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No. A potential bidder will not need a specific legal form.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Bidders can submit joint offers as a consortium but there are formalities to be met, such as a consortium agreement and the joint and several responsibility.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

Bidders must be registered as a chartered supplier before the Registry of Suppliers to the State at CONSUCODE the Superior Council for the Contracting and Procurement of the Peruvian State.

There is no legal obligation to have a branch office in Peru. In certain cases this is not a prior requirement but when the award has been granted.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain ad-**

**ditional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

No. It will not be possible under a bidding process. It will be possible to submit an offer but it will have to abide to the requirements of the law and Regulation, which calls for at least a domiciled representative.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Multinational bidding consortium can submit bids as long as they comply with the legal requirements.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The tenders are always in Spanish, except for documentation and supporting literature which can be in English, and if in other language, translated at least into English. It is common for the Government to request translation of the documents.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Each tender procedure can establish its own submission rules. Bids will be submitted to the contracting authority as per the published schedule of each process.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

No. Each bidder will have to assume at its own expense and risk their cost in preparing and submitting the bid.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

According to the law and its regulation, the selection criteria can be economic and/or technical. The technical offer evaluation criteria is provided for in the Law in general terms, however each process may set their specific selection criteria usually based on points and percentage of evaluation set forth in advance.

- 14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection) ? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

In the case the tender process provides for a prequalification stage, some procedures admit the possibility of filing a claim against a prequalification ruling admitting as a bidder a competitor.

Any bidder is entitled to file a complaint against the awarding to a competing bidder based on legal or technical grounds. Any bidder can question or place an appeal against the proposed award merited of legal or technical issues duly supported, but placing a guarantee.

- 15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured ? If so, what are the conditions?**

In case primary legal protection under a prequalification stage of the tender procedures the conditions will be specifically set in the bidding terms. A placement of a guarantee in the form of a bank bond is mandatory.

- 16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

There will be legal protection against the award granted on the grounds of default or non compliance to the bidding terms, and such protection will consist in the claim or appeal within the bidding process under the administrative tribunal before CONSUCODE. In case of a secondary protection, it will have

be submitted to and resolved by an Arbitration Tribunal which is the mandatory process established by Law.

**17. Can your office**

- give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- Please name a contact person within your office for questions of public procurement law!**

Estudio Grau is involved in assisting foreign clients who participate in bidding process, is involved in defending their interest and in supporting their claims through the whole process, whether under the administrative stage or be the arbitration tribunal.

Kindly contact any one of Alberto Musso, Javier Ballon Landa, Luciano Barchi or Victor Avila

# **Poland**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes.

Procedures of awarding public procurements are set forth in the Act of 29 January 2004 – Public Procurement Law (“Public Procurement Law”). Domestic legislation has to be in accordance with the EU Directives 2004/18/EC and 2004/17/EC (and other EU regulations in this area).

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Partly they do.

According to the Public Procurement Law two primary procedures (namely open tendering and restricted tendering procedures) apply in case of any type of goods/services. However, several specific procedures for awarding contracts apply to specific type of goods/services that are to be procured (for example:

- (i) direct-award contract procedure applies where among others supplies, services or construction works may be provided by only one contractor for technical reasons or for reasons connected with the protection of exclusive rights,
- (ii) the request for prices procedure or the electronic bidding procedure applies where the object of the contract is that of supplies or services generally available and fixed quality standards, while the contract value is less than EUR 133,000 (for the contract for supplies or services) and EUR 5,150,000 (for the contract for construction works);
- (iii) sectorial contracts procedure applies where the contract relates to the following types of activities: exploring, prospecting for or extracting natural gas, crude oil and its natural derivatives, lignite coal, anthracite coal and other solid fuels; the management of airports, maritime or inland ports and their provision to air, sea and inland carriers; the creation of networks intended to provide public services connected with the production, transport or distribution of electricity, gas or heat, or supply of electricity, gas or heat to such networks or management of such networks; the organization of networks intended to provide public services connected with the production or distribution of drinking water or supply of drinking water to such networks or management of such networks; the operation of networks providing public services in the field of transport by railway, tram, trolley bus, cable car or automatic systems; the operation of

networks providing public services in bus transport and provision of postal services.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Public Procurement Law does not apply to contracts not exceeding the equivalent of EUR 14,000.

The provisions of the Public Procurement Law envisage a wide spectrum of facilitations with respect to the proceedings for award of contract, where the value of contract is lower than EUR 133,000 (in some cases EUR 206,000 or 412,000 depending on the status of the awarding entity) and or for construction works is lower than EUR 5,150,000. The above facilitations refer in particular to: the time limit for submission of tenders, the time limit for submission of requests for participation in the proceedings, obligatory provisions of the specification of essential terms of the contract, bid bond, initial tenders and indicative tenders and the provisions of law referring to appeals and complaints.

Notices should be dispatched to the Office for Official Publications of the European Communities where the value of the public contract for supplies or services is equal to or exceeds EUR 133,000 (in some cases EUR 206,000 or 412,000 depending on the status of the awarding entity) and or for construction works is equal to or exceeds EUR 5,150,000.

The awarding entity shall not conclude a procurement agreement until the final resolution of the protest. The protest is regarded as finally resolved:

- (i) if no right to appeal exists – upon the resolution of the protest by the awarding entity,
- (ii) where no appeal has been lodged – upon the expiration of time limit for submission of appeals,
- (iii) in the event an appeal has been lodged:
  - on the date of delivery of the ruling ending the appeal proceedings or
  - on the date of the issue of the judgment ending proceedings in the case by the circuit court or upon the time limit for lodging a complaint, if the value of the contract for construction works is equal to or exceeds the expressed in zlotys equivalent of EUR 20,000,000 and for supplies or services – of EUR 10,000,000.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Publication in the official bulletin – Biuletyn Zamówień Publicznych (the Public Procurement Bulletin) is compulsory irrespectively of the thresholds. Awarding authority will place notices of initiated proceedings and concluded agreements on the Public Procurement Office’s Internet portal and its own web site, as well as in a publicly accessible place at its seat. The awarding authority is also obliged to publish the specification of essential terms of the contract on its web site.

Notices, referred to in the Act, have to be dispatched to the President of the Office or the Office for Official Publications of the European Communities for the publication respectively in the official bulletin - Biuletyn Zamówień Publicznych (the Public Procurement Bulletin) or the official bulletin - Official Journal of the European Union. Notices should be dispatched to the Office for Official Publications of the European Communities if the value of the public contract for supplies or services is no less than EUR 133,000 (in some cases EUR 206,000 or EUR 412,000 pending on the status of the awarding entity) and for construction works no less than EUR 5,150,000.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

In principle all forms are acceptable. However, to compete for a contract a bidder may be required by statutory law to be authorized to perform specific activities or acts.

It means that services or constructions of specific character may imply that the supplier thereof must have a specific legal form. For example for banking activity in Poland a joint stock company form is required.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Contractors may compete for a contract jointly. One of the members of the consortium needs to be appointed as proxy representative to contract and to operate the contract. When a bid of joint contractors has been selected the awarding authority may request an agreement regulating the cooperation of those contractors prior to the conclusion of the public procurement agreement.

As regards the subcontractors, the rules of the proceedings provide, in practice, for obligation of the contractors to stipulate subcontractors that would be entrusted with a part of the contract.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

Polish law does not require to have a registered office or branch office in Poland for the purposes of the awarding procedure. Therefore, it is possible to submit a tender for the contract directly from abroad. From the European law perspective it is fully compliant with the general rule regarding freedom of competition; any restrictions referring to the status or nationality of the potential contractor must have in regard the mentioned rule. Exceptions could only be justified on the basis of the public interest or security.

However, in the case of contracts in the sector field (see point 2 section (iii) above), the awarding entity may reject the tender for a contract for supplies where the share of goods originating in the member States or states with which the Community concluded agreements on equal treatment of entrepreneurs is less than 50 per cent, if the awarding authority envisaged this in the specification of essential terms of a contract.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

According to the relevant provisions of the Public Procurement Law the awarding authority may request from (domestic and foreign) contractors only declarations and documents necessary to conduct proceedings. Declarations and documents proving compliance:

- (i) with conditions for participation in the proceedings,
- (ii) of the offered supplies, services or construction works with the requirements specified by the awarding authority shall be indicated by the awarding entity in the contract notice, the specification of essential terms of the contract or the invitation to submit tenders.

The types of documents which the awarding authority may require from the contractor and the format thereof are specified in the regulation of the Council of Ministers.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, that is possible.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Contract award proceedings should be in writing in the Polish language. In particularly justified cases the awarding entity may agree to the submission of a request for participation in contract award proceedings, declarations, bids and other documents also in a language commonly used in international trade or the language of the country where the contract is to be awarded.

In the proceedings declarations, requests, notices and information should be delivered by awarding entity and bidders, at the awarding entity 's option, also by fax or by electronic means.

In one of the specific award procedures, namely electronic bidding, the bid must be submitted in an electronic form and provided with a safe electronic signature verifiable using a valid qualified certificate (otherwise being void). The rules governing safe electronic signature are set forth in the Safe Electronic Signature Act of 18 September 2001 (Official Journal No. 130 position 1450 with amendments).

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

In general, the awarding authority is entitled to set the time within which bids have to/can be submitted. Nevertheless the awarding entity is obliged to follow the time boundaries stipulated in the Public Procurement Law.

The time required for the submission of bids to the contracting authority varies with regard to the specific contract award procedure provided for in the Public Procurement Law. In respect to the primary procedure for awarding contracts, namely open tendering, the Public Procurement Law sets forth that where the value of the contract for supplies or services is less than EUR 133,000 (in some cases EUR 206,000 or EUR 412,000 depending on the sta-

tus of the awarding entity) the minimum time period is 7 days from the date of dispatch of the contract notice to the President of the Office and where the value of the construction works is less than EUR 5,150,000 the minimum time period is 20 days from the same starting day. Where the value of contract is equal to or exceeds the amounts specified above the time limit for submission of tenders shall not be less 40 days from the date of transmission of the contract notice to the Office for Official Publications of the European Communities by electronic means or 47 days from the date of dispatch of the notice to the Office for Official Publications of the European Communities in a manner other than specified above.

In relation to the restricted tendering procedure (the second primary procedure), the minimum time periods are, respectively, 7 and 14 days (where the value of the contract for supplies or services is less than EUR 133,000 (in some cases EUR 206,000 or EUR 412,000 depending on the status of the awarding entity) and where the value of the construction works is less than EUR 5,150,000) and 40 days from the date of dispatch of the invitation to submit tenders (where the contract value is equal to or exceeds the amounts specified above).

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

As a general rule, bidders can not claim reimbursement for the cost of submitting a bid. However, in the event of cancellation of the contract award proceedings result from events brought about by the awarding entity, bidders who submitted admissible (proper) bids shall be entitled to claim reimbursement of the reasonable costs of participation in the proceedings, and in particular, the costs incurred for the preparation of the tender.

The awarding entity may also include in the specification of essential terms of contract the amount of reimburse costs of participation in the proceedings. Please note that reimbursement is not obligatory, and in practice such provision of the specification of essential terms of contract

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

Eligible to compete for contract shall be bidders who:

- (i) are authorized to perform specific activities or acts, where the obligation to hold such authorization is imposed by the statutory law,
- (ii) have the necessary knowledge and experience as well as technical potential and persons at their disposal able to perform a contract,
- (iii) are in an economic and financial position ensuring the performance of a contract,
- (iv) are not liable to exclusion from contract award proceedings (excluded from the proceedings shall be among others: bidder who during the past 3 years prior to the initiation of the proceedings have caused damage by failing to perform or by improper performance of a contract and the damage had not been voluntarily remedied by the date of the initiation of proceedings, unless non-performance or improper performance was the result of circumstances for which the bidder was not liable; bidder against whom liquidation proceedings have been opened or whose bankruptcy has been declared; bidder who are in arrears with payment of taxes, charges of social insurance or health insurance premiums; bidder who or whose members have been validly sentenced for specific crimes; bidder who provided false information influencing a result of the proceedings; bidder who has failed to submit the declaration concerning the compliance with conditions for participation in the proceedings or documents confirming the same or the submitted documents contain errors; bidder who has failed to pay deposit).

The awarding entity may not specify conditions for participation in the contract award proceedings in a manner, which could prejudice fair competition.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

According to the Polish Public Procurement Law, the bidder (both domestic and foreign) whose legal interest in obtaining a contract has been or may be prejudiced as a result of the infringement by the awarding entity of the provisions of the Public Procurement Law, shall be entitled to three types of legal protection measures, i.e. protest, appeal and complaint. The later measure may be exercised by the bidder if the former has not reached in the bidder's opinion to the satisfactory decision.

A protest may be lodged to the awarding entity against the contents of the contract notice, acts performed by the awarding entities in the course of proceedings and in the event of an omission by the awarding of an act it is bound to perform under the Public Procurement Law. The protest may be lodged within 7 days of the date on which the contractor became aware or may have become aware of the circumstances constituting the basis of lodging thereof.

An appeal may be available against the resolution of the protest. The appeal should be submitted to the President of the Public Procurement Office within 5 days of the dates of receiving the resolution of the protest or the expiry of the time limit for the resolution of the protest.

The judgment ending the appeal proceedings may be complained against to the court. Complaints shall be submitted with the circuit court (Sad Okregowy) having the jurisdiction over the place of residence of the awarding entity; it shall be submitted through the President of the Public Procurement Office within 7 days of the delivery of the judgment ending the appeal proceedings.

No appeal against the court judgment is available to the higher court.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

Where the value of the contract does not exceed EUR 133,000 (in some cases EUR 206,000 or 412,000 depending on the status of the awarding entity) or, for construction works, EUR 5,150,000, there is only one legal protection measure (see point 14 above) available i.e. a protest.

As regards the procurements which do not reach the above thresholds, a resolution of the protest by the awarding authority is final and shall not be a subject of judgment of any independent authority.

The legal protection measures may not be submitted against a decision of a jury of a contest<sup>1</sup> concerning evaluation of contest projects and the selection of the contest projects.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

After the contract has been awarded the bidders may exercise the following rights:

- (i) they may demand the annulment of the concluded contract, if the party thereto or another participant of the public procurement proceeding or any person acting in the agreement with them have affected the result of the proceeding contrary to the provisions of law or public decency (the above entitlement expires after a lapse of one month from the day when the entitled person obtained the information of the existence of the reason for the annulment, not later however, then one year from the day when the contract was concluded),
- (ii) they may claim for damages at civil court (the claim might be successful on the condition that (i) there is evidence of an act contrary to the law, (ii) the bidder claiming suffered damage and (iii) there is evidence of a causation between the violation of law and the damage.

#### 17. Can your office

- (i) give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- (ii) represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- (iii) Please name a contact person within your office for questions of public procurement law!**

Yes, our office:

- (i) advises foreign clients on the formal conditions for preparing a proper bid, etc. and assists in the procurement procedure in Poland,
- (ii) represents foreign clients in the procedures for the award of contracts, as well as in the primary and secondary legal protection procedures before all public offices/courts in Poland,
- (iii) Contact persons within our office for questions of public procurement law are Anna Cudna-Wagner (acudna@furtek.pl) and Maciej Gawronski (mgawronski@furtek.pl).

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<sup>1</sup>A contest is a public promise in which by a public notice the awarding entity promises a prize for the execution and transfer of rights to the contest project selected by the contest jury, in particular in the fields of spatial planning town planning, architecture and construction planning and data processing

# Portugal

## **Sérvulo & Associados | Sociedade de Advogados, RL**

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## **1. Does your legal system provide specific procedures for the award of contracts for contracting authorities?**

Yes, the legal system in Portugal provides specific procedures for the award of contracts. In Portugal, as in all member states of the EU, there are several national regulations concerning the different procurement procedures transposing the EU directives on the award of contracts.

## **2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes, there are several types of procedures depending on the kind of goods, services etc. which are to be procured.

For instance, nowadays the award of public works and the award of public supplies and services have different regimes.

There are, essentially, two public procurement legal regimes:

- The Decree-Law n.º 59/99, of 2 March, which is the legal regime of the award of public works;
- The Decree-Law n.º 197/99, of 8 June, which is the legal regime of the award of public supplies and services;

The award of public works, supplies and services in the water, energy, and transport and telecommunication sectors (the special sectors) has a special regime – the Decree-Law n.º 223/2001, of 9 August. The general regime laid down in the Decree-Law n.º 59/99, of 2 March, and in the Decree-Law n.º 197/99, of 8 June, is the supplementary law applicable to these contracts.

There is also a special regime for the award of contracts covered by article 296.º of the Treaty establishing the European Community (TEC), i.e. contracts for the purchase of products which are intended for specifically military purposes, laid down in the Decree-Law n.º 33/99, of 5 February. The general regime laid down in the Decree-Law n.º 197/99, of 8 June, is the supplementary law applicable to these contracts.

It is foreseen that the new code of public procurement and government contracts will come into force until the end of 2007 transposing the EU Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts of 31 March 2004 and the EU Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors of 31 March 2004.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes, both depend on the estimated value of the public contract. If the public contracts have an estimated value greater than specific thresholds laid down in the Directives 2004/18/EC and 2004/17/EC, as amended by the Commission Regulation (EC) n.º 2083/2005, of 19 December and Regulation (EC) n.º 1422/2007, of 4 December 2007, the procedures apply. The essential thresholds currently amount to

- (i) EUR 5.150.000 - for public works contracts;  
EUR 1.000.000 - for lots of a public works contract;
- (ii) a) EUR 133.000- for supply/service contracts of public institutions;  
EUR 80.000 - for lots;
- (ii) b) EUR 206.000 - for all other public supply/service contracts;  
EUR 80.000 - for lots;
- (iii) EUR 412.000 - for public supply/service contracts in the sector field (water, energy, and transport sectors);

**4. In which way does the contracting authority have to inform the market about the intended procurement?**

Public contracts which have a value, net of Value Added Tax (VAT), estimated to be equal to or greater than said thresholds have to be awarded EU-wide, i.e. they have to be announced in the Supplement to the Official Journal of the European Union (OJEU). The contracts in principle have to be awarded by applying the “open procedure”, i.e. for an unlimited number of tenderers.

**5. Does an undertaking which is interested in the contract need to have a specific legal form to submit a tender?**

No, in order to submit a tender, a bidding consortium may not be required by the contracting authorities to assume a specific legal form; however, the bidding consortium selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract. This is normally not the case.

**6. Are undertakings allowed to submit joint offers, e.g. as general contractor and subcontractor or as bidding consortium?**

Yes, both are possible.

**7. Do undertakings interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

Legally it is not required that the tenderer or its sub contractor has a registered office or branch office in Portugal, therefore a tenderer theoretically can act completely from abroad. From experience it makes sense for the award of a contract and for the satisfactory performance of the contract to have temporarily an office in Portugal, at least on the occasion of the award of the contract.

**8. If in your country it is possible for foreign undertakings to submit a tender for a contract with a contracting authority directly from abroad, does the foreign undertaking have to consider certain additional aspects, such as having to provide certain supporting documents and have foreign and domestic undertakings equal rights in the procedures for the award of contracts?**

There can be no discrimination between national undertakings and the ones which have the nationality of or are established in other member states of the EU, as laid down in the TEU. The same rule applies to the undertakings which have the nationality of or are established in one of the contracting parties of the Agreement on the European Economic Area or of the World Trade Organisation, as laid down in the respective treaties.

The foreign undertakings must produce the same documents as the national ones. In fact, awarding authorities may – as far as the object of the contract it requires – request evidence from national and from foreign tenderers,

- (i) that the tenderer does not employ a person who is convicted due to a certain offense, which indicates the unreliability of this person and therewith of the tenderer;
- (ii) concerning registration in the professional or commercial register in the country of origin;
- (iii) that the taxes and duties as well as the social insurance contributions are duly paid by the tenderer;
- (iv) bank inquiry;

- (v) concerning liability insurance;
- (vi) concerning financial statements or an abridgement of it, if a publication is provided in the country of origin;
- (vii) concerning declarations overall turnover of the tending undertaking as well as the turnover in a special field, which is matter of the award of the contract;
- (viii) that the tenderer deposits an amount as a security to grant the proper fulfillment of the contract

These documents produced by a foreign undertaking must be issued by the competent authorities of the country of origin.

### **9. Is a multinational bidding consortium allowed to submit a tender?**

Yes, that is possible.

All members of a bidding consortium have to be stated and one of them needs to be appointed as proxy representative to contract and to operate the contract.

### **10. In which language do the tenders have to/can be submitted and which form is required, written form, fax, e-mail or digital?**

The tenders must be presented in Portuguese. It is possible, though, to submit a tender in a foreign language in the condition that it is accompanied by certified translation. Sometimes it is allowed that documents related to technical specifications may be presented in English or Spanish.

In general, tenders must be submitted in writing and can be sent through the mail or directly delivered in the awarding authority services.

### **11. Are there any legal regulations within which term tenders have to/can be submitted to the contracting authority?**

In general, the time limit for the submission of tenders is fixed taking into account factors such as the nature and characteristics of the contract.

The minimum time limit for the submission of tenders laid down in the Decree-Law n.º 197/99, of 8 June, which is the legal regime of the award of public supplies and services is:

- (i) 52 days, when the invitation to tender has to be published in the OJEU from the date on which the notice was sent – the minimum time limit can be diminished to 36 days if an indicative notice is published;

- (ii) 15 days, in other cases, from the date on which the notice is published in the Official Journal of the Republic of Portugal (“Diário da República”).

The minimum time limit for the submission of tenders laid down in the Decree-Law n.º 59/99, of 2 March, which is the legal regime of the award of public works is:

- (i) 52 days, when the invitation to tender has to be published in the OJEU from the date on which the notice was sent – the minimum time limit can be diminished to 36 days if an indicative notice is published;
- (ii) 30 days, in other cases, from the date on which the notice is published in the Official Journal of the Republic of Portugal (“Diário da República”).

The minimum time limit for the submission of tenders laid down in the Decree-Law n.º 223/2001, of 9 August, which is the legal regime of the award of public works, supplies and services in the special sectors, is 52 days, when the invitation to tender has to be published in the OJEU from the date on which the notice was sent – the minimum time limit can be diminished to 22 days if an indicative notice is published.

**12. Can the tenderers claim their costs for preparing the tender? If so what are the conditions for and up to which amount a reimbursement can be claimed?**

As a general rule the tenderers can not claim a reimbursement for their submitted tender. This may be different if the contracting authority demands drafts, designs, drawings, calculations etc. which are typically asked only for value. In this case an adequate reimbursement will be set in the specifications valid for all tenderers and each candidate who has submitted a tender, together with the required supplementary documents, may claim this compensation.

**13. Are there any selection criteria set by law that tenderers have to satisfy in a procedure for the award of a contract and can the contracting authority establish its own additional selection criteria?**

Yes. The contracting authority may only take into account those tenderers who are suitable to perform the contract by complying with the criteria of economic and financial standing, of professional and technical knowledge and ability.

For this purpose the contracting authorities may set several questions which in general are to be answered by the tenderers. The answers often have to be supported by references.

When preparing a tender the tenderer must pay close attention to produce all answers, references and documents concerning suitability criteria, completely and as requested. Otherwise the tenderer might be excluded due to formal reasons. One should point out that – other than before – the contracting authority may not show any tolerance even in case of only small nonconformities.

**14. Does your legal system provide legal protection against an alleged award of a contract favoring a competing tenderer even before the contract with the competitor is actually awarded (primary legal protection)? If so please roughly explain the proceedings. Is such a primary legal protection applicable for foreign tenderers without any restrictions?**

The public procurement legal regime provides for a hearing of the parties concerned prior to the awarding of the contract.

This means that the awarding entity must make referral of the draft decision to award (or not) the contract to all candidates whose bid has been accepted.

The candidates have the minimum of 5 days to submit their observations on the draft decision.

The awarding entity can only award the contract after hearing the parties concerned and weighting their arguments in favour or against the decision.

If, after that, the awarding entity awards the contract in accordance with the draft decision, the candidates can challenge the legality of such decision.

A party can file a petition for judicial review of awarding of a contract within a month after the date on which the decision to award was notified.

Judicial review may have suspensive effect on the contract award procedures, postponing the signature of the contract, upon request by the concerned party.

**15. If primary legal protection exists in your country, does depend on certain conditions, p.e. certain thresholds or the kind of goods, services etc. which are to be procured? If so, which are the conditions?**

In public tenders the awarding entity must always conduct a hearing of the concerned parties before the awarding of a contract, irrespective of the thresholds or the kind of goods, services etc..

The same can be said of the possibility of judicial review.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, which are the principal conditions which have to be presented before a court to be able to be awarded the damages?**

As stated in the answer to question (15) there is a mandatory hearing of the concerned parties in the Portuguese legal regime, which constitutes a primary legal protection of the bidding parties. It is also possible to file a petition for judicial review of the awarding of the contract and ask for damages and lost profits on the grounds and to the extent that they were caused by an unlawful award of a contract.

If and to the extent to which a tenderer suffers damages due to a irreversible act contrary to public procurement law, in principle he can claim for damages at civil court. The claim might be successful provided that (i) there is evidence of an act contrary to public procurement law, which is a violation of (ii) a provision that protects tenderers and (iii) through this the tenderer who is supposed to be protected by the provision is affected. In practice it is very difficult to evidence the causation between the violation and the caused damage.

**17. Can your office**

- give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- Please name a contact person within your office for questions of public procurement law!**

Our Office offers legal assistance in this field to public and private Clients during both the pre-contractual process and the lifetime of the contract itself, including the drafting of procedural documents (tendering programmes, contract specifications and other relevant documents) and the drawing up of tenders, the follow-through of the entire procedure, including the public opening of tenders and the drafting of other acts leading to the formation of contracts, the negotiation of contracts. Our Office also gives assistance during the process of approval by the Court of Auditors and intervenes in dispute resolution in court, before any jurisdiction or in arbitration or other alternative forms of dispute resolution.

# **Romania**

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## **1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Government Emergency Ordinance no. 34 of 2006 on the Award of Public Contracts, Public Works Concession Contracts and Services Concession Contracts (“GEO 34”) reflects the main provisions of the relevant EU Directives in the public procurement area.

GEO 34 regulates the specific procedures to be followed for the award of the procurement contract, as follows:

- (i) Open public tender - takes place in a single stage and any interested provider can submit a tender;
- (ii) Limited public tender - consists of two stages, and only the bidders selected by the contracting authority in the first stage will be invited to submit bids in the second stage.
- (iii) Competitive dialog - any interested provider can submit a bid; the contracting authority may perform the dialogue only with the accepted candidates and only candidates selected by the contracting authority from the accepted candidates are invited to make the final offer;
- (iv) Negotiation – the contracting authority discusses and negotiates the contractual clauses, including the price, with the selected candidates from suppliers, contractors and providers; the negotiation may be with or without the publication of a participation notice.
- (v) Offer request – a simplified procedure according to which the contracting authority requests offers from several suppliers, contractors and providers;
- (vi) Solutions contest – allows the contracting authority to obtain a plan or a project that was selected by a jury on a competitive basis, especially in the territorial planning, urban and zoning field.

## **2. Do the procedures for the award of the contracts depend on the kind of goods, services etc. which are to be procured?**

No. There are other criteria to be taken in consideration when deciding upon a procedure for the awarding of a public procurement contract, such as the area of activity of the contracting authority or the value of the public procurement contract.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

As a rule, a public procurement contract is awarded pursuant to an open or limited public tender.

In case of contracts in sectors of water, energy, transport, postal services or other relevant activities as defined by GEO 34, as a rule, a public procurement contract is awarded pursuant to an open or limited public tender or negotiation with a prior publication of a tender notice. In these sectors, the procedure of the competitive dialogue cannot be used by the contracting authorities when awarding a public procurement contract.

According to the provisions of Art. 19 of GEO 34, the contracting authority is entitled to directly procure products, services or works, if the value of the procurement does not exceed the RON equivalent of EUR 15,000 for each procurement of products, services or works. Consequently, the contracting authority must use the public procurement procedures for the awarding of a public procurement contract above this threshold.

The procedures to be used for the awarding of a public procurement contract also depend on the estimated value of the public procurement contract, i.e. the Offers Request may be used by the contracting party only in cases when the estimated value of the public procurement contract, exclusive of VAT, is less than the RON equivalent of EUR 100,000 for services or supply contracts, or EUR 750,000 for the construction works contracts.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

The contracting authority is obliged to ensure the transparency of the public procurement process by publishing the notices of intent, the participation notices and the award notices according to GEO 34.

The contracting authority has the obligation to submit for publication a notice of intent when it intends to benefit from the provisions Art. 75 (2) or of Art. 89 (2) of GEO 34 which provide the diminishing of the general term mentioned under item (11) below, within which bids have to be submitted to the contracting authority, and if:

- (i) the total estimated value of the contracts/framework agreements which are to be awarded/concluded within the following 12 (twelve) months with regard to

the procurement of products of the same CPV group, is equal or higher than the RON equivalent of EUR 750,000;

- (ii) the total estimated value of the contracts/framework agreements which are to be awarded/concluded within the following 12 (twelve) months with regard to the procurement of services of the same CPV group is equal or higher than the RON equivalent of EUR 750,000;
- (iii) the total estimated value of the contracts/framework agreements which are to be awarded/concluded within the following 12 (twelve) months for the procurement of works, is equal or higher than the RON equivalent of EUR 5,000,000.

The notice of intent is published:

- (i) in the Official Journal of the European Union, in the Electronic System of Public Procurement (“SEAP”) and in the Official Monitor of Romania, Part VI, Public Procurement; or
- (ii) only in SEAP, provided that, before publication, a prior simplified information notice was sent to the European Commission.

The contracting authority must publish a participation notice in the SEAP, and optionally in the Official Monitor of Romania, Part VI, in the following cases:

- (i) open or limited public tender, competitive dialogue or negotiation with the prior publication of a participation notice procedures are launched in order to conclude a public procurement contract or frame-agreement;
- (ii) a dynamic purchasing system is initiated;
- (iii) a solution contest is organized.

The participation notice shall be published in the Official Journal of the European Union in case the value of the contract exceeds the RON equivalent of:

- (i) EUR 125,000 for supply or services contracts granted by authorities and public institutions;
- (ii) EUR 400,000 for supply or services contracts granted by public companies or subjects of law performing relevant activities in one of the sectors of public utility – water, energy, transports and postal services;
- (iii) EUR 5,000,000 for works contracts.

As of January 1, 2008, the publication of the participation notice in the Official Monitor of Romania, Part VI is optional.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

Any economic operator is entitled to participate, individually or as part of a group of operators, to the tender procedure.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Several economic operators are entitled to associate for the purpose of submitting their participation or common offer, without having the obligation to officially register their association.

The contracting authority is entitled to request that the association/joint venture shall be registered only in case the common offer is declared the winner and only if such measure represents a condition necessary for the appropriate performance of the contract.

Without any derogation from its liability with regard to the manner of performance of the future public procurement contract, the bidder is entitled to include the possibility to subcontract a part of the mentioned contract in the technical proposal.

In case the contracting authority requests such, the bidder has the obligation to specify the part/parts of the contract to be subcontracted and the contact details of the proposed subcontractors.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

The bidders do not need to have any presence in Romania and they can submit their tenders directly from abroad.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain Romanian translations of the documents or whether domestic bidders receive preferences in the award of contracts?**

The domestic and the foreign bidders are equally treated. In addition to the documentation required to the Romanian bidders the foreign bidders will also have to submit Romanian certified translation of the documents.

In case the documents to be submitted in a bid are issued by the authorities or are notarized in countries which concluded with Romania treaties for the waiving of the apostille formalities, such documents will also have to be apostilled.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

The participation notice mentions the languages and the format in which the tenders can be submitted.

Usually, the bids can be submitted in English and can be sent by e-mails.

**11. Are there any legal regulations governing the time within which tenders have to/can be submitted to the contracting authority?**

GEO 34 provides for the calculation methods of the deadlines for the submitting of the tenders for each procedure for the awarding of the public procurement contracts.

- A. Thus, in the case of open tender when the estimated value of the contract exceeds the following thresholds:
- a) EUR 125,000 for services/products (the contracting authority complies the provisions of Art. 8 (a) – (c) of GEO 34);
  - b) EUR 400,000 for services/products (the contracting authority complies the provisions of Art. 8 (d), (e) of GEO 34);
  - c) EUR 5,000,000 for works,  
as a rule, a general deadline of at least 52 days between the date of transmission of the participation notice for publication in Official Journal of the European Union and the deadline for submitting the tenders must elapse.

The following are exceptions from the general deadline mentioned above:

- (i) if a notice of intent was published, the general term of 52 days is reduced to 36 days;
  - (ii) If the participation notice was sent for publication in the Official Journal of the European Union, in electronic format, the general term of 52 days is reduced by 7 days, as follows:
    - 52-7=45 days (without a notice of intent,
    - 36-7=29 days (with a notice of intent,
  - (iii) If the award documentation is published in SEAP, the general term of 52 days is reduced by 5 days:
    - 52-5=47 days (without a notice of intent, 45-5=40 days (without a notice of intent, with a participation notice sent in electronic format to the Official Journal of the European Union, 29-5=24 days (with a notice of intent, with a participation notice sent in electronic format to the Official Journal of the European Union,
- B. In case of an open tender when the estimated value of the contract is under the thresholds mentioned above, i.e. (EUR 125,000, EUR 400,000, and respectively EUR 5,000,000):
- 1. Rule: at least 20 days between the date of transmission of the participation notice for publication in Official Journal of the European Union and the deadline for submitting the tenders.
  - 2. If the award documentation is published by SEAP, the general term of 20 days is reduced by 5 days: 20-5=15 days.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

No.

**13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

The contracting authority has the obligation to specify the qualification and selection criteria in the participation notice and, in case the criterion regarding the granting of the contract is the most economically advantageous offer, the calculation algorithm of the score; the participation notice must be submitted together with an opportunity report providing reasons for the procurement of advertising services/advertised products (services) works, at the same time

mentioning the intended impact and the criteria for the measuring of the obtained result.

The contracting authority is entitled to apply qualification and selection criteria only with regard to:

- a) personal status of the candidate;
- b) capacity to carry out his/her business activity;
- c) economic and financial status;
- d) technical and/or professional capacity;
- e) quality assurance standards;
- f) standards regarding the environment protection, in certain cases mentioned by GEO 34.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Any competing bidder, including the foreign bidders, without any restriction, whose rights or interests were infringed by a deed of a contracting authority is entitled to challenge the respective deed either through the common proceeding before the administrative litigation courts or through the special procedure provided by GEO 34.

- a. The special procedure provided by GEO 34 is conducted before the National Council for Settlement of Contestations (“CNSC”).

CNSC is a special body created to review and take decisions on any challenge brought against any deed issued in regard to an award procedure. The decisions of this body may be challenged before the Administrative Litigations Section of the Court of Appeals competent in the jurisdiction of which the contracting authority is located. The court decision is final and irrevocable.

- b. The common judicial proceeding is followed before the administrative courts and is subject to a preliminary challenge filed by the applicant with the contracting authority. The decision of the administrative court ruling on the merits of the case may be appealed with the superior administrative court, the decision of the latter being final and irrevocable.

The applicant may choose for only one of the two procedures mentioned above.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

As mentioned above under item 14, there are no such restrictions.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

The claims for damages caused within the course of the awarding procedure may be filed only with the courts, according to the conditions set out in GEO 34, or by filing a separate legal action, according to the common procedure.

The damages caused by a deed of the contractive authority or by not solving in due term an application regarding the awarding procedure, by non-complying with public procurement legal provisions, may be granted only after the annulment of such deed or other remedies carried out by the contracting authority.

If the damages are claimed in relation to the costs/expenses for preparing the bid and attending the awarding procedure, the party which is claiming damages must prove the non-compliance with the provisions of GEO 34, and the fact that it would have had a realistic chance to be awarded the contract, which was compromised further to such non-compliance.

The claims for damages caused within the awarding procedure are subject to a stamp fee of 2% of their value.

The claims in connection with the awarding procedure which are not pecuniary (i.e. there is no valuation in money if the claim) are subject to a stamp fee of RON 2,000, i.e. around EUR 470 if by such claims, there are also damages requested, the requested amount of damages will be subject to application of the above-mentioned fee of 2% of their value.

A contract awarded in breach of the conditions set forth under public procurement legislation may be annulled. The ascertaining of the contraventions and the application of sanctions is carried out by the National Regulatory and Monitoring Authority for Public Procurement (“ANRMAP”). Any person is entitled to notify ANRMAP with respect to an alleged infringement of the provisions regarding public procurement contracts and to any procedural aspect regarding the award procedure.

In case the public procurement contract had legal effects or if the ascertaining of the nullity thereof by the Court of Appeals had more negative effects than positive effects and only if there are imperative reasons of general interest, the court may order:

- a. limitation of the effects of the contract, by diminishing the performance deadline thereof; and/or shorting the deadlines for the performance of the contract
- b. application of a fine to the contracting authority up to 2% of the value of the object of the contract, the amount of the fine being reversely proportional to the possibility to limit the effects of the contract according to the provisions of mentioned in item (a) above.

## 17. Can your office

- **give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

Yes.

- **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

Yes.

- **Please name a contact person within your office for questions of public procurement law!**

Magda Alexandru.

# Singapore

## **CitiLegal LLC**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

No. There are no legislation governing the award of contracts by contracting authorities.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

No. See answer to (1).

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Government policy for awards of contracts are as follows.

Quotations are requested for contracts between S\$3001 and S\$70,000. Invitations to tenders are issued for contracts exceeding S\$70,000 in value.

There are three types of tender: open tender, selective tender (where a pre-qualification exercise is held to shortlist applicants who are then invited to bid on GEBiz) and limited tenders (by invitation only tenders). Limited tenders are held where the contract concerns national security or are considered to be impractical for open tenders.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Please see answer to (3).

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

There is no legal requirement that a potential bidder must have a specific legal form although the terms of tender may stipulate specific requirements.

However, in order to bid for Government projects, a bidder must first register with GeBIZ (Government Electronic Business, an on-line government procurement portal) as a government supplier (also known as a “GeBIZ Trading Partner”).

For some tenders, a bidder may also need to be registered as an Expenditure and Policies Procurement Unit (EPPU) Supplier or Building and Construction Authority (BCA) Supplier.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

There is no legal prohibition against either although specific tender documents may impose their own specific requirements.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

There is no legislation stipulating that bidders must have a registered office or branch. A foreign company may apply to be registered as a GEBiz Trading Partner and submit tenders on GEBiz. The terms of a specific tender may stipulate its own requirements.

Singapore law also requires foreign companies doing business or having a place of business to be registered as a branch in Singapore. Hence, having a Singapore registered entity will be relevant if the bid is accepted and if the contract has to be performed in Singapore.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

Bids or quotations are submitted electronically on GEBiz so bids can be submitted from abroad.

The terms of the tender may require both domestic and foreign bidders to submit information concerning their due incorporation, good standing, audited financial statements etc. Bidders for the recent casino projects were known to be subject to intense scrutiny and due diligence.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Quotation and tenders are submitted electronically through GEBiz (an English portal). The terms of some tenders may require hard copies to be submitted. A presentation to the authorities may also be required.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

No.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

Generally no, unless otherwise specified in the tender documents.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

There is no legal selection criteria. The authorities will assess if the tender meets the critical criteria set out and offers “value for money”. Depending on the value and type of the contracts, these critical criteria may include meeting minimum capital and/or financial criteria and requisite experience.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

No.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

No.

**17. Can your office**

**– give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

Yes.

**– represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

No, there is no such protection.

**– Please name a contact person within your office for questions of public procurement law!**

Singapore

# **Slovakia**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes, the Slovak legal system particularly the Act on Public Procurement No. 25/2006 Coll. (hereinafter referred to as “APP”) regulates public award of supply contracts, building works contract and service contracts. APP fully implemented European legislation related to the public procurement.

**2. Do the procedures for the award of contracts depends on the kind of goods, services etc. which are to be procured?**

Yes, there are some differences in procedures for the award of the contract according to the type of goods, works and services to be procured.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes, the procedure depends on the estimated value of the contract. APP distinguishes procedures for the award of contracts upon financial limits and sets rules for estimation of value of the contract. The APP divides the contracts into four categories, i.e. small-value contracts, contract below the threshold, contract below the limit and contract above the limit. Article 4 of the APP specifies the thresholds of the contracts in detail. The essential thresholds (for contracts above the limit) are the following.

Related provisions of APP / Financial limits valid from 01.01.2008 on the ground of Com. Reg. No. 1422/2007 (in EUR):

- § 4 sec. 2. a) APP - where a supply contract is awarded by a contracting authority pursuant to Article 6 (1) (a); for a contracting authority in the defence sector in the event of a contract for the delivery of supplies listed in Annex 4 of the APP: 133 000,- EUR
- § 4 sec. 2. b) APP - where a supply contract is awarded by a contracting authority pursuant to Article 6 (1) (b) to (e), for a contracting authority in the defence sector in the event of a contract for the delivery supplies not listed in Annex 4 of the APP: 206 000,- EUR
- § 4 sec. 2. c) APP - where a service contract is awarded by a contracting authority pursuant to Article 6 (1) (a) except a service contract referred to in (e) § 4 sec. 2 of the APP: 133 000,- EUR

- § 4 sec. 2. d) APP - EUR 236 000 where a service contract is awarded by a contracting authority pursuant to Article 6 (1) (b) to (e) § 4 sec. 2 of the APP: 206 000,- EUR
- § 4 sec. 2. e) APP - where a contract is awarded for the provision of a service included in category 8 of Annex 2, category 5 telecommunications services pursuant to the Common Procurement Vocabulary<sup>7</sup> (hereinafter referred to as the CPV) corresponding to CPC 7524, 7525, 7526 codes and a service listed in Annex 3 awarded by a contracting authority: 206 000,- EUR
- § 4 sec. 2. f) APP - where a supply contract or a service contract is awarded by a contracting entity: 412 000,- EUR
- § 4 sec. 2. g) APP - in the event of a building works contract. 5 150 000,- EUR

#### **4. In what way does the contracting authority have to inform the market about the intended procurement?**

The obligation of the contracting authority to inform the market about the intended procurement depends on the type of the contract;

- a) small-value contract - the contracting authority is not obliged to publicly inform the market
- b) contract below the threshold - the contracting authority shall issue the contract notice publicly
- c) contract below the limit - the contracting authority shall send a contract notice to the Office for Public Procurement (hereinafter referred to as the “Office”) to be published in the Journal of Public Procurement (hereinafter referred to as the “Journal”)
- d) contract above the limit - the contracting authority shall send a notice to the Office for Official Publications of the European Communities (hereinafter referred to as the “Publications Office”) and to the Office for publication. A prior notice and a periodic indicative notice may be published on the internet in the contracting authority’s profile.

#### **5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No, in accordance with the APP, a candidate (potential bidder) shall be a natural person, a legal entity or a group of such persons that delivers supplies, executes building works or provides services on the market and is interested to participate in a restricted procedure, in a negotiated procedure or in a com-

petitive dialogue, or has taken over tender documents in an open procedure (i.e. the political party may not be a candidate). The criteria for selection of participants must not restrict participation through a requirement concerning its legal form. Neither a contracting authority nor a contracting entity may request that a supplier group establish legal relationships before a tender submission. A contracting authority and contracting entity may however request to establish legal relationships in the event that the tender of a supplier group has been accepted and establishment of legal relationships is necessary due to a proper contract performance (Article 31 of the APP).

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

A supplier group may take part in the public procurement. A supplier group shall demonstrate the meeting of the conditions of participation in public procurement regarding financial and economic standing and technical abilities and professional suitability shall be demonstrated jointly. Each tenderer (bidder) may submit one tender only. In the same contract award procedure, a tenderer must not be a subcontractor of another tenderer or a member of a group submitting a tender. The contracting authority and contracting entity will exclude a tender which has been submitted contrary to aforementioned (Article 39, section 5 of the APP).

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

It is not prohibited by the law to submit a tender for the contract directly from abroad and it is not required for the bidder to be established in the Slovak Republic. The contracting entity may exclude a supply tender where the share of products originating in a non-EU country pursuant to a special regulation represents more than a half of the total value of the products tendered. It applies for the contracts above the limit (Article 75 of the APP).

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain**

**additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

The same criteria apply to the domestic and foreign persons who intend to take part in the public award of contracts. (as specified in question 13). The contracting entity shall assess the meeting of the conditions of participation in accordance with the rules it has specified. In the event that a tenderer or candidate is not established in the Slovak Republic and the country of his establishment does not issue some of the documents necessary to demonstrate the meeting of the conditions for participation in the public award of contracts concerning the personal situation as specified above, such documents may be replaced by a solemn declaration pursuant to the regulations in effect in the country of his establishment. Where a tenderer or candidate from a Member State is authorized to exercise the requested activity in the country of his establishment, he must not be excluded by the contracting authority and contracting entity by the reason that a certain legal form is requested to perform the required activity on the basis of law.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Yes, it is possible.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Tenders and other documents and documents in public procurement shall be submitted in the state language. In a contract notice or in a notice used as a call for competition, the contracting authority and contracting entity may allow the tender submission in another language as well (Article 19 of the APP). In respect of the form required, notice, submission of documents and communication between a contracting authority or contracting entity and a tenderer or candidate may be carried out in writing by post, fax, by electronic means or by telephone or by a combination of those means. The contracting authority and contracting entity shall determine the means of communication so that they are generally available and that the opportunities of tenderers or candidates to participate in public procurement are not restricted (Article 16 of the APP).

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

The APP stipulates that a tender shall be delivered in the tender submission period. A tender delivered after the expiry of such tender submission period it will be returned to the tenderer unopened or unencrypted. The contracting authority shall decide on the specific time limit, taking into account the limits set by the APP, e.g. the tender submission period shall be at least 52 days from the date of dispatch of the contract notice to the Publications Office, or 36 days from the dispatch of the contract notice to the Publications Office etc. in case of the contracts above the limit. Further conditions are stipulated by the APP.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

As a general rule, bidders can not claim reimbursement for the cost of submitting a bid. However, the contracting authority/contracting entity may suggest the costs reimbursement.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria**

Yes, the bidders have to demonstrate the suitability to perform the contract in respect of their economic and financial standing, professional and technical knowledge and ability.

*Criteria for evaluation of bidders*

Personal situation - only a person may take part in the public award of contracts who meets the conditions of participation concerning his personal situation:

- a) neither he nor his statutory body or a member of the statutory body has been lawfully convicted for the offence of corruption, for the offence of damaging the financial interests of the European Communities, for the offence of laundering of the proceeds of crime or for the offence of establishing, plotting and supporting a criminal group,
- b) neither he nor his statutory body or a member of his statutory body has been lawfully convicted for an offence concerning the professional conduct of business,

- c) is not subject of proceedings for the declaration of bankruptcy, is not bankrupt or being wound up, nor a bankruptcy petition has been rejected against him due to lack of estate,
- d) does not have a history of arrears in the payment of contributions to health insurance, social insurance and contributions to seniors pension savings scheme to be collected by a judicial execution of a decision,
- e) does not have a history of tax arrears to be collected by a judicial execution of a decision,
- f) is authorised to deliver supplies, execute building works or provide a service,
- g) over the preceding five years, he has not violated the prohibition of illegal employment pursuant to a special regulation,
- h) he has not committed any grave professional misconduct over the preceding five years, which can be proven by the contracting authority and contracting entity.

Financial and Economic Standing - as a rule, financial and economic standing may be proven by

- a) statement of a bank or foreign bank branch, which may be a commitment of a bank or foreign bank branch to extend a loan,
- b) blue card of professional liability insurance or blue card of business liability insurance in the event such insurance is required,
- c) balance sheet or statement of assets and liabilities or data therefrom, or
- d) an overview of the total turnover or an overview of the turnover made in the field related to the object of contract, for not more than three economic years, for which they are available depending on the establishment or commencement of the activity operation.

To demonstrate financial and economic standing, a tenderer or candidate may use financial resources of another person regardless of their legal relationship, which he would have available for the contract performance. In such event, he shall submit the contracting authority or contracting entity a document proving that fact, which may be a commitment of that person.

Technical Ability or Professional Suitability - technical ability or professional suitability may be demonstrated by a document or by documents depending on the type, quantity, importance or use of the supply, building works or services, according to the rules stated in Article 28 of the APP. To demonstrate one's technical ability or professional suitability, a tenderer or candidate may use technical and professional capacities of another person regardless of their

legal relationship, which he would have available for the contract performance. In such event, he shall submit the contracting authority or contracting entity a document proving the fact, which may be a commitment of that person.

*Criteria for evaluation of tenders*

Article 35 of the APP sets criteria upon which contracting authority and contracting entity shall evaluate the tenders. The tenders shall be evaluated on the basis of

- a) economically the most advantageous tender, or
- b) the lowest price (most common).

The criteria for the evaluation of tenders shall be specified

- a) by the contracting authority in a contract notice,
- b) by the contracting entity in a notice used as a means of calling for competition, in an invitation to confirm repeated interest, in an invitation to tender, or in an invitation to negotiate, or in tender documents.

Where tenders are evaluated on the basis of economically the most advantageous tender, the contracting authority and contracting entity shall specify the individual criteria relating to the object of contract, which are in particular the price, technical execution, functional characteristics, environmental characteristics, operating costs, operating cost effectiveness, post-warranty service and technical assistance, delivery date of the supplies. In addition to the individual criteria, the contracting authority and contracting entity shall also specify the rules for application of the criteria which are to ensure a quality-based distinction of meeting of the individual criteria. The rules for application of the criteria specified by the contracting authority and contracting entity must be non-discriminatory and must support fair competition. The contracting authority and contracting entity shall determine a relative weight for each of the criteria.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

The possibility of the primary legal protection depends also on the type of the contract.

No restrictions shall apply to foreign bidders.

### *Request for remedy*

There is a primary legal protection under the APP. On purpose of review procedures pursuant to the APP the person who believes that his rights or rightfully protected interest have been or might have been affected, prior to conclusion of a contract, by the course of action of a contracting authority, may file a request for remedy concerning:

- a) the conditions set out in the notice, in the tender documents or other documents provided by the contracting authority, contracting entity, or
- b) the conditions set out in the call for submission of tenders or designs, or
- c) the selection of candidates in a restricted procedure, in a negotiated procedure or in a design contest, or
- d) exclusion of a tenderer, candidate or participant. or
- e) the result of evaluation of tenders or designs. or
- f) an action of a contracting authority, contracting entity.

The request for remedy must be in written form and must include all information named in APP (Article 136 section 2). A written request must be delivered to the contracting authority, contracting person within seven days from the date of publishing the notice. Within the seven days from the delivery of a complete request for remedy submitted within the time limit the contracting authority, contracting entity shall deliver

- a) a notice in writing about the result of settlement of the request for remedy with a justification and setting out the manner and time limits for remedy to the claimant and all known tenderers, candidates or participants, or
- b) a notice in writing to the claimant stating that the request for remedy has been rejected with a justification.

This procedure applies to the contracts below the threshold, contracts below the limit and contracts above the limit.

### *Lodging of a protest*

In case, the tenderer, candidate or other person as specified in the APP is not satisfied with the results of the above mentioned proceedings (Request for remedy), he may lodge a protest. Such protest must be preceded by filing of a request for remedy. Furnishing a bail shall be a condition for the Office to act in protest proceedings. Article 138 of the APP explains the procedure in detail. Until the decision regarding protests, the Office may issue a decision of

preliminary ruling to suspend the action of the supervised person (contracting authority, contracting entity) for a time not longer than the delivery of the Office decision regarding protests. This procedure applies to the contracts below the limit and the contracts above the limit.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

The possibility of the primary legal protection depends also on the type of the contract. The conditions are described in question 14 above.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

*Damage claims*

There is a secondary legal protection in case a bidder suffers damages due to an irreversible act contrary to public procurement law. He can claim for damages at civil court providing that

- a) there is evidence of an act contrary to public procurement law, which is a violation of provision that protects bidders and
- b) through this the bidder who is supposed to be protected by the provision is affected (and suffered damage).

*Audit of Contract Award Procedure*

The Office shall audit the contract award procedure prior to the conclusion of a contract or framework agreement and in the event of audit prior to closing a design contest on its own initiative only. The Office shall audit a contract award procedure after the conclusion of a contract or framework agreement and in the event of audit after closing a design contest on the initiative of natural persons and legal entities that are not entitled to file protests and on its own initiative.

*Conciliation proceedings*

In addition, there is other secondary legal protection under Article 151 of the APP, where a tenderer, candidate or other person who believes that its rights or rightfully protected interest have been or might have been affected by the

course of action of a contracting entity in the award of a supply, building works or service contract above the limit, it may seek commencement of conciliation proceedings by the European Commission. The motion shall be filed with the European Commission or the Office, which shall forward it to the European Commission without any delay.

#### *Motion to Nullify a Contract*

Where the entity supervised by the office has concluded a contract or framework agreement contradictory to this Act, the Office may file a motion to have it nullified by the court within the time limit of one year from its conclusion.

### **17. Can your office**

- **give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- **Please name a contact person within your office for questions of public procurement law!**

Our office is competent to:

- give legal advices to foreign clients concerning bid preparation in the Slovak republic
- in this matter represent foreign clients before all public offices/courts in the Slovak Republic
- the contact persons for relations concerning public procurement law are Tomáš Kamenec and Zuzana Šatková

Slovakia

# **South Africa**

## **Fluxmans Inc**

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## **1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

1.1 Yes - The awarding of contracts by a public sector institution to a private party must be structured on a combination of financial, technical and Black Economic Empowerment (“BEE”) components in order to achieve optimal value for money in government’s delivery of infrastructure and services. To this end the award of contracts by public sector institutions is governed by particular pieces of legislation, regulations and practice notes. The most important of these include:

1.1.1 the Constitution of the Republic of South Africa;

1.1.2 the Promotion of Administrative Justice Act;

1.1.3 the Preferential Procurement Policy Framework Act (“the PPPFA”) which prescribes that all procurement procedures must also include a preference for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination;

1.1.4 the Public Finance Management Act (“PFMA”);

1.1.5 the Municipal Finance Management Act (“MFMA”); and

1.1.6 Treasury Regulations and Treasury Practice Notes issued in terms of the PFMA and MFMA. The PFMA and Treasury Regulations and Practice Notes issued in terms of the PFMA govern national and provincial government departments and public entities while the MFMA and Treasury Regulations and Practice Notes issued in terms of the MFMA govern the municipal sphere.

## **2. Do the procedures for the award of contracts depend on the kind of goods, services etc, which are to be procured?**

2.1 Generally No – The general position is that a contract must be awarded through a selection process that must be fair, equitable, transparent, cost effective and competitive. Each stage of the procurement process must be in accordance with the law and prescribed procedures; there must be accountability, responsiveness and openness in the decision making of the institution; all bidders at each stage of a procurement process must have an equal chance of competing for the contract; and no action taken by the institution may prejudice their competitiveness.

2.2 There are however provisions that may add certain nuances to this position such as the fact that:

2.2.1 in the case of municipalities, if a contract will impose financial obligations on the municipality beyond three years, the municipality may only enter into that contract if certain requirements are met which include liaising with the relevant stakeholders as well as the public on the proposed terms of the contract; 2.2.2 in the case of Public Private Partnerships (“PPP’s”) entered into by provincial and national departments, when undertaking the feasibility study for approval by the Treasury Department, the accounting officer or authority of the particular institution must undertake a feasibility study that meets with certain requirements depending on whether:-

2.2.2.1 the PPP involves the performance of an institutional function; or

2.2.2.2 the PPP involves the use of state property for its own commercial purposes in a service delivery project.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

- 3.1 Generally No – However, with BEE being a key evaluation component in the awarding of contracts, and in compliance with the PPPFA, the BEE component of a tender bid will constitute 10% of the bid evaluation weighting. The price and technical components will be weighted within the remaining 90%, as appropriate to the project. BEE in the bid will be evaluated against a balanced scorecard designed for the project, and bidders must achieve a minimum threshold of 50% of the total BEE points. If a bid fails to pass this BEE threshold, it should not be evaluated further.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

4.1 Procurement opportunities are brought to the attention of the public through various channels including the government tender bulletin and newspapers.

4.2 Members of the public have the right to be informed of decisions which can materially and adversely affect their rights, property and reasonable expectations. To this extent, an institution must thus comply with empowering legislation when deciding to procure and, to the extent that empowering legislation is silent on the procedures to follow in informing the public, must decide between holding a public enquiry and following notice and comment procedures.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

A contract can only be entered into with an institution, entity or person legally competent to operate a business activity.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes - Bidders are allowed to submit bids as consortia and as main contractor and subcontractor. With BEE being an imperative for the success of any bid, bids are generally submitted by consortia and contracting partnerships that have been formed to enhance BEE credentials. As a matter of fact, at the Request For Qualification (“RFQ”) stage of the bidding process, all BEE elements and targets which the institution intends for the project are communicated clearly with potential bidders so that appropriate consortia and contracting partnerships can be formed and the necessary financing sourced. It is with this in mind that as a matter of principle no contract may be issued to the market by an institution without a BEE balanced scorecard for the project containing a clear and appropriate set of BEE elements, targets, minimum thresholds and weightings.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

As far as PPP’s are concerned, potential bidders are typically special purpose vehicles incorporated in the Republic of South Africa as private limited liability companies for the sole purpose of exercising the rights and performing the obligations under the PPP agreement. It would not be impossible to submit a bid for a contract from abroad but the chances of the bid being successful are very minimal considering that if a bid does not have a BEE component it will not be considered at all.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain**

## **additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

- 8.1 Yes there will be certain additional supporting documents and most certainly these will be indicated in the bidding documentation. Examples include:-
- 8.1.1 the necessary tax clearance certificates;
  - 8.1.2 documents indicating the legal status and profile of the bidder;
  - 8.1.3 documents indicating the BEE profile of the bidder;
  - 8.1.4 documents evincing the requisite South African Bureau of Standards qualification; and
  - 8.1.5 documents indicating a history of involvement in similar projects.

## **9. Is a multinational bidding consortium allowed to submit a bid?**

As far as PPP's are concerned, potential bidders are typically special purpose vehicles incorporated in the Republic of South Africa as private limited liability companies for the sole purpose of exercising the rights and performing the obligations under the PPP agreement. It would not be impossible for a multinational bidding consortium to submit a bid provided that the consortium has the requisite BEE credentials. If the requisite BEE credentials are not present then the chances of the bid being successful are very minimal considering that if a bid does not have a BEE component it will not be considered at all.

## **10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Bid documents will specify which one/s of the many South African official languages can be used in submitting the bid. In similar vein, they will specify as well the form in which the bids must be submitted.

## **11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

No – The time limits relating to when bids have to be submitted by are specified in the bid documents. In the case of PPP's, the process, beginning from the RFQ stage and ending at the bid submission date, and also depending on the type of PPP, can take anything between 4 and 50 weeks.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

As a general rule, bidders are not usually entitled to claim their costs for preparing their bid.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

- 13.1 The awarding of contracts by a public sector institution to a private party must be structured on a combination of financial, technical and BEE components in order to achieve optimal value for money in government's delivery of infrastructure and services.
- 13.2 The BEE component of a bid will constitute 10% of the bid evaluation weighting. The price and technical components will be weighted within the remaining 90%, as appropriate to the project. BEE in the bid will be evaluated against a balanced scorecard designed for the project, and bidders must achieve a minimum threshold of 50% of the total BEE points. If a bid fails to pass this BEE threshold, it should not be evaluated further.
- 13.3 The Bid evaluation panel does however, subject to provisions in the governing pieces of legislation and regulations, also set their own systems and criteria for the evaluation of bids. Where this has been done it will be saliently spelled out in the bid documentation.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

- 14.1 Yes – the decision to award a contract by an institution amounts to an administrative action. In South Africa everyone has the right to administrative action that is lawful, reasonable and procedurally fair and everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- 14.2 Any person, including foreign bidders, may institute proceedings in a court or a tribunal for the judicial review of an administrative action and the court or

tribunal has the power to judicially review the administrative action if certain conditions are satisfied, including amongst others, the presence of procedural unfairness.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

No – it does not depend on any conditions related to the kinds of goods or services to be procured.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

If a bidder is not successful in enforcing primary legal protection then, to the extent that: (a) it has suffered damage, (b) as a result of, (c) a wrongful and, (d) culpable (e) conduct of the institution, it will be entitled to institute a claim in damages.

**17. Can your office:**

**17.1 give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

Yes

**17.2 represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

Yes

**17.3 Please name a contact person within your office for questions of public procurement law**

South Africa

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# **South Korea**

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## **1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes. There are laws governing general public procurement procedures. There also exist separate laws and regulations governing international bidding for public procurement.

The international bidding means a bidding open to only foreigners or both foreigners and Koreans. Public procurement contracts that may be awarded by the international bidding are limited to the contracts whose value meet or exceed certain threshold amount designated by the Ministry of Strategy and Finance in accordance with the relevant international treaties on public procurement or other international rules. Such threshold amount varies depending on the relevant treaties and type of the contract. (For example, the threshold amount promulgated in accordance with the WTO's Agreement on Government Procurement is KRW 200 million for contracts for goods/services and KRW 7.6 billion for construction contracts.) However, certain types of public procurement contracts such as contracts for the procurement of defense goods cannot be awarded by the international bidding.

While the public procurement laws provide broad, general standards for the award of a public procurement contract, details of a specific bidding including eligibility and requirements for the submission of a bid are usually specified in the public notice for the bidding.

## **2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

In principle, public procurement contracts should be awarded based on general competition of the bidders, regardless of the kind of good, services, etc. which are to be procured. However, when deemed necessary in light of the purpose, nature and size of a contract, the contract may be awarded by other methods such as a competition among bidders designated by the contracting authorities or the execution of the contract with a person designated by the contracting authorities without competition procedures. For example, when the goods to be procured are military goods manufactured or sold by a defense contractor, the relevant procurement contract may be awarded without going through the general competition procedures. Again, detailed procedures for a specific bidding/procurement contract are specified in the public notice for the bidding/procurement contract.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

As described in (2), while public procurement contracts should, in general, be awarded based on general competition of the bidders, other methods may be used depending on the value and kind of the contracts. For example, a construction contract under the Basic Act on the Construction Industry may be awarded to a person designated by the contracting authorities without general competition procedures if the estimated value of the contract is KRW 200 million or less. On the other hand, for a construction contract with an estimated value of KRW 30 billion or more, bidders eligible to participate in bidding for such contract are determined by the contracting authorities before the formal bidding process begins.

In sum, the procedures for the award of public procurement contracts may vary depending on both the value and kind of the contracts.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

When the intended procurement is to be awarded based on competition through bidding procedures, a public notice on the intended procurement should, in principle, be made using Korea ON-line E-Procurement System (<http://www.g2b.go.kr/>) (the “KOEPS”). If necessary, public notices on newspapers, etc. may be used together with notices on the KOEPS.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

There is no legal requirement that a potential bidder should have a specific legal form. The bidder, however, should have a business registration certificate for the relevant business in order to participate in the bidding. The business registration certificate or an equivalent thereof is also required for registration with the KOEPS.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

There is no legal restriction on this. Usually, whether to allow joint offers or not is specified in the public notice for the bidding.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

For the international bidding, a registered office or branch office in Korea is not required, and submission of a tender directly from abroad is allowed.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

In an international bidding, the governmental officials must be fair in making a decision on the award of contracts, and information should be provided on a non-discriminatory basis. While there is no legal requirement that foreign bidders should submit more supporting documents than Korean bidders, the contracting authorities may, by the relevant public notice, require foreign bidders to submit additional documents.

**9. Is a multinational bidding consortium allowed to submit a bid?**

There is no significant legal restriction on the multinational bidding consortium. Whether a multinational bidding consortium is allowed or not is usually specified in the public notice for the bidding.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

In principle, the Korean language should be used for the international bidding. However, when it is found that the use of a foreign language is unavoidable due to certain circumstances (for example, when the suppliers of the goods to be procured are located in a limited geographical area), English, French, Spanish or the language of the country of the suppliers may be used instead.

In principle, tenders should be submitted in person at the time and location designated in the public notice for the bidding. However, tenders for an international bidding may be submitted by mail or fax, if necessary. Submission of a tender using the KOEPS is common in practice.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Usually, the deadline for the submission of a bid is specified in the public notice.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

In principle, bidders may not claim their costs for preparing the bid. However, the deposit for the submission of the bid and deposit for the execution of the contract may be returned as described below.

Under Korean laws, a person who wishes to participate in a bid must pay 5/100 or more of the value of the relevant contract as a deposit for the submission of the bid. Such deposit is returned to the bidder if the bidder (i) fails to win the bid or (ii) wins the bid and enters into the contract with the contracting authority. However, such deposit is forfeited if the bidder wins the bid but fails to enter into the relevant contract.

In addition, the winning bidder who wishes to enter into the contract must pay 10/100 or more of the value of the relevant contract as the deposit for the performance of the contract. Such deposit is forfeited if the winning bidder fails to perform its obligation under the contract. Such deposit may be returned upon request immediately after the purpose of the contract has been satisfied.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

The relevant laws of Korea provide that, in order to receive the award of a contract, the bidder should satisfy one of the following criteria:

- (i) the bidder has sufficient ability to perform its obligations under the contract and has offered the lowest price among bidders;

- (ii) the bidder's tender is found to be most favorable to the contracting authority based on selection criteria specified in the public notice for the bidding; or
- (iii) the bidder is selected by the contracting authority based on the review of bidders' ability to perform its obligations under the contract in the order of prices offered by bidders (from low price to high price) among those bidders who submitted prices lower than the estimated price.

The contracting authorities may establish additional selection criteria, which are typically specified in the public notice for the bidding.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

A person who suffered disadvantage in an international bidding process (the "Disadvantaged") may file an objection demanding that the relevant act should be cancelled or corrected. Such objection may be made within (i) 15 days from the date the relevant act occurred or (ii) 10 days from the date the Disadvantaged became aware of the relevant act. The objection should be submitted to the head of the contracting authority (the "Head").

If the Disadvantaged disagrees with the decision of the Head, a request for the review of the decision of the Head may be filed with the Committee for the Resolution of Disputes Related to International Contracts (the "Committee") established under the Ministry of Finance and Strategy. Such request should be filed within 15 days from the date the Disadvantaged received the notice of the decision of the Head. The Committee has the power to order the bidding procedures to be postponed or suspend the execution of the contract.

Alternatively, the Disadvantaged may file a lawsuit with the court to seek preliminary injunction to prevent the execution of the contract.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

The legal protection described above is generally applicable to all kinds of public procurement contracts.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

In addition to the primary legal protection described in (14), civil remedies may be available even after the contract has been awarded. Significant factors in determining whether to award damages include the following:

- (i) a showing that the claimant had reasonable expectation/reliance that the claimant would receive the award of the contract;
- (ii) a showing that the claimant incurred monetary expenditures/losses or lost other opportunities for profit based on the expectation/reliance described above; and
- (iii) a showing that the other party refused to enter into the contract without a justifiable cause.

**17. Can your office**

- (i) give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- (ii) represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- (iii) Please name a contact person within your office for questions of public procurement law!**

Yes, we can

- (i) advise foreign clients on all aspects of public procurement laws and procedures of Korea and assist foreign clients at all stages of public procurement projects from bid preparation to the execution and closing of the contract; and
- (ii) represent foreign clients seeking any legal remedy available under the laws of Korea.

For any question relating to public procurement laws and procedures, please contact:

- (a) Thomas P. Pinansky, [tom.pinansky@barunlaw.com](mailto:tom.pinansky@barunlaw.com) or
- (b) Joo Hyoung Jang, [joohyoung.jang@barunlaw.com](mailto:joohyoung.jang@barunlaw.com)

South Korea

# Switzerland

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## **1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes, the legal system in Switzerland provides specific procedures for the award of public contracts<sup>1</sup>:

- Open Procedure: General submission procedure. All interested competitors may submit tender offers.
- Restricted Procedure: Only those competitors invited by the contracting authority may submit tender offers.
- Negotiated Procedure: Direct consultation of one or more competitors by the contracting authority. Limited by law to specific cases<sup>2</sup>.

Contracting authorities in Switzerland are either Federal authorities or Cantonal authorities. As far as the latter are concerned, specific Cantonal Acts might be applicable in addition to the relevant International and Federal Law.

## **2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Basically not. The above mentioned procedures are applicable on any kind of public contract except from specific distinctions which are inherent in the type of contract. The contracts are divided into: – works contracts; – supply contracts; – public service contracts.

## **3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

The procedures do basically not depend on the value of the goods, services etc. Thresholds according to Swiss law comply with GATT thresholds. For the year 2009 therefore: – CHF 9'575'000 for works contracts; – CHF 248'950 for supply and public service contracts<sup>3</sup>. Public contracts with values below

1 Federal Act on Public Procurement (SR 172.056.1); Ordinance on Public Procurement (SR 172.056.11)

2 Art. 13 of the Ordinance on Public Procurement: e.g. no tender offers received after deadline in open or selective procedure, only one bidder in the specific market, very urgent cases, purchase at commodity exchange etc.

3 estimated value of public contract ex VAT; different thresholds for telecommunication, electricity and railways [Art. 2a para. 3 Ordinance on Public Procurement (SR 172.056.11)]

these thresholds do not have to proceed according to the rules of public procurement.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Public contracts of Federal Authorities have to be announced in the Swiss Commercial Gazette, public contracts of Cantonal Authorities have to be announced in their local Commercial Gazettes. International announcements according to a treaty have to comply with the specific announcement regulation.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

According to the Federal Act on Public Procurement, the contracting authority is allowed to establish certain criteria for the bidder's financial, economical and technical abilities. Among these factors, the legal form can be of relevance especially for major projects. There are no strict requirements but at least there is some sort of optional provision. The competent authority has some leeway to weight the existence of a specific legal form.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes, both are possible.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender offer for the contract directly from abroad?**

It is possible to submit a tender offer for the contract from abroad. But since Switzerland is not a member of the EU, (all) foreign companies need to get permissions for employees that shall be sent to Switzerland in order to carry out a (public or private) contract. It depends on the country of the foreign company: if it is a EU member state, a declaration (for less than 90 work days per year) or a request for a work permit (for more than 90 work days per year) must be submitted to the competent authority for foreign employees - the latter also if it is not a EU member state. EU member states are basically entitled to

get such permission; for non EU member states the opposite is the case. Their chances to get a permission are significantly smaller and depend on the applicant's qualification. If he is able to show that his work in Switzerland requires specific knowledge, he has good chances to get the permission. In any case, either in case of a declaration or a request for work permit, the submission of the required documents must be filed with the competent authority<sup>4</sup> before the beginning of the project in Switzerland.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

Foreign bidders and domestic bidders must basically be treated equally (equality principle)<sup>5</sup>. The principle is restricted to: a) GATT member states that grant the principle also for Swiss competitors; b) other states that also grant the equality principle<sup>6</sup>. Within the equality principle, the contracting authority has a vast leeway for awards of contracts. The applicable GATT sub-agreement GPA provides two basic principles for awards: either the lowest price or the most economically advantageous tender offer<sup>7</sup>. Switzerland does apply the principle of 'most economical'.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Basically yes, but for the 'open procedure' only [see (1)] and if the contracting authority does not explicitly exclude consortia. All members of a bidding consortium have to be stated. Retirement of one member would be considered as significant change of the tender and must be disclosed immediately.

**10. In which language do the tender offers have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

4 Declaration: Federal Migration Department; Request for work permit: Cantonal authority for foreigners

5 Art. 1 para. 2 Federal Act on Public Procurement

6 Art. 4 Federal Act on Public Procurement

7 Art. XIII para. 4 lit. b Government Procurement Agreement (GPA) of the World Trade Organisation

The contracting authority is stipulating the language in its public contract notice. It is either German, French or Italian, depending on the respective community language. Public contract notices according to GATT/WTO must be written in one of the official languages of WTO<sup>8</sup>.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Deadlines must be appropriate to the particular case and its complexity and must basically not be shorter than 40 days<sup>9</sup>. Extensions of deadlines are valid for all bidders.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

Bidders can basically not claim their costs for preparing their bid. Exceptions can be granted by the contracting authority for special requirements but must be announced in the public contract notice.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

In the public contract notice and in compliance with the law, the contracting authority discloses the application criteria. They are binding. The authority is not allowed to apply unknown or later established application criteria. Bidders must be sure to submit all required answers, documents and references. Based on the application criteria, the contracting authority selects among the competitors according to the principle of the most economically advantageous tender offer [see (8)].

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please**

8 Art. XII para. 1 Government Procurement Agreement (GPA) of the World Trade Organisation

9 see Art. XI Government Procurement Agreement (GPA) of the World Trade Organisation for public contract notices according to GATT/WTO

**generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

There is no specific legal protection before the award. The award is confirmed by appealable decree. Appellate court for decrees of Federal Authorities is the Federal Administrative Court. In cases of obvious violations of the awarding rules, competitors may antecedently appeal to the competent regulatory authority ('Aufsichtsbeschwerde').

Legal protection is available for any competitor.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

An appeal to the competent regulatory authority before the award is restricted to obvious violations of the awarding rules, e.g. the equality principle or the principle that the application criteria must not be altered during the procedure. The regulatory authority is an administrative authority but not a court.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

Together with an appeal against the decree, the competitor is legally allowed to claim for compensation of damages<sup>10</sup>. The latter is granted if the decree was unlawful. The damage compensation is limited to expenditures for the public procurement procedure and some possible costs of an appeal.

**17. Can your office**

- **give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

<sup>10</sup> Art. 34f. Federal Act on Public Procurement

- **Please name a contact person within your office for questions of public procurement law!**
- “Yes, we can!”
- We have a department specialized in public law. Please get in touch with Dr. Anton W. Blatter or Karin Eisenring Hiestand in order to arrange for a first contact.

Switzerland

# **Thailand**

## **Vovan & Associés - Thailand**

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**1- Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes but the procedure may vary depending on the public person which issues the procurement:

- the ministries and affiliated administrations must comply with the regulations adopted by the Prime Minister’s Office;
- the local administrations must comply with the Regulation on Procurement of Provincial Administration issued by the Ministry of Interior;
- State owned enterprises have their own procurement regulations.

**2- Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be produced/provided?**

No.

**3- Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services, etc. which are to be produced (thresholds) and if so, what are the thresholds?**

The traditional procurement methods are used only for contract with a value below 2 million baths (about USD 66,000). Above this threshold, the electronic bidding procedure applies. In an electronic bidding, the bidders have to hand to the procuring authority a set of documents detailed in the terms of reference (TOR). Once the procuring authority has determined the qualified bidders, such bidders can take part to the electronic bidding by entering their bid in the administration’s computer system.

It should be noted that the new Thai government might issue a series of invitation for bidding related to infrastructure projects for which a special procedure applies under the *Regulation related to Public Mega-Projects for development of the country (2006)*.

**4- In what way does the contracting authority have to inform the market about the intended procurement?**

The contracting authorities need to use several channels to inform the market about the procurement, such as administrative publication, newspaper, radio and television. Besides, since most the electronic bidding applies in most cases,

the government has made a website which posts all the biddings ([www.goprocurement.go.th](http://www.goprocurement.go.th)).

**5- Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No, unless otherwise specified in the TOR.

**6- Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes, consortiums are allowed to submit joint offers, as general contractor and sub-contractor as well. However, foreign participants need to take into considerations the limits set by the foreign investment regulations (Foreign Business Act).

**7- Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

Although the e-bidding procedure may allow participants to take part to the bidding from abroad, the terms of reference will often require or imply a presence in Thailand. In case the foreign bidder does not wish to set up a legal entity in Thailand, it is still possible to fulfill the criteria through a consortium in which the Thai party will often act as the leader.

**8- If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad , does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

There is no discrimination between Thai and foreign bidders with the reserve of the provisions of the Foreign Business Act and the TOR. Now, the foreign bidder must be ready to provide documents to evidence its identity, the person to act on his behalf as well as its business credentials.

**9- Is a multinational bidding consortium allowed to submit a bid?**

Yes.

**10- In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

In principle, all the tender documents must be in Thai. It should be noted that the original documents written in English by a possible foreign bidder will be enclosed to the tender along with their Thai translation.

The procuring authority will review the bidding documents to determine the qualified bidders who will take part to the electronic auction.

**11- Are there any legal regulations governing the time within which bids have to /can be submitted to the contracting authority?**

Yes. The Regulation issued by the Prime Minister's office provides for a minimum period of 21 days which may be extended by the authority calling for bids.

**12- Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?**

No.

**13- Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

The Thai regulations do not set minimum criteria but guidelines, such as consideration of the price, quality and preference that should be given to Thai products. In practice, the TOR provides conditions of eligibility based on criteria that maybe very precise, such as special certifications.

**14- Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before this contract with the competitor is actually awarded (primary legal protection)? If so, please**

**generally explain the proceedings. Is such a primary protection available to foreign bidders without any restriction?**

Yes. There is no discrimination between the foreign and the domestic bidder. In case of irregularities in the bidding procedure, an unsuccessful bidder may submit a complaint at the government level, i.e. the contracting authority, the Council of State of the Prime Minister's Committee in charge of Procurement. At this stage, the bidding procedure or the decision to award the contract is suspended.

If the plaintiff does not obtain satisfaction, such plaintiff can then bring the action before the administrative court.

**15- If primary legal protection exists in your country, does it depend on certain condition, i.e., certain thresholds or the kind of goods, services, etc. to be procured? If so, what are the conditions?**

No, the right to legal protection is not to subject to conditions.

**16- If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g., through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

Inapplicable.

**17- Can your office :**

- Give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- Represent foreign clients seeking primary and secondary legal protection before all public offices /courts in your country?**

Yes, our office has experience in advising clients on procurement contracts, draft of joint-venture and consortium agreements, electronic biddings and dispute resolution in and out of courts.

- **Please name a contact person within your office for questions of public procurement law.**

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## **1. Does the Federal Government have specific procedures for the award of contracts by contracting authorities?**

The U.S. Congress enacted the Competition in Contracting Act and the Federal Procurement Policy Act that set forth the procedures used at the Federal level for the award of public contracts. The executive branch of the Federal Government created the Federal Acquisition Regulatory Council to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government via the Federal Acquisition Regulations (FAR). The prominent member of the Council is the Administrator of the Office of Federal Procurement Policy that provides overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government. Finally, other public contracts may be awarded based on the discretion of an executive agency.

Federal procedures are only used for public projects involving Federal spending or Federal Laws and Treaties. These procedures differ depending on whether a public contract involves a State or not. When a public contract involving the Federal Government occurs in a State, that State's procedures must also be recognized and followed. The majority of States share general guidelines for the award of public contracts, however, each of the 50 States also utilize unique procedures that must be learned and adhered to.

## **2. Do Federal procedures for the award of public contracts depend on the kind of goods or services that are to be procured?**

Federal procedures may depend on the amount of the public contract or whether the public contract is for goods or services. The majority of public contracts are subject to procedures allowing for full and open competitive bidding. However, public service contracts are not obligated to be awarded via competition. There are several exceptions to the competitive bidding process. For instance, an executive agency may justify using a non-competitive process in awarding a public contract up to \$50,000,000 if the justification is approved by a general or flag officer. Finally, Federal procurement procedures for specific classes of public contracts may be expressly authorized by statute.

**3. Do Federal procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods or services that are to be procured and if so, what are the thresholds?**

Generally, purchases and contracts for supplies or services for the Federal Government may be made or entered into only after advertising for competitive bids, except (1) when the amount involved in any one case does not exceed \$25,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service (such as in a time of war), (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis (however, the competitive bid process may still be implemented). See 41 U.S.C.A. §§ 5, 253.

**4. In what way does the Federal Government have to inform the market about the intended procurement?**

Public contracts that are subject to the competitive bidding process must advertise for solicitation of sealed bids or competitive proposals. This is done to insure that all persons have the equal right to compete for Government contracts, to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies, and to secure for the Government the benefits which arise from competition. The manner of advertising is left by the law to the discretion of the department advertising, no particular form being prescribed. Advertisements, notices, or proposals for an executive department of the Government, or for a bureau or office connected with it, may not be published in a newspaper except under written authority from the head of the department. Normally, an Invitation for Bids is published in the Federal Register, now posted at [www.Regulations.gov](http://www.Regulations.gov). Other Federal Government procurement opportunities over \$25,000 are accessed through the single government point-of-entry (POE) at [FedBizOpps.gov](http://FedBizOpps.gov).

Solicitations for bids may include specifications that depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of function, performance, or design requirements.

In addition to bid specifications, each solicitation for sealed bids or competitive proposals shall at a minimum include a statement of all significant factors which the executive agency reasonably expects to consider in evaluating the bids, the relative importance assigned to each of those factors and the time and place for the opening of the sealed bids.

Defects in the notice calling for bids or in the publication of the notice will require the re-publication of the notice in conformity with the applicable statutory requirements. Once it is determined that defects exist in the advertisement of the call for bids, prudence dictates re-publication rather than proceeding with the bidding process. If, notwithstanding any defects in advertising the call for bids, the bidding process continues, defects in the notice and publication requirements could become the basis for a disappointed bidder to attack the award of a contract to a competitor.

**5. Does a potential bidder need to have a specific legal form, e.g., corporation, to submit a tender?**

It is not necessary that a bidder conform to a specific legal form. A "prime contractor" is defined as "a person who has entered into a prime contract with the United States." This definition is to be used in conjunction with the definitions of "prime contract" and "person". A "person" is defined as "a corporation, partnership, business association of any kind, trust, joint-stock company, or individual." The definition is meant to cover any individual or business entity. See 41 U.S.C.A. § 52.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Often, a successful bidder is a licensed prime contractor that uses listed subcontractors. A joint bidding arrangement made up of a prime contractor and subcontractor is unusual but not unknown. See *Alcatel, Space SA v. Loral Space & Communications Ltd.* 154 F.Supp.2d 570 (2001). By definition, a consortium is a joint venture of affiliates, which is not prohibited from procuring and performing public contracts. See 41 U.S.C.A. § 15. In fact, joint ventures and contractor/subcontractor partnerships are both sanctioned as "construction team arrangements." F.A.R. § 9.601. However, the prime contractor remains fully responsible for contract performance, regardless of any team arrangement between the prime contractor and its subcontractors. F.A.R. § 9.604. Further, in

regard to consortiums, one entity must be named as principal contractor to lead the consortium in its performance of the contract and have the power to control the others in regards the performance of the contract. See F.A.R. § 19.101.

The Federal Government recognizes the advantage of joint bidding agreements in that they add potential bidders to the bidder pool and thus promote competition. F.A.R. §3.303. Contractor team arrangements may be desirable from both a Government and industry standpoint in order to enable the companies involved to complement each other's unique capabilities and offer the Government the best combination of performance, cost, and delivery for the system or product being acquired. Such arrangements may be particularly appropriate in complex research and development acquisitions, but may be used in other appropriate acquisitions, including production. F.A.R. § 9.602.

However, joint bids must avoid the appearance of violating Federal antitrust laws. One of the practices that may evidence violation of antitrust laws is the filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance. See F.A.R. § 3.303)(c)(7).

A public contract with a joint venture may involve any combination of individuals, partnerships, or corporations. F.A.R. § 4.102. If a public contract involving the Federal Government occurs in a State, that State's laws regarding a joint venture must also be recognized and followed. For instance, in California a joint venture must be duly licensed to be engaged in construction activities requiring licensure. See *California Business & Professions Code § 7029.1*. Under the California License Law, a joint venture license is issued to "any combination of individuals, corporations, partnerships, or other joint ventures, each of which holds a current, active license in good standing." See *California Business & Professions Code § 7029*. However, multinational entities may be prohibited from participating in the bidding process in certain public projects, i.e., those affecting national security.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

There are no requirements that a bidder must have an office in the United States or any State for that matter. Federal and State laws tie a bidder to the Country or State via licensed contractor requirements.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

There are no additional document requirements for foreign bidders and most States have minimum bid document requirements. For example, in California, although there is no legal requirement that bid documents include Instructions for Bidders ("IFB"), as a practical matter, the IFB is critical to the bidding process. By the terms of the IFB, the public agency is able to establish the "rules of the game" for the bidding process and for award of the contract. In the IFB, the public agency can consider and provide for the handling of many of the typical issues arising in competitive bidding.

A local bidder may be given preference over a nonresident bidder. The amount of preference is governed by each State's choice of law rules. In California, the reciprocal preference afforded a local contractor against a nonresident contractor is equal to the amount of preference applied by the state of the nonresident contractor. If that State has no contractor preference on construction contracts, then California does not apply any preference against the nonresident contractor. See Public Contract Code § 6107. Each State may have legislation addressing similar preferences for foreign bidders.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Multinational consortiums are not prohibited from procuring and performing most public contracts. Public contracts are administered by two separate agencies: the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council. The councils follow different governing statutes and regulations including what entities may submit bids on contracts. Certain types of contracts impose limitations on bids by a "foreign entity." The term, "foreign entity" means a foreign person, a foreign company, or any other foreign entity. 10 U.S.C.A. § 2410i.

Some projects limit bidders to "concerns" (meaning any business entity organized for profit, even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States or its outlying areas and that makes a significant contribution to the U.S. economy through payment

of taxes and/or use of American products, material and/or labor, etc. F.A.R. § 19.001.

In general, a Department of Defense contract or Department of Energy contract under a national security program may not be awarded to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract. 10 U.S.C.A. § 2536. It is the policy of Congress that procurement regulations used in the conduct of trade in defense articles and defense services should be based on the principle of fair trade and reciprocity and reflect the goal of establishing an equitable trading relationship between the United States and its "foreign defense trade partners." 10 U.S.C.A. § 2531.

Bids made in response to a Department of Defense solicitation must disclose any significant interest in the bidder or its subsidiary (or, in the case of a subsidiary, in the firm that owns the subsidiary) that it is owned or controlled (whether directly or indirectly) by a foreign government or an agent or instrumentality of a foreign government, if such foreign government is the government of a country that the Secretary of State determines under section 6(j)(1) (A) of the Export Administration Act of 1979 has repeatedly provided support for acts of international terrorism. A bid made by a foreign entity that supports the secondary Arab boycott on Israel may not be awarded a contract for an amount in excess of the small purchase threshold (\$100,000).

The Indiana Toll Road is an example of not only a multinational consortium being allowed to bid, but ultimately being awarded the contract. The Indiana Toll Road was operated for twenty-five years by the Indiana Department of Transportation until April 12, 2006, when enabling legislation allowed a take-over by the ITR Concession Company LLC comprised of an even partnership between Cintra of Spain and Macquarie of Australia.

#### **10. In which language do the bids have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

Submission of bids in response to solicitations for bids for most public contracts must be in the English language. Bids and offers received in any other language will be rejected. F.A.R. §§ 14.201-6, 52.214-34.

Bids must be submitted in sealed envelopes or packages unless submitted by electronic means. F.A.R. § 52.214-5.

Bids must be submitted in a manner that will ensure that they will be received in the office designated in the invitation for bids not later than the exact

time set for opening of bids. Normally, the invitation for bids would indicate the preferred method of bid submission as well as other accepted methods. The invitation may authorize telegram or mailgram bids, facsimile bids, electronic commerce bids (email) or regular mail bids. F.A.R. §§ 14.301, 14.302, 14.304, 14.202-7, 14.202-8, 52.214-13, 52.214-31, 52.215-5.

**11. Are there any Federal legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

There is no universal regulation that determines a specific amount of days in which a bid must be submitted. Federal procedures mandate that any solicitation for bids on a public contract must be designed to achieve full and open competition with due regard for the nature of property or services desired to be acquired. 41 U.S.C.A. § 253a; F.A.R. § 14.202-1. Each solicitation for bids must include a statement of the time and place for the submission of proposals. *Id.* In no case shall a bid be accepted after 4:30 p.m. on the last day the bids are due, unless otherwise specified in the solicitation for bids. F.A.R. § 14.304.

For proposed contract actions expected to exceed \$10,000, but not expected to exceed \$25,000, a contracting agency must display the notice of solicitation in a public place, or by any appropriate electronic means, an unclassified notice of the solicitation or a copy of the solicitation. The notice must include a statement that all responsible sources may submit a response which, if timely received, must be considered by the agency. The information must be posted not later than the date the solicitation is issued, and must remain posted for at least 10 days or until after quotations have been opened, whichever is later. F.A.R. § 5.101; 41 U.S.C.A. § 416.

For proposed contract actions expected to exceed \$25,000, a contracting agency must furnish the notice to the Secretary of Commerce for publication by electronic means that meets the accessibility requirement (FedBizOpps.org) or for publication in Commerce Business Daily. The solicitation may not issue less than 15 days after the date the notice was published. 41 U.S.C.A. § 416.

For proposed contract actions greater than \$100,000, in addition to the procedures set forth in the preceding paragraph, the deadline for submission of bids or proposals for a contract for property or services, including architect/engineer services, in response to the notice may not be earlier than 30 days after the date the solicitation was issued. In the case of a solicitation for a contract involving research and development, the deadline for submission of bids or proposals

may not be earlier than 45 days after the date the solicitation was issued. 41 U.S.C.A. § 416/ F.A.R. § 5.203.

Some public contracts may qualify for a streamlined solicitation procedure that may reduce the notice and submission times. 41 U.S.C.A. § 413.

Further, each State may have different policies regarding the time limit for accepting bids on a public contract. The time limit for accepting bids would be an integral part of the publication of solicitation for bids.

Defects in the notice calling for bids or in the publication of the notice will require the re-publication of the notice in conformity with the applicable statutory requirements. Once it is determined that defects exist in the advertisement of the call for bids, prudence dictates re-publication rather than proceeding with the bidding process. If, notwithstanding any defects in advertising the call for bids, the bidding process continues, defects in the notice and publication requirements could become the basis for a disappointed bidder to attack the award of a contract to a competitor under the Administrative Procedure Act.

## **12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

“Bid and proposal (B&P) costs” consist of the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts. The term does not include the costs of effort sponsored by a grant or cooperative agreement, or required in the performance of a contract. F.A.R. § 31.205-18. Bid and proposal costs are not among the allowable costs listed in 41 U.S.C.A. § 256. However, for contracts that are "fully covered" (over \$500,000) B&P costs may be allocated to final cost objectives if allowed in the solicitation for bids. 41 U.S.C.A. § 256(l); F.A.R. § 31.205-18.

The general rule for the letting of public contracts is that an unsuccessful bidder is not entitled to damages. *Telephone Assoc., Inc. v. St. Louis County Bd.* 364 N.W.2d 378 (Minn.1985). This is because the authority for letting public contracts is derived for the public benefit and is not intended as a direct benefit to the contractor. *Id.* However, a bidder who is wrongfully denied the contract is entitled to recovery of bid preparation costs but not lost profits. *Keco Industries, Inc. v. U. S.* 428 F.2d 1233 (1970). Further, the competitive bidding process employed by a public agency includes the right to reject all bids without the responsibility of having to reimburse bidders fees associated with bid

preparation. This applies as well to solicitations that are cancelled before the contract is awarded. See *Coastal Corp. v. U.S.* 713 F.2d 728 (1973).

Most States have similar legal authority preventing the recovery of bid preparation costs. For instance, a California court refused recovery to a disappointed bidder saying it saw "no injustice in requiring the [bidder] to bear the expense of preparing its bid; it entered into the bidding procedure with full knowledge of [the public agency's] right to reject the bids if it should choose to do so. As an experienced business entity, [the bidder] must be deemed to have assumed the risk that [the public agency] might act in accordance with its legal right; such a risk is a cost of seeking to do business with a governmental body." *Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 149, 156.

**13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

The Federal Government will only award public contracts to "responsible" contractors. (Federal Acquisition Regulation § 9.103) A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors. If the contractor is made up of "affiliates", i.e., a consortium or partnership, then each affiliate must meet the applicable standards for responsibility. F.A.R. § 9.104-3.

To be determined responsible, a prospective contractor must:

- (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));
- (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- (c) Have a satisfactory performance record (see 9.104-3(b) and Subpart 42.15). A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;
- (d) Have a satisfactory record of integrity and business ethics;
- (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be

produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a);

- (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and
- (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

Subpart (g) imports any applicable State qualification requirements. Many public contracts call for a bidder to have a valid State Contractor's License as a requisite for a bid. For example, in California, the determination of the knowledge and experience requirements for the issuance of a contractor's license is necessarily based upon the qualifications of the individual sitting for the contractor's license examination. As entities such as partnerships and corporations cannot be examined, the License Law adopts the concepts of "responsible managing employee" ("RME") and "responsible managing officer" ("RMO") to allow for the issuance of a contractor's license to entities. An individual owner is licensed by virtue of the license held by the owner or an RME acting on behalf of the owner. Partnerships are licensed by virtue of the license of an RME on behalf of the partnership. Corporations and all other forms of entities are licensed by an RMO or RME. See *California Business & Professions Code* §§ 7065, 7068(b).

The "responsibility" of each individual bidder must be evaluated independently. That is, in determining the "lowest responsible bidder," there is no basis for the awarding authority to apply a concept of relative superiority of the bidders' responsibility. If the awarding agency makes a finding that the low bidder is responsible, the contract cannot be awarded to another bidder on the basis of that other bidder's superior responsibility. Essentially, once a finding is made of the bidders' responsibility, all such bidders are deemed equally responsible. See *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court* (1972) 7 Cal.3d 861. There, the court held that to permit a public agency to reject the bid of the lowest responsible bidder and to award the contract to a "more" responsible bidder operates to frustrate the very purposes of the competitive bidding process and could promote favoritism in the award of public contracts. However, other State laws mandating that public works projects be awarded to the lowest responsible bidder would not be precluded from implementing affirmative action requirement as part of contract specifications. See *Thomas P. Carney, Inc. v. School Dist. of Philadelphia* 633 F.Supp. 1273 (1986).

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Protests against the proposed award of contracts are permitted under Federal regulations at various stages of the procurement process. Most Federal bid protests are filed with the Government Accountability Office (GAO), although certain protests may be filed with the Court of Federal Claims or the United States District Court in the district where the project is located. Protests regarding the form of the government's solicitation itself must be filed prior to the bid opening. Protests regarding a bid submitted by a competitor must be filed within 10 days from the time when the basis for the protest should have been known.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

Assuming that the procurement meets the minimum amount necessary to trigger competitive bidding, then no other pre-conditions exist to the filing of a protest.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

The Administrative Procedure Act confers to bidders the right to challenge agency actions. However, only injunctions or declaratory judgments were available to protesters under this jurisdiction. The passage of the Administrative Dispute Resolution Act of 1996 expanded available remedies under this forum to include monetary relief.

**17. Can your office:**

- Give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?

- **Represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- **Please name a contact person within your office for questions of public procurement law!**

Our firm is competent to assist foreign clients navigate domestic procurement procedures. Our firm may represent foreign clients in Federal Court as well as State Courts in California, New Mexico, New York and elsewhere. Peter Lindborg and Irina Drill are contact persons in this office in regard public procurement procedures. Contact them at (818) 637-8325 of plindborg@ldllp.com and idrill@ldllp.com

USA I

# USA II

## **Duane Morris LLP**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes, at the federal (national), state and local levels. The federal government has extensive general regulations on the subject, and a number of government agencies have their own supplementary regulations on acquisitions.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes. The procedures to be followed and the level of competition required depend in part on the category of goods or services being procured. At the federal level, for goods that are deemed “commercial” items, many requirements are relaxed. There is a system for businesses wishing to sell certain categories of goods and services to the government to qualify for a web-based catalog, known as the GSA Schedules, which can be used by both federal and local agencies to purchase the items through the catalog without competitive procurement. In order to qualify for the GSA schedules, the seller must commit to most-favored-customer pricing. As to items not on the GSA schedules, depending on the nature of goods or services to be acquired, requirements range from competitive fixed price bidding, to negotiated sole-source procurement.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

At the federal level, there are abbreviated procedures for purchases below \$100,000, and extremely flexible procedures for purchases at or below \$2,500 (Micropurchases).

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

At the federal level, procurements are announced in an on-line database. All public procurements are subject to publication requirements in some form or another.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

The general contractor (the party to be in privity of contract with the government) submits the bid or proposal, but will often have subcontractors lined up to handle parts of the supply. In most instances, the government will accept bids from joint ventures formed specifically for a procurement. In joint venture bids, each company is fully liable for the performance of its co-venturer. However, joint ventures may raise anti-trust or competition issues, so there should be a valid justification for the joint venture, such as the size of the project, or the different capabilities of the joint venturers.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

It depends on what is being acquired by the government. Some acquisitions must come from domestic suppliers. As to others, that's not required.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

See 7 above. Also, the federal government “qualifies” bidders to assure that they have the technical and financial wherewithal to perform if they're awarded the contract.

**9. Is a multinational bidding consortium allowed to submit a bid?**

See 6 and 7 above.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

English. Invitations for bids and requests for proposals contain detailed explanations of the forms in which bids and proposals may be submitted.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Always stated in the IFB/RFP.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

Not unless there was some impropriety in the award process, and the bidder wins a favorable ruling in a legal protest of the procurement.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

“Yes” to both questions. Also, see item 8 above.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Yes. It is not uncommon for there to be pre-award challenges. At the federal level, if an administrative protest is filed within strict time limits, the procurement agency is required to cease further action on the procurement pending resolution of the protest in almost all cases.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

It has much more to do with the propriety of the process.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

As noted above, there are procedures for pre-award protests. But, there can be post-award protests as well. Again, typically if there has been fraud or impropriety in the process.

**17. Can your office**

- **give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**

Yes.

- **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**

Yes.

- **Please name a contact person within your office for questions of public procurement law!**

You can contact either of the undersigned and, depending upon the particular federal agency involved (or the state or local government, if that is the case); we can refer you to the appropriate person.

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## **USA III – Ohio**

### **Bricker & Eckler LLP**

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**1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?**

Yes. There are numerous statutes and local ordinances that govern the procedures for award of contracts by the various contracting authorities. In general, most procurement by governmental entities in Ohio is made by traditional, competitive processes. However, there are a number of statutory exceptions to the rule and local political subdivisions, particularly municipalities, have the authority and a great deal of discretion to draft ordinances that provide for alternative procedures. There is no comprehensive law or process that governs all procurements by all entities in Ohio.

**2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?**

Yes. The procedures for award of contracts generally do differ depending on whether goods, services, or construction is involved. In broad generalities, for goods or construction, a competitive bid process is used. The state of Ohio also maintains the “state’s term schedules” which allow the state and political subdivisions to purchase supplies from pre-screened contracts without engaging in a traditional competitive process. For services, or in the case of a very large, expansive or unique project, the state and political subdivisions often use a quasi-competitive process, such as issuing a request for proposals, requests for qualifications, or other process that provides the contracting entity with greater flexibility to select a vendor who meets the entity’s needs.

**3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?**

Yes. There are certain thresholds which dictate the type of procurement that must be used. For the state of Ohio, any purchase in excess of an established threshold must be made through more formal channels, often through a central procuring department within the state of Ohio, rather than by an individual department or agency. Smaller dollar purchases can generally be made with more discretion given to the individual state department making the purchase. Many Ohio cities also maintain such thresholds which vary from city to city.

**4. In what way does the contracting authority have to inform the market about the intended procurement?**

Virtually every contracting process requires notice to the public or interested bidders in some form. The most prevalent form used by the state of Ohio is a central computerized system, which informs interested contractors of bidding opportunities in various procurement areas. In other instances, contractors may notify the individual contracting entities and ask to be advised of upcoming bid requests.

**5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?**

No. Ohio law does not limit its bidding opportunities to corporations or other entities that take a specific legal form.

**6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?**

Yes. Often bidders are permitted to submit a joint offer, or create what is called a “joint venture” to respond to a procurement opportunity. Generally, these types of responses are governed by the requirements in the bid opportunity itself.

**7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?**

No. Potential bidders are not required by law to have a presence in the United States or the state of Ohio. It is possible that some bid requests will contain such requirements.

**8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?**

Ohio law allows state departments to provide a 5% preference for vendors that provide products that are produced or mined in Ohio or the United States. Local governments may also adopt such a preference.

**9. Is a multinational bidding consortium allowed to submit a bid?**

Nothing in Ohio law prohibits a multinational bidding consortium from submitting a bid.

**10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?**

There is no specific form in which bids must be submitted as dictated by Ohio law. Whether a governmental entity will permit faxed, e-mailed, or digital submittals will be governed by the language in the bid documents themselves.

**11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?**

Timeframes by which bids must be submitted to a governmental entity will be specified in the bidding documents.

**12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?**

Generally, Ohio law prohibits bidders from claiming the costs of bid preparation. There is some limited ability to recover these costs, in very narrow circumstances, in the award of a bid dispute and at the discretion of the court.

**13. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?**

Ohio law contains numerous criteria that apply to the selection of bidders including restrictions on political contributions, requirement for workers' compensation coverage, requirements for drug-free workplace programs, compliance with various state and local tax requirements, various professional licensing criteria, and many other requirements depending on the nature of

the contract to be awarded. In addition, a contracting authority can and often does establish additional selection criteria based upon the goods or services required. Selection criteria cannot be arbitrary nor can criteria be so narrowly drafted as to destroy the competitive nature of a most types of procurement processes. In general though, the entity has a great deal of discretion in establishing selection criteria.

**14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?**

Most procurement processes contain some sort of a protest or dispute mechanism whereby a bidder may challenge the procedures used to award a contract, may challenge specific requirements contained in the procurement process, or can challenge the award of the contract to a competitor. In most instances, the protest processes are outlined within the bidding documents themselves, and generally contain a limited period of time by which a protest must be filed. Bid documents also generally specify the format of any filed protest and dictate the general content, form, or individual to whom the protest must be submitted. In addition to internal administrative protest processes, most large contracts that are not bid in a traditional competitive method must seek approval by the legislative authority of the state or political subdivision before they may be awarded. This legislative approval provides yet another opportunity to defend or challenge a contract award prior to actually being awarded. Finally, Ohio law provides an opportunity to challenge a potential contract award through the judicial system. There is no legal restriction on a foreign bidders' ability to avail itself of these primary legal protections.

**15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?**

The ability to protest or challenge an anticipated contract award is generally covered within the bidding documents, and there is generally little, if any, restriction or threshold based upon the types of goods or services to be procured.

**16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?**

In addition to primary legal protection, there is the ability to raise challenges to a contract even after award. This type of challenge is generally more limited, and damage awards are very rare.

**17. Can your office**

- give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?**
- Yes. Bricker & Eckler LLP can give legal advice and assist foreign clients in preparing bid documents, and can assist with various procurement procedures in Ohio.
- represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- Bricker & Eckler LLP can represent foreign clients with any type of bid dispute or challenge before administrative agencies, public offices, and courts within the state of Ohio and in some other states.
- Please name a contact person within your office for questions of public procurement law!**
- Please contact Maria J. Armstrong at 614-227-8821 or [marmstrong@bricker.com](mailto:marmstrong@bricker.com)

