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ITechLaw In-House Counsel Committee's

International Public Procurement Guide for In-House Counsel

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In any legal department of any global player regardless of its size, there is never enough in-house counsel to cover all jurisdictions with local qualified in-house counsel. But the smaller any global or international active company is, the more challenging this gap becomes. The reason for this is obvious: Some countries are so small that the potential sales revenue will never justify a local qualified in-house counsel.

Very few legal departments have the budget and the luxury to simply purchase any missing legal expertise from external qualified local counsel. This means it is daily business for in-house counsel to handle cases for a jurisdiction for which they sometimes don't even have a basic understanding of law, language or culture.

This means also that it is daily business for local sales teams to contact their far-away-lawyer-in-charge reaching for help in an RFI or RFP opportunity. And unlike the situation in a regulatory or compliance case, which have higher priority and where legal budget is usually no issue, it is far more challenging for the lawyer in charge to allocate budget for external specialists for an unqualified opportunity in which a final payout of any investment is very doubtful.

This international public procurement guide is developed to help in-house counsel in such situations and to offer aid and support in making the difficult early decision whether it's worth spending legal time and budget on the RFI/ RFP opportunity or whether the whole setup indicates that any engagement of scarce resources is most likely in vain. This international public procurement guide will provide some guidelines to avoid larger pitfalls in public procurement law, because as a general rule public procurement law is largely driven by formalities.

This international public procurement guide does not provide an academic comparative law analysis, but nonetheless some very interesting facts are clear. Public procurement legislation in most European countries is based on the respective EU directive described in more detail in the EU analysis – this is even the case for some non-EU members, such as Norway. Other countries, such as Switzerland and Canada, base their public procurement legislation on WTO guidelines on transparency legislation, as do Russia and India, or in the case of Brazil, on equal treatment principles granted in Brazil's constitution.

The comparison also allows discovering indirectly the effect that any country's political structure, history, social/cultural challenges or history has on its public procurement legislation. The underlying motives for having public procurement legislation, such as transparency, avoidance of corruption, avoidance of discrimination, reduction of costs or simply the necessity to fulfill requirements of a multinational organization like WTO or the European Union, may be similar, but the relevance of such motives differs significantly.

Any country's political structure, ranging from a very centralistic approach such as in France to a very fragmented federal setup such as in the United States or India, has a very significant effect on the country's public procurement legislation. Most countries have a structure that falls somewhere in between these extremes. While a federal structure has in most cases a big impact on formalistic details, contract templates are mostly not affected and hence are very similar throughout a whole country, even in a federal structure.

It needs to be clarified, however, that this international public procurement guide cannot address the language barrier, which remains the biggest practical challenge. Most but not all countries publish their respective procedures or templates in English – though some do not, even in a working translation. However, other very practical challenges, such as local presence or time zone, seem to have become less relevant over the last year, as most countries use or at least have the required legal prerequisites for e-procurement, e-auction and other progressive IT-based tools and methods for public procurement.

This international public procurement guide for in-house counsel covers the European Union legislation and 20 additional countries in central Europe and, from outside Europe, the United States, Canada, Brazil, Russia, India and Turkey. The focus is very hands-on, covering only the legal fundamentals in such a way that lawyers unfamiliar with local law are able to find a very quick access to it. Very useful are the links to contract templates and a reference to a local law specialist if further information is required.

For further information about the ITECHLAW In-House Counsel Committee's International Public Procurement Guide for In-house Counsel, please turn to:

Christian Ringeling CRingeling@MicroStrategy.com and
Mark Muench M.Muench@IT-Recht-Kanzlei.de

For further details, please click on the location of interest:

- EU by Mark Muench
- Austria by *RA Dr. Fabian Höss*
- Belgium by William Timmermans and Evelyne Goossenaerts
- Brazil by Paulo Brancher and Thays Gentil
- Canada by J. Fraser Mann
- Denmark by Anne Sofie Schummel Larsen and Lau Normann Jørgensen
- Finland by Asko Lindqvist and Jukka Airaksinen
- France by Fabrice Perbost
- Germany by Mark Muench
- India by Rahul Matthan
- Ireland by Yvonne Cunnane
- Italy by Luca Gambini and Domenico Colella
- Norway by Torstein Arendt
- Poland by Krzysztof Stefanowicz
- Portugal by Jaime Medeiros and Luis Melo
- Russia by Alexander Titov
- Spain by Enrique J. Batalla
- Switzerland by Ursula Widmer
- Turkey by Ceylin Beyli
- UK by Paul Henty and Robert Bell
- U.S. by Matthew Mousley and Urmika Devi

Public Procurement Law in Europe

General

As one of the initiatives of the European Union to install a Common Market, the EU established common procurement rules in the EU and the EEA to guarantee un-discriminatory access to public tenders.[1] These rules are based on the WTO Agreement on Government Procurement[2], which has been signed by the EU on behalf of its member states. These rules install both formal procedures to award public contracts and a system of legal remedies in case the public procurement rules have not been followed by the Contracting Authorities, which are defined as the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

Procedures

These formal procedures are:

a. Open procedure
b. Restricted procedure
c. Competitive dialogue
d. Negotiated procedures

These rules have been transformed into local laws. Please refer to the respective local reports for details and specific local application. Generally all of these rules have in common that public tenders in the EU are on a "take it or leave it" basis. Apart from the Negotiated procedures, where limited negotiations are allowed, offers to EU tenders need to be precisely according to the tender rules, the tender specifications and the respective Ts&Cs of the tender. Offers not meeting the tender requirements are to be excluded from any further procedure, no matter how attractive they might be for the contracting authority.

Thresholds

These rules are mandatory for all public contracts exceeding the threshold amounts for public contracts.

These threshold amounts currently are:

a. EUR 130.000 for public supply and service contracts other than research and development services awarded by central government authorities
b. EUR 200.000 for any other supply and service contract
c. EUR 5.000.000 for public works contracts.

[1] DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The ""Utility Directive"", DIRECTIVE 2004/17/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors is not applicable for the products and services at hand.

[2] http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

These threshold amounts are revisited and reworked by the European Commission every two years. The next adjustment of the threshold for public contracts will be in January 2014.

Different thresholds apply to the supply of military and sensitive equipment; where different rules may also apply from the rules described. Sensitive equipment means equipment for security purposes, involving, requiring and/or containing classified information.[3]

For these contracts the threshold amounts are:

a. EUR 400.000 for supply and service contracts
b. EUR 5.000.000 for works contracts

Finally, for the procurement procedures of private entities operating in the water, energy or transport services sectors, there is a third set of rules applicable if the procurement is in conjunction with the operation of those services (not for the operations of the company). This third set of rules may also differ from the rules described.

For these contracts the threshold amounts are:

a. EUR 400.000 for supply and service contracts
b. EUR 5.000.000 for works contracts

All threshold amounts for contracts are calculated excluding value-added tax (VAT).

For further information please turn to:

Mark Muench LL.M
IT Recht Kanzlei (IT Law Firm)
M.Muench@IT-Recht-Kanzlei.DE

[3] DIRECTIVE 2009/81/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, amending Directives 2004/17/EC and 2004/18/EC

Public Procurement Law in Austria

Similar to all other member states of the European Union, in Austria two major fields of Public Procurement Law must be respected: on one hand, the European Public Procurement Law and its thresholds, and on the other hand, the national rules of the Austrian Federal Public Procurement Act (BVergG 2006) and its thresholds -- which are applicable below the European thresholds. The European thresholds can be found on the EU´s website[4]; the thresholds for Austria are published on the website of the Federal Public Procurement Office[5].[6]. The Austrian Federal Public Procurement Act is applicable above and below these thresholds (Oberschwellen- /Unterschwellenbereich); particularly in procedures below these thresholds, the rules grant more flexibility to the contracting authority.

Procedures

The Austrian Federal Public Procurement Act offers different kinds of procedures as follows:

a. **Open procedure**
   Any interested economic operator may submit a tender; there is no maximum number of tenderers

b. **Non-open/restricted procedure with prior publication**
   The contracting authority has the right to invite several suitable economic operators to place a tender after any economic operator was allowed to request to participate

c. **Non-open/restricted procedure without prior publication**
   The contracting authority has the right to invite several suitable economic operators to place a tender; a request to participate is not possible

d. **Negotiated procedure with prior publication**
   The contracting authority has the right to invite several economic operators to place a tender after any economic operator was allowed to request to participate; the terms of the contract will be then negotiated between the contracting authority and the tenderer(s) during the proceeding

e. **Negotiated procedure without prior publication**
   The contracting authority has the right to invite several suitable economic operators to place a tender; the terms of the contract will be then negotiated between the contracting authority and the tenderer(s) during the proceeding

f. **Direct award with prior publication**
   If the volume of the contract is below the respective threshold, the contracting authority can contract with any suitable economic operator that submitted a valid application to participate in the procedure, after publication of the planned contract notice

[4] http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm
[5] http://www.bva.gv.at/GrundlagenDerVergabe/Schwellenwerte/Seiten/default.aspx
[6] For more details on the European procedures and its thresholds, please take a look at the EU section.

g. **Direct award without prior publication**
If the volume of the contract is below the threshold of € 100.000,00, the contracting authority can contract with any suitable economic operator; presumably before the end of 2012 this threshold will be reduced to € 50.000,00

h. **Framework agreement**
In this agreement, one or more contracting authorities and one or more economic operators agree upon future contract terms (especially regarding price and quantity) for a certain period of time (not more than three years and in special cases not more than five years) without any purchase commitment; if the economic operator that is party to the framework agreement is a successful tenderer in the given period, the negotiated contract terms are applicable

i. **Dynamic purchasing system**
This is an exclusively electronic procedure, in which an unlimited number of economic operators, which offer commonly used purchases that meet the standards set by the contracting authority, are invited by public publication to submit a non-binding statement to provide the asked service/good. If the service/good is needed by the contracting authority, these economic operators are invited to submit a tender, and the contracting authority will then contract with the tenderer that has submitted the best tender based on the award criteria for the decision determined in the documents to establish the dynamic purchasing system

j. **Competitive dialogue**
This system was established for very complex purchase orders of the contracting authority. The contracting party invites an unlimited number of economic operators to participate; the contracting authority then starts negotiations with the admitted economic operators to develop one or more suitable alternatives that meet the contracting party´s standards; on this basis the admitted economic operators are invited to submit their tenders, and the technical and economically most reasonable tender must be accepted

Regardless of the chosen procedure, the submitted tender must meet the guidelines published by the contracting authority. Otherwise the bid will be excluded from the tender proceeding, with no chance to add the missing documents or information or change particular files, etc. During the bid phase, the tenderer may address questions in written form to the contracting authority. The questions and answers must be distributed to all other tenderers by the contracting authority.

Contractual Terms

The contracts entered into by the contracting authority and the successful tenderer follow private law and therefore are primarily subject to the Austrian Civil Code (ABGB). With respect to public IT-supply or -service contracts, there exist three types of terms of contract that can be agreed upon:

a. Terms of Contract for IT-services, software development and project handling[7]
(Allgemeine Vertragsbedingungen der Republik Österreich für IT-Dienstleistungen, Software-Entwicklung und Projektabwicklung (AVB-IT/Projekte))

b. Terms of Contract for IT-supply software[8]
(Allgemeine Vertragsbedingungen der Republik Österreich für IT-Leistungen Software (AVB-IT/SW))

c. Terms of Contract for IT-supply hardware[9]
(Allgemeine Vertragsbedingungen der Republik Österreich für IT-Leistungen Hardware (AVB-IT/HW))

Remedies

The Austrian Federal Public Procurement Act differentiates between "normal" and separately reviewable decisions of the contracting authority during the tendering procedure. Depending on the decision and the chosen procedure, there exist different time limits to file the remedy before the body in charge (either the Federal Public Procurement Office or one of the nine provincial administrative courts[10]). The time limit to apply for review of the tender or the contracting authority´s separately reviewable decision varies between seven and 10 days counted from the day the applicant becomes aware of the (separately reviewable) decision. The aim of this remedy is to declare the appealed decision not valid. Usually the remedy is combined with a claim to set in force a preliminary injunction to safeguard the applicant´s legal rights.

Within six weeks from the day the applicant becomes aware of the (separately reviewable) unlawful decision, the applicant can file an application to receive a decision that the acceptance of the tender was unlawful. There is a possibility that, if the contract is already awarded or the decision has already been taken, it can no longer be annulled because the above stated time limit has elapsed. As a consequence of the declaration of an unlawful decision, the applicant has the right to claim damages resulting from the unlawful decision against the contracting authority. The time limit in the direct award proceeding is 30 days from the day on which the applicant becomes aware of the unlawful decision.

For further information, please contact:

Knoflach – Kroker – Tonini & Partner
RA Dr. Fabian Höss
Sillgasse 12
6020 Innsbruck, AUSTRIA
office@kanzlei-tirol.at

[7] http://www.bbg.gv.at/fileadmin/daten/Downloads/vkc/AVB-IT_2011-06__Projekt-Loesungsbeschaffung.pdf
[8] http://www.bbg.gv.at/fileadmin/daten/Downloads/vkc/AVB-IT_2011-06_Software.pdf
[9] http://www.bbg.gv.at/fileadmin/daten/Downloads/vkc/AVB-IT_2011-06_Hardware.pdf
[10] The implementation of the provincial administrative courts is already decided upon, but they are not installed yet (September 2012).

Public Procurement Law in Belgium

General

The Belgian legislation on public procurement is codified in the Act of 24 December 1993. There are four main Royal decrees implementing this Act:

- Award procedures in the public sector: the Royal decree of 8 January 1996[11]
- Award procedures for publicly held utilities: the Royal decree of 10 January 1996[12]
- Award procedures for privately held utilities: the Royal decree of 18 June 1996[13]
- Contracting conditions: the Royal decree of 26 September 1996, and its Annex 1 containing the General Terms & Conditions (GTC) for procurement contracts[14]

In 2006, the Belgian legislature initiated the reform of public procurement legislation and adopted a new public procurement Act of 15 June 2006[15]. The intention was to swiftly issue Royal decrees implementing said 2006 Act, but this process has been delayed significantly. On 15 July 2011, more than five years after the adoption of the 2006 Act, a first royal decree for its implementation was issued. This new 2011 Royal decree only applies to the public sector[16] and will eventually replace the Royal decree of 8 January 1996.

Aside from the provisions pertaining to the competitive dialogue procedure (see below), the 2006 Act and the 2011 Royal decree have not yet entered into force. For other proceedings, the 2011 Royal decree is expected to enter into force by mid-2012. Other Royal decrees regarding utilities and regarding general terms and conditions are expected to follow.

Award Procedures

Under Belgian law, there are four types of procurement procedures: the *"aanbesteding/ adjudication",* the *"offerteaanvraag/appel d'offres",* the negotiated procedure and the competitive dialogue.

In the event of an *"aanbesteding/adjudication",* the contract must be awarded to the tenderer that submitted the regular tender at the lowest price. In the event of an *"offerteaanvraag/appel d'offres"*, the contract must be awarded to the most economically advantageous tender. The contracting authority can choose freely between both procedures.

Both procedures can be organised by way of an open or restricted procedure. In the case of an open procedure, all interested contractors may submit tenders, whereas a restricted procedure, which is a two-step procedure, entails that only those contractors invited by the contracting authority may submit tenders.

[11] Royal decree of 8 January 1996, Belgian State Gazette *(B.S.G.)* 26 January 1996.

[12] Royal decree of 10 January 1996, *B.S.G.* 26 January 1996.

[13] Royal decree of 18 June 1996, *B.S.G.* 25 June 1996.

[14] Royal decree of 26 September 1996, *B.S.G.* 18 October 1996.

[15] Act of 15 June 2006, *B.S.G.* 15 February 2007.

[16] Royal decree of 15 July 2011 on the award of public contracts ""public sector"", *B.S.G.* 9 August 2011.

The negotiated procedure allows the contracting authority to consult the economic operators of its choice and to negotiate the terms of the contract with one or more of them. Currently, this procedure can only be applied under specific conditions. For complex ICT contracts, contracting authorities tend to invoke one of the following exceptions allowing application of the negotiated procedure: (i) the nature of the works or services or uncertain circumstances do not permit prior overall pricing; (ii) the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tenderer according to the rules governing the procedures of *"aanbesteding/ adjudication"* or *"offerteaanvraag/appel d'offres".*

Finally, the competitive dialogue is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure. The aim is to develop one or more suitable alternatives capable of meeting the requirements of the contracting authority. The competitive dialogue can only be applied in the case of very complex contracts (such as complex ICT contracts). The competitive dialogue, which was introduced by the 2004 Directives, was only implemented into Belgian law as of 28 September 2011[17]. Hence, it is fair to say that Belgian authorities currently do not have considerable experience with this procedure.

Contractual Terms and Conditions

As for the contractual terms governing the performance of procurement contracts, in principle, public contracts are subject to the General Terms & Conditions (GTC), attached as an Annex to the Royal Decree of 26 September 1996. In general, these GTC are favourable to the contracting authority. They include the possibility for the authorities to take unilateral measures in the event of default by the contractor. Some of these terms and conditions are not market practice and could be problematic for IT companies.

The contracting authority can derogate from the GTC should the specifics of the project so require. If the contracting authority wants to derogate from certain essential clauses (such as the guarantees), the contract documents must contain the reasons for such derogation.

Remedies

Pursuant to Directive 2007/66, the 1993 Act contains a specific chapter on remedies. This chapter is applicable to procurement procedures where the estimated contract value exceeds the thresholds for a European publication and to some other procedures.

There is a standstill obligation of 15 days following the notification of the award decision to the interested candidates and tenderers. Within that period, summary proceedings can be brought before the Council of State (public authorities) or before the President of the Court of First Instance or the Commercial Court (other contracting entities). Other measures can also be requested, such as the annulment of the decision taken by the contracting authority, damages or alternative sanctions.

[17] Royal decree of 12 September 2011, *B.S.G.* 23 September 2011.

Some Novelties in the Belgian Procurement Legislation

The 2011 Royal decree contains several novelties. As discussed, it has introduced the competitive dialogue procedure into Belgian law. Furthermore, it gives contracting authorities more possibilities for applying the negotiated procedure. In the future, a negotiated procedure with publication will be possible for contracts with an estimated value that is lower than the European thresholds in the case of supplies and services and lower than EUR 600,000 in the case of works.

The 2011 Royal decree also formally introduced the framework agreement for the public sector (which was already in place for the utilities sector), which was already being applied in practice without explicit legal basis. There are several other important novelties such as changes to price revision formulas, the delay during which offers remain binding, the introduction of electronic tendering systems (electronic auction and dynamic purchasing system), etc.

For further information, please contact:

William Timmermans
Evelyne Goossenaerts
ALTIUS
Tour & Taxis Building
Havenlaan 86C B.414 Avenue du Port
B-1000 Brussels
Tel: +32 2 426 14 14
Fax: +32 2 426 20 30
william.timmermans@altius.com
evelyne.goossenaerts@altius.com
www.altius.com

Public Procurement Law in Brazil

General

In Brazil, all government contracts for construction, services, purchases and sales must be preceded by a public bid. This bid must comply with the principles of lawfulness, impersonality and publicity, and its terms must be established in a call for bids, among other requirements.

The public bid must comply with the constitutional principle of equal treatment. This applies both to the time when the call for bids is prepared – it cannot discriminate without justification – and to the way the tender is conducted – the government must give all bidders equal treatment.

Types of Public Bid

The main types of public bids allowed under Brazilian law and used to acquire goods and services are[18]:

i. **Open competitive tender** *("concorrência")*: this type of public bid is open to any interested party that proves it meets the minimum requirements stated in the call for bids during the initial qualification phase. This type of bidding is used to acquire goods and services worth more than R$650,000 (approximately US$370,000)

ii. **Price survey** *("tomada de preços")*: this type of public bid is for interested parties who have already registered, with those who have not yet registered but who meet the requirements to do so within three days of receipt of proposals also being allowed to participate. This type of bidding is used to acquire goods and services worth up to R$650,000 (approximately US$370,000)

iii. **Invitation** *("convite")*: in this type of public bidding, the government chooses and invites at least three interested parties, who may have registered in advance or not, whose activities are related to the purpose of the public bid. Other parties registered in the appropriate business area can state their interest in participating within 24 hours of the presentation of bids. This applies to public bids for goods and services up to R$80,000 (approximately US$45,000)

iv. **Auction** *("pregão")*: this type of public bid is used to acquire common goods and services whose performance and quality standards can be objectively defined in the request for bids using normal market specifications. This kind of bid can be conducted electronically under the regulations

Invitation, price survey, and open competitive tenders can be decided according to four criteria: *(i)* lowest price; *(ii)* best method/technology; *(iii)* method/technology and price; or *(iv)* highest bid or offer (used for the sale of goods). An auction type of public bid always uses the

[18] Open competitive tender, price survey and invitation type public bids are governed by Federal Law 8,666 of June 21, 1993 (""Public Bidding Law""). Auction type public bids are regulated by Federal Law 10,520 of July 17, 2002.

criterion of the lowest price that meets the supply deadline, technical specifications and minimum performance and quality standards established in the call for bids.

Although the invitation, price survey and open competitive tender type public bids apply to public bids for certain amounts, the government can choose to use a method that is intended for use with higher amounts. An open competitive tender may therefore always be applied, especially when the object of the public bid is more complex.

Unlike the types of public bid mentioned above, no value limit applies to auction type public bids – these can be used to acquire goods and services in any amount.

The government can decide not to conduct a public bid only when the law says such bids do not apply or can be waived.

Public bids cannot be required where competition is not viable. This is the case, for example, with materials or equipment that can only be supplied by an exclusive producer, company or sales representative. It is also the case with technical services that can only be performed by professionals or a company with a widely recognized specialization.

Waiver of a public bid, on the other hand, involves situations in which, in theory, a public bid is required but there are other, more important factors that prevent it from being held. Examples of such situations include war or serious public disturbances, emergencies, calamities, a possible compromise of national security, or government intervention in the market to regulate prices or normalized supply. The Public Bidding Law also allows for the waiver of a public bid when information technology services are performed by a government-owned corporation or government agency or entity created for that specific purpose.

Acquisition of Information Technology Goods and Services

In addition to the rules that apply to public bids in general, the government must follow specific legal rules when acquiring information technology goods or services.

Decree 7,174 of May 12, 2010, which governs the Brazilian federal government's acquisition of information technology and automation goods and services, establishes the following order of preference for contracting:

i. Goods and services with technology developed in Brazil and produced according to the Basic Productive Process[19], as defined by the Brazilian government

ii. Goods and services with technology developed in Brazil

iii. Goods and services produced according to the Basic Productive Process, as defined by the Brazilian government

That decree also says that micro and small-scale companies will have priority over medium-sized and large companies that also meet the requirements stated above.

[19] The Basic Productive Process (Processo Produtivo Básico), or PPB, is defined in Law 8,387 of December 30, 1991, as being ""the minimum set of operations, in the manufacturing establishment, that characterizes the effective manufacturing of a particular product"".

Federal Law 8,248 of October 23, 1991, which seeks to encourage development and competitiveness in the information technology and automation industry, says that equivalent delivery dates, support services, quality, standardization, compatibility, performance specifications and price in relation to the other public bid participants will be taken into account when applying the priority given to micro and small-scale companies.

The same law says that information technology goods and services that are classified as "common" can be acquired through auction-type public bids as long as the participating companies comply with the Basic Productive Process. Public bids governed by the Public Bidding Law (open competitive bids, price surveys and bids by invitation) must use the "method/technology and price" criteria to decide the winner.

Another rule that applies specifically to acquiring information technology goods and services relates to the duration of the government contracts. As a rule, these contracts are tied to the time for which the respective budgeted funds are available. However, contracts for equipment rental and the use of computer programs can be extended to 48 months after they come into effect.

For further information on this topic, please contact:

Paulo Brancher and Thays Gentil
BKBG Attorneys at Law
telephone (+55 11 3897 0300)
email brancher@bkbg.com.br and gentil@bkbg.com.br

Public Procurement Law in Canada

Public sector entities in Canada are subject to a complex array of trade agreements, legislation, directives and court decisions with respect to their procurement policies and practices.

Trade and Procurement Agreements:

Among the applicable agreements are: (i) the North American Free Trade Agreement (NAFTA)[20]; (ii) the World Trade Organization Agreement on Government Procurement (the "WTO-AGP")[21]; (iii) the Agreement on Internal Trade (the "A.I.T.") (an agreement made between the various provinces and the federal government); and (iv) the Canada-U.S. Agreement on Procurement[22]. Various regional agreements that have been adopted include an Agreement on the Opening of Public Procurement between Ontario and Quebec, and the New West Partnership Trade Agreement[23] (an agreement made between Saskatchewan, Alberta and British Columbia to replace the Trade, Investment and Mobility Agreement made between British Columbia and Alberta).

Not all agreements apply to all levels of government. For example, Canadian provinces or municipalities are not expressly bound by NAFTA, although the Agreement provides a mechanism that allows private sector entities to initiate challenges based on the actions at the so-called "sub-federal" level. Similarly, although the WTO Agreement on Government Procurement applies only to the federal government and specified federal agencies, some of the provisions of the Agreement have been incorporated into the Canada-U.S. Agreement on Procurement that came into force in 2010.

In addition to existing agreements, a Comprehensive Economic and Trade Agreement (the "CETA") is currently under negotiation between Canada and the European Union. The EU negotiators have stated that one of their objectives is to ensure that European companies obtain enhanced access to public procurement markets through provisions in the Agreement to apply to sub-central (i.e., provincial and municipal) governments.

Legislation and Government Directives:

Various provinces have enacted legislation, or have adopted directives to implement procurement principles set out in various agreements. An example of legislation at the provincial level is the Ontario Broader Public Sector Accountability Act[24] that was adopted as of April 1, 2011, which applies initially to designated broader public sector organizations, such as hospitals, schools and universities. The Act extends to other publicly funded organizations as of January 1, 2012. Pursuant to this legislation, the Management Board of

[20] NAFTA, December 17, 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force January 1, 1994)

[21] See online http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm

[22] See the Foreign Affairs and International Trade Canada website: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ENG-Canada-USA_Government_Procurement.pdf

[23] See online www.newwestpartnershiptrade.ca

[24] S.O. 2010, c. 25

the Cabinet of the Ontario government issued a Broader Public Sector Procurement Directive which imposes some 25 mandatory requirements for affected organizations.

Decisions of Courts and Tribunals:

The Canadian International Trade Tribunal (the "CITT") is the forum that deals with disputes under NAFTA and the WTO-AGP, as well as the A.I.T., involving procurement by the federal government. While its decisions are not binding on other levels of government in Canada, they provide guidance as to the rules that all public sector entities should follow as part of their procurement processes.

In addition to decisions of the CITT, decisions of the Supreme Court of Canada and other Canadian courts set out various principles with which public sector bodies must comply with respect to their procurement practices. For example, in the leading case of *Ontario v. Ron Engineering*[25], the Supreme Court established the principle that when a public body issues an invitation to submit bids, an initial contract (sometimes known as "Contract A") arises from the submission of a compliant bid. This contract, which includes an obligation by the issuer to treat all bidders fairly and equally, is separate and distinct from the contract that is ultimately made with the successful bidder.

In a recent decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*[26], the Supreme Court found that in the circumstances of that case, the government of British Columbia was not entitled to rely on an exclusionary clause contained in a procurement document to enable the government to avoid an obligation to act in good faith in selecting the successful proponent.

Guiding Principles for Procurement:

While arising from different legal instruments, certain well-established principles must be followed by public sector entities in the conduct of their procurement activities. Some of these principles include: (i) reciprocal non-discrimination (i.e., the obligation to treat suppliers from various jurisdictions in the same manner); (ii) transparency and openness (i.e., the obligation to make procurement documents and the terms and conditions for submitting bids generally open and available to all interested parties); and (iii) use of neutral specifications and standards (i.e., the obligation to define requirements for goods and services based on objective criteria, rather than criteria that only one supplier would be capable of meeting).

Other basic principles with which public sector entities must comply are the obligation to require bidders to comply with all mandatory requirements, to ensure that any waiver of deficiencies is expressly permitted under the terms of the applicable procurement document, and to ensure that all bidders are treated fairly and equally.

[25] (1981) S.C.R. 111

[26] [2010] S.C.R. 69

Federal Government's Standard Acquisition Clauses and Conditions:

Public Works and Government Services Canada, the federal department that handles most of the government's procurement, has developed a Standard Acquisition Clauses and Conditions Manual (the "Manual")[27]. The Manual contains terms and conditions commonly included in contracts made by the federal government for the procurement of goods and services. The purpose of the Manual is to increase the efficiency of any dealings with the government by reducing the level of detailed text contained within the various procurement documents. The Manual includes:

- Standard instructions, such as those applicable to the submission of bids
- Templates for certain types of bids, such as "medium complexity bid solicitation"
- Conditions and definitions
- Standard procurement clauses, such as instructions to bidders and contractors, pricing, and terms of payment

Public Works and Government Services Canada also publishes the Supply Manual, which offers a comprehensive overview of the federal procurement process.

For further information, please contact:

J. Fraser Mann
Partner, Miller Thomson LLP
E-mail: fmann@millerthomson.com
Tel: (416) 595-8195

[27] See online: http://sacc.tpsgc.gc.ca/sacc/index-e.jsp

Public Procurement Law in Denmark

Regulation

Denmark has implemented the Public Procurement Directive (Directive 2004/18/EC) and the Utilities Directive (Directive 2004/17/EC) directly into Danish law by Executive orders no. 712 of 15 June 2011 and no. 936 of 16 September 2004. In 2011, Directive 2009/81/EC on defence and sensitive security procurement was also implemented into Danish law by Executive order no. 892 of 17 August 2011. Thus, Danish law is identical to the exact wording of the directives. Hence, the Danish procurement rules must be interpreted in accordance with the EC directives.

Public contracts not governed by the implemented directives because they fall below the EC thresholds are governed by the Danish Tender Act (Act no. 1410 of 7 December 2007). The Danish Tender act regulates both public works contracts and public supply and service contracts with thresholds of DKK 3.000.000 for works and DKK 500.000 for services and goods (approx. EUR 400.000 and EUR 67.000 respectively).

Procedures

Since the EC directives are implemented directly into Danish law, the spectrum of possible procedures will not differ from those set out in the Directives. In accordance with the directives, the possible procedures are open, restricted, competitive dialogue and negotiated procedures or design contests. Denmark has also implemented the possibility of dynamic purchasing systems and framework agreements.

Accordingly, the contracting authority is free to choose between open and restricted procedures. When the open procedure is used, any economic operator may submit a tender. The restricted procedure requires a prequalification of suitable tenderers that afterwards are invited to submit a tender. Only when certain conditions set out in the Public Procurement Directive are fulfilled does the authority have the discretion to choose between the competitive dialogue and negotiated procedures or design contest.

When the contract value is below the EC thresholds, the Danish Tender Act Section 1 contains detailed rules for the contracting of works contracts, while Section 2 only prescribes an obligation to announce the public awarding of a service contract. However, the contracting authority must always fulfil the general principles on equal treatment and transparency and thus at least has to prepare award criteria to assess the submitted tenders. The requirements in the Danish Tender Act are similar to the requirements under the EC directives but less strict.

Award of orders

The EC directives rules on awarding the contract are likewise applicable in Denmark. A contract can be awarded by the criteria "lowest price" or "most economically advantageous tender". The same two award criteria can be found in the Danish Tender Act.

When the criterion "most economically advantageous tender" is used, the contracting authority must state on which sub-criteria – and weight them if possible – the authority intends to base its evaluation and identification of the most economically advantageous tender. The sub-criteria must be linked to the object of the contract and not the tenderers' qualifications.

Remedies and Enforcement

Remedies or enforcement of the procurement rules can be sought before the Danish Public Contracts Appeals Board and the Danish courts by anyone with sufficient interest in the subject matter.

If a complaint is handed in during the standstill period, the complaint is automatically granted suspensory effect, pending the complaints board's decision on whether or not the complaint shall be granted suspensory effect until a decision has been rendered on the matter of the complaint.

According to Section 7 of the Danish law on enforcement of the procurement rules, etc., complaints must be submitted to the Danish Public Contracts Appeals Board within certain time limits, when the complaint concerns an EU tender.

Complaints concerning non-prequalification must be received by the board within 30 days from the day after the day on which the authority has notified the applicants who has been prequalified. Other complaints must -- as a main rule -- be submitted to the board within six months from the day after publication of the contracting authority's notice in the journal Tenders Electronic Daily (TED) that the authority has contracted with an undertaking.

There is no access to administrative recourse in Denmark. Instead a complaint concerning the decision rendered by the Danish Public Contracts Appeals Board can be brought before the Danish Courts within eight weeks from the delivering of the complaints board's decision. The alleged infringement of the public procurement rules can under certain circumstances be brought directly before the courts without filing a complaint with the Danish Public Contracts Appeals Board.

The Danish Competition Authority can also assess whether the public procurement rules have been violated. However, the Competition Authority cannot issue orders or prohibition notices. Instead, the Competition Authority has been granted the right to bring cases before the Danish Public Contracts Appeals Board. The time limit for such complaints is two years from the contracting authority's publication of the notice in the Tenders Electronic Daily (TED).

Government Standard IT Contracts

In the IT sector, the standard contracts K01 (Contract for short-term IT projects) and K02 (Contract for long-term IT projects)[28] are often used as the basis for the customer and the supplier's contractual relationship. The K01 and K02 are so-called "agreed documents"

[28] http://en.itst.dk/it-architecture-standards/it-management/government-standard-contracts

developed in cooperation between vendors' and purchasers' industry organizations and they were finalized in 2004 and 2007 respectively.

The contract known as the K01 is a standard contract for short-term IT projects (i.e., delivery of standard products for which customization, etc. is relevant only to a limited extent), while K02 is a standard contract for long-term IT projects (i.e., development and implementation projects of a certain magnitude, e.g. high complexity, economic extent and timescale more than six months, etc.).

The contracts are mandatory for the procurement of IT projects by Danish public authorities, and they are also commonly used as contract standards in the private sector.

Both contract standards are available in Danish and English translations and are easily used by contracting parties.

For further information, please turn to:

Anne Sofie Schummel Larsen
aso@kromannreumert.com
Dir. +45 38 77 20 25
Mob. +45 24 86 00 32

Lau Normann Jørgensen
LNJ@kromannreumert.com
Kromann Reumert
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Public Procurement Law in Finland

General

Public Procurement is regulated in Finland in the Act on Public Contracts (laki julkisista hankinnoista) (248/2007, "the Act"). Finnish Public Procurement Law distinguishes among three types of procurement: procurement of supplies or services falling below the national threshold amounts in value, national procurement exceeding the national thresholds in value, and EU procurement exceeding the so-called EU threshold amounts. National procurement falling below the threshold amounts for public contracts set by the European Commission, but exceeding the national threshold amounts (EUR 30 000 for public supply and service contracts, for example; EUR 100 000 for certain service contracts relating to health care, social service or education; and EUR 150 000 for public works contracts), is subject to somewhat different procedural rules and preconditions for procurement procedures from EU procurement. Decisions made by a contracting authority may be taken up for judicial review in the Market Court, provided that such a decision concerns the status of a bidder in a procurement procedure in which the value of the procurement exceeds at least the national threshold amounts.

Procedures

Finnish Public Procurement Law offers the following procedures:

a. Open procedure (avoin menettely) means a procedure whereby any interested economic operator may submit a tender. The contracting authority may also invite suitable economic operators to bid.

b. Restricted procedure (rajoitettu menettely) means a two-step procedure for procurements, where a certain level of qualification is required by the supplier. Any economic operator may request to participate, but only qualified economic operators invited by the contracting authority may submit a tender

c. Competitive dialogue (kilpailullinen neuvottelumenettely) is a procedure in which any economic operator may request to participate. The contracting authority negotiates with the candidates admitted to the procedure with the aim of developing one or more suitable alternatives capable of meeting its requirements, on the basis of which the candidates chosen are invited to tender

d. Negotiated procedure (neuvottelumenettely) stands for a procedure whereby the contracting authority consults the economic operators of its choice and negotiates the terms of contract with one or more of them

In addition, the law allows for

a. Framework agreement (puitejärjestely)
b. Design contest (suunnittelukilpailu)
c. Dynamic purchasing system (dynaaminen hankintajärjestelmä)
d. Electronic auction (sähköinen huutokauppa)

The procedures above have in common that any offer submitted must strictly comply with all requirements set in the invitation to bid. Bidders are required to observe time limits and may not refer to their own general terms and conditions unless explicitly allowed for. A tender's rejection is mandatory if these requirements are not complied with.

Contractual Terms

Contracting authorities may choose to incorporate one of the existing General Terms of Contract for public procurement in public contracts they enter into and are often given recommendations to do so. JYSE 2009 SUPPLIES and JYSE 2009 SERVICES are general terms for supply contracts and service contracts, respectively. JIT 2007 (Recommendation JHS 166 for Terms and Conditions of Government IT Procurement)[29] is a collection of terms and conditions for public procurements concerning IT. It contains special terms in addition to general terms and conditions, which should be used in conjunction with them.[30] Reference to applicable general terms and conditions must have already been made in the invitation to tender – there is no automatic incorporation of general terms and conditions.

JIT 2007 contains the following model contracts and terms and conditions for IT-related procurement:

Subject-matter	Available Template
Instructions concerning JIT	Annex 1
General terms and conditions 2007	Annex 2
Special terms and conditions for procurement of customized applications	Annex 3
Special terms and conditions for procurement of IT services	Annex 4
Special terms and conditions for procurement of consulting services	Annex 5
Special terms and conditions for procurement of standard software applications	Annex 6
Special terms and conditions for procurement of IT hardware	Annex 7
Model contract for software procurement (only in Finnish and Swedish)	Annex 8
Model contract for deliver of service (only in Finnish and Swedish)	Annex 9
Model contract for consulting agreement (only in Finnish and Swedish)	Annex 10

Remedies

There is a dedicated procedure for judicial review of public procurement above the national threshold amounts. An appeal to the Market Court allows, for example, for cancellation of a decision made by a contracting authority or ordering compensatory payment. In a procurement exceeding the EU threshold, the Market Court can, for example, render an already awarded contract ineffective. A bidder has also the right to sue for damages in a

[29] http://www.jhs-suositukset.fi/suomi/jhs166

[30] Contracting authorities may also use YSE 1998 general terms for building contracts, KSE 1995 for consulting services and KH-I YSE 2000 for property management, but use of these general T&C is not limited to public procurement.

general court of first instance. Currently it takes the Market Court on average six to eight months to give a ruling in an appeal process. The appeal period is, according to the main rule, 14 days from the date when notice of the appealed decision was given to the appellant.

In addition, an interested party may request rectification of a decision relating to procurement (hankintaoikaisu). Requests for rectification are made to the contracting authority, which may then rectify its own incorrect application of the Act. This remedy is available regardless of whether an appeal has been made to the Market Court, and the deadline for such an application is 14 days, as with an appeal. The contracting authority may also begin the process concerning rectification on its own initiative, in which case the time limit is 60 days from the day on which the decision in question was made. An application for rectification is expected to be dealt with much more swiftly than an appeal. Recommended course of action can be also to file both an appeal and an application for rectification.

For further information, please turn to

Attorneys at Law Borenius Ltd

Asko Lindqvist
Attorney at law, Partner
asko.lindqvist@borenius.com

Jukka Airaksinen
Attorney at law, Specialist Partner
jukka.airaksinen@borenius.com

Public Procurement Law in France

General

According to Article 1 of the *Code des Marchés Publics* (hereinafter French Public Procurement Code) the public procurement contracts (also known as government contracts) are defined as "*contracts for pecuniary interest entered into with public or private entities by the contracting authority (pouvoir adjudicateur) in order to meet their requirements in terms of works, supplies or services"*.

Different sets of rules may apply to public tenders, depending on the legal nature of the public buyer:

- The French Public Procurement Code applies to the State, local authorities (*collectivités territoriales*), local or national administrative public establishments (*établissements publics administratifs*) and social service establishments (the "Contracting Authority")

- Outside the scope of the CMP, some other public tenders are also governed by public procurement rules stated in the Ordinance no. 2005-649 of June 6th, 2005 and Decree no. 2005-1742 of December 30th, 2005: a number of industrial and commercial public establishments (*établissements publics industriels et commerciaux*), Public Interest Groups, Economic Interest Groups, mixed economy companies and associations (the "Other Entities")

The general principles governing these bodies of rules are essentially the same and aim at ensuring that public monies are not squandered and that fair competition and transparency are respected throughout the public procurement procedure.

In any public procurement, the applicable procedure is determined by the needs of the public tender and the amount of the order.

Procedures

French Procurement Law offers the following procedures (described in order from the less negotiable to the more negotiable ones):

- **The Call for Tender (*Appel d'offres*)**

  The call for tender is the procedure of reference in French government contracts. It means the procedure under which the contracting authority selects the tenderer, without negotiation, on the basis of objective criteria that will have been beforehand transmitted to the candidates. The call for tender may be either open or restricted.

  An *open* call for tender designates a procedure where any candidate that reaches minimum requirements (financial capacity, clear social and tax status, etc.) may submit an offer.

A *restricted* call for tender designates a procedure where only the candidates authorized by the public buyer, following a selection process, may submit an offer.

- **Competitive Dialogue**

  The procedure of competitive dialogue is a procedure pursuant to which the public buyer selects the candidates that will participate in the design of the specifications. The specifications will be part of the government contract.

  The candidates will make their respective offers on the basis of these specifications.

- **Negotiated Procedures**

  The negotiated procedure is a procedure further to which the Contracting Authority negotiates the conditions of the government contract with one or several economic operators.

  Negotiated procedures may be either with prior publication (allowing the presentation of competing offers) or without. If there is no prior publication, the negotiated procedure may be either with or without prior competition.

- **Adapted Procedures**

  The adapted procedure is defined as government contracts concluded according to conditions freely determined by the Contracting Authority, based on the nature and the characteristics of the requirements, on the number or localization of the economic operators likely to submit a tender, and on the circumstances of the purchase.

Contractual Terms

The terms applicable to each public procurement contract are contained in standard documents and/or documents specifically designed by the public buyer, which are mandatory for both the candidates and the public buyer.

For procedures governed by the French Procurement Code, these documents, which are constitutive of the government contract to be entered into between the Contracting Authority and the candidate that will be awarded the contract, are as follows:

- The *Cahier des Clauses Administratives Générales (CCAG)*, which corresponds to general terms and conditions of public bodies. The five existing CCAGs have been enacted by government decrees. Considering the purpose of each public procurement, the Contracting Authority decides which one of the CCAGs will govern the public procurement.

  The five CCAGs are as follows:
  - CCAG-FCS, related to current services supply
  - CCAG-MI, related to industrial furniture
  - CCAG-TX, related to public works
  - CCAG-PI, related to intellectual services

- CCAG-TIC, related to information technology and computer hardware and services

- The *Cahier des Clauses Techniques Générales* (CCTG), which contains general technical requirements applicable to all works or services of the same nature

- The *Cahier des Clauses Administratives Particulières* (CCAP) and the *Cahier des Clauses Techniques Particulières* (CCTP), which set forth the specific administrative and technical requirements applicable to a given public procurement

- The *Acte d'engagement* (Act of Commitment), a document filled in and executed by the candidates for a government contract, in which they delineate the administrative and financial terms of their offer or proposal and adhere to the provisions under which the Contracting Authority has submitted the government contract. Once executed by the Contracting Authority, the *Acte d'engagement* becomes the contractual link between the parties

- The purchase order is the written document sent by the Contracting Authority to the successful contractor. It specifies the works, supplies or services that are required from those described in the contract and determines their quantity

Remedies

Should the public buyer fail to reject a non-compliant tender, and more generally in case of breach of the principle of equality of treatment, a supplanted candidate may bring the case before the administrative courts.

In case of emergency, before the conclusion of the contract, the supplanted candidate may bring a case in chambers to obtain adherence to the public procurement rules relative to publicity and competition (*Recours en référé précontractuel*). Since 2009, a similar summary proceeding is available after the conclusion of the contract (*Recours en référé contractuel).*

In addition, since 2007, a supplanted candidate may request the cancellation of a public contract as well as damages before the administrative courts (*Recours de plein contentieux*).

For further information, please contact:

Fabrice Perbost
Associé – Partner
Avocat à la Cour
fperbost@kahnlaw.com
Kahn & Associés

Public Procurement Law in Germany

General

Public Procurement Law in Germany is divided into two major fields. Local and so-called European (EU) Public Procurement Law.

Local Procurement Law is applicable below the respective threshold amounts for public contracts issued by the EU (EUR 130.000 for public supply and service contracts by Federal Government Agencies (Bundesbehörden), EUR 200.000 for any other contracts for public supply and services, and EUR 5.000.000 for public works contracts), while European Public Procurement Law is applicable for any public contracts above these thresholds.

For public contracts above the EU thresholds, any contracting authority's decision taken in the context of, or in relation to, a contract award procedure may be taken for review.[31] This review (Nachprüfungsverfahren) is a formal legal procedure that provides the supplier with the possibility to reverse an unlawful award of a contract to a competitor. This is not possible for tenders below the threshold amounts for public contracts.

Procedures

German Public Procurement Law offers the following procedures:

(a) Open procedure (Offenes Verfahren, Öffentliche Ausschreibung[32])

This means a procedure whereby any interested economic operator may submit a tender. Consequently any interested tenderer may issue an offer leading to -- theoretically -- an unlimited number of offers.

(b) Restricted procedure (Nicht offenes Verfahren, Beschränkte Ausscheibung[4])

This means a two-step procedure for tenders where a certain level of qualification is required by the supplier. First, any economic operator may request to participate but must prove its qualification; and second, after a qualitative selection, only those economic operators invited by the contracting authority may submit a tender.

(c) Competitive dialogue (Wettbewerblicher Dialog)

This is a procedure in which any economic operator may request to participate, whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

(d) Negotiated procedures (Verhandlungsverfahren, Freihändige Vergabe[4])

[31] ""Remedy Directive"" DIRECTIVE 2007/66/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

[32] Öffentliche Ausschreibung, Beschränkte Ausschreibung and Freihändige Vergabe are terms for procedures below EU threshold amounts for public contracts, i.e., "Local Law Procedures."

This means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these.

All of those procedures have in common that any offer submitted must strictly comply with the specifications and Ts&Cs issued and must comply with the formal requirements such as templates, time schedule and accompanying documentation**. Any changes to the requirements, non-compliance with formal requirements, timelines, missing documentation or information will lead to mandatory exclusion from the tender.**[33] This includes mere reference to supplier's Ts&Cs. Any changes are deemed an illegitimate deviation from the tender and will lead to mandatory exclusion from the tender. These rules also apply to the Negotiated Procedures, with the only exception being that minor changes to the specification are allowed. Generally, participating in public tenders is a "take it or leave it" decision based on risk management principles.

However, during the bid phase the suppliers may pose questions to the contracting authority in order to clarify the tender's specifications. This tool is strongly recommended.

Contractual Terms

From a contractual perspective, public contracts generally follow the German Civil Code, the General Terms of the Performance of Supplies and Services (VOL/B),[34] and, especially for IT supplies and services, the Supplementing Contract Terms for IT supplies and services (EVB-IT or BVB).[35] For some of the EVB-IT, English versions are also available[36]. However, different EVB-IT/BVB apply for different supplies and services requested.

When answering a public tender, the referenced contract terms need to be checked before providing an offer! There is no automated incorporation of VOL/B and EVB-IT/BVB. If there is no explicit reference to EVB-IT/BVB, generally an unlimited liability applies! Only EVB-IT/BVB contain a limitation of liability. This needs to be checked in every single case, including the scope of exposure according to EVB-IT/BVB. VOL/B only excludes lost profits, while German Civil Code does not limit any liability at all.

List of currently existing Supplementing Contract Terms for IT supplies and services (EVB-IT/BVB):

Subject-matter of a contract	Available Template
Purchase of hardware	EVB-IT Kauf
Perpetual license of standard software	EVB-IT Überlassung Typ A
Rental limited license of standard software	EVB-IT Überlassung Typ B
Service agreement	EVB-IT Dienstleistung

[33] A list of respective statutes and a short summary can be found at the homepage of the German Federal Ministry of Commerce.

[34] Which can be found at http://bmwi.de/BMWi/Redaktion/PDF/Gesetz/allgemeine-vertragsbedingungen-fuer-die-ausfuehrung-von-leistungen,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf

[35] Which can be found at http://www.cio.bund.de/DE/IT-Angebot/IT-Beschaffung/EVB-IT_BVB/Aktuelle_EVB-IT/aktuelle_evb_it_node.html

[36] http://www.otto-schmidt.de/evb-it/

Subject-matter of a contract	Available Template
Hardware maintenance	EVB-IT Instandhaltung
Maintenance of standard software	EVB-IT Pflege S
System integration (for complex solutions containing different components involving major services such as software development)	EVB-IT System
Hardware solution sales (for hardware platform deals involving services)	EVB-IT Systemlieferung
Software development	EVB-IT System
Rental of hardware	BVB-Miete
Maintenance of bespoke software	BVB-Pflege (future: EVB-IT Systemservice)
Delivery of specifications for software development or planning of a new infrastructure	BVB-Planung (future EVB-IT Planung)

Remedies

For public tenders above the threshold amounts for public contracts, there is a dedicated review procedure offering the possibility to reverse an unlawful award of a public contract to a competitor. **This procedure needs scrutiny because it involves very short cut-off periods. Deadlines even apply during the bidding phase.** If during the bidding phase a supplier feels that the tender or the procedure under which the tender is performed violates the procedural rules according to Public Procurement Law, the supplier has to immediately (at the latest, on the next day!) post a notice to the contracting authority claiming the non-compliance (Rüge). Not meeting either the requirements to immediately notice non-compliance during the bidding phase or any cut-off period makes the case inadmissible or it will be lost!

For further information, please turn to

Mark Muench LL.M
IT Recht Kanzlei (IT Law Firm)
M.Muench@IT-Recht-Kanzlei.DE

Public Procurement Laws in India

Introduction

The Constitution of India (**Constitution**) broadly governs contracts entered into by the Government. Article 299 of the Constitution stipulates that all contracts made in the exercise of the executive power of the Union or State shall be expressed as made by the President, or by the Governor of the State, as the case may be.

The Indian Contract Act, 1872 (**Contract Act**) also lays down the essential requirements of a valid contract. Under the Contract Act, a valid contract is one made by the free consent of parties competent to contract. The contract must be for a law object and should have a lawful object. These general principles also apply to public procurement contracts.

While there is no central law specifically governing public procurement in India, there are several rules, guidelines and directions issued at the central level that govern public procurement in India. Some of them are:

i. General Financial Rules 2005 (**GFR**) issued by the Ministry of Finance

ii. Delegation of Financial Powers Rules 1978 (**DFPR**) (as amended from time to time)

iii. Guidelines issued by the Central Vigilance Commission to increase transparency and objectivity in public procurement by Governmental instrumentalities

iv. Manual on Procurement issued by the Directorate General of Supplies & Disposal

In addition to the above, there are sector-specific procurement rules, policies and laws, such as the Defence Procurement Manual 2009 and Defence Procurement Procedures 2011, Manual of Procedures for Purchase of goods/services issued by individual ministries/departments, and Government orders regarding price or purchase preference or other facilities to sellers in the handloom sector, cottage and small-scale Industries, and to public sector undertakings.

Some State Governments have their own general financial rules based on the broad principles laid down in the GFR. States such as Karnataka and Tamil Nadu have introduced legislation for procurement; for example, the Tamil Nadu Transparency in Tenders Act, 1998 and the Karnataka Transparency in Public Procurement Act, 1999.

Procedure

The procurement rules, policies and legislation govern the purchase of goods or services by public bodies and Government authorities, in order to ensure that contracts are awarded on an open, transparent, competitive and non-discriminatory basis. The GFR is also applicable to autonomous bodies, except where the bylaws of that body provide for separate financial rules.

Under the GFR, the purchase of goods up to the value of Rs. 15,000 at a time may be made without inviting quotations or bids on the basis of a certificate provided by a competent authority in a prescribed format. Purchase of goods costing above Rs. 15,000 and up to Rs. 100,000 at a time may be made on the recommendations of a duly constituted local purchase committee.

The GFR prescribes three forms of tender enquiries:

(i) Advertised Tender Enquiry (ATE)

For procurements of the value of Rs. 2,500,000 or more, the invitation for tenders must be advertised in the Indian Trade Journal and in one national daily having wide circulation. It must also be published on the website of the relevant organisation along with the complete bidding document. The minimum time allowed for submission of bids must be three weeks (four weeks for bids from abroad) from the date of publication of the tender notice or availability of the bidding document for sale, whichever is later.

(ii) Limited Tender Enquiry

This method is adopted when the estimated value of the procurement is up to Rs. 2,500,000. The bidding document must be sent directly to firms who are listed as registered suppliers with regard to the particular procurement. The number of such suppliers must be more than three. The limited tenders must be published on the internet. This method is adopted only if the Ministry or Department certifies the demand as urgent and that there exists a justified reason for not carrying out the procurement through ATE.

(iii) Single Tender Enquiry

Procurement can be made from one single firm:

a. If the Department or Ministry has knowledge that only a particular firm is the manufacturer/provider of the good or service to be procured

b. In case of emergency, if the required goods are necessarily to be purchased from a particular source with due reasons that are recorded; or

c. If it is necessary in order to maintain compatibility with the existing sets of equipment (after seeking advice by a competent technical expert)

In addition to this, the GFR advocates certain general conditions for contracts, such as:

i. The terms of contract must be precise, definite and without any ambiguities

ii. Standard forms of contracts must be adopted wherever possible, with such modifications necessary in respect of individual contracts, provided that legal and financial advice is sought for such modifications

iii. The contract, where necessary, must be executed within 21 days of the issue of the letter of acceptance

iv. The cost-plus method must ordinarily be avoided in contracts

v. If the contract stipulates a price variation clause, it must be detailed and must specifically lay down the procedure under which the price may vary

vi. Copies of contracts for procurements above the value of Rs. 2,500,000 must be sent to a duly authorised audit or accounts officer for verification

vii. The contract must envisage the provision for recovery of liquidated damages due to faults of the contractor

The GFR discourages negotiations. No negotiations are allowed in respect of tenders received for modification of rates and conditions. However, in exceptional circumstances, where price negotiations are unavoidable, negotiation may be resorted to with the lowest evaluated responsive tenderer, along with the approval of the competent authority. Negotiation is also permitted while awarding rate contracts.

Remedies

All tendering processes are subject to judicial review by the Supreme Court of India and High Courts in India on grounds such as arbitrariness and lack of fairness in action. The Supreme Court of India has held that every administrative action including public procurement is subject to the tests of reasonableness, must adhere to standards of fair procedure and must not be arbitrary or discriminatory. Hence any arbitrary or unreasonable award of a contract by a Government body can be challenged before a court of law.

Right to Information Act 2005 (RTI)

The RTI has been enacted with an aim to bring transparency to all key aspects of governance including public procurement. Under the RTI, citizens can approach public authorities and organisations funded by the Government to seek information about procurements made and decisions taken while awarding tenders.

Please note that there have been some recent efforts made by the Government to introduce a central legislation governing public procurement. It is expected that comprehensive legislation on public procurement will be introduced before the Parliament during the impending winter session.

For further information, please turn to:

Rahul Matthan
Rahul.Matthan@trilegal.com
TRILEGAL
One Indian Bulls Centre
14th floor, Tower One Elphine Road • Mumbai- 400 013
Phone No: 91 22 4079 1000 • FAX No: 91 22 4079 1098

Public Procurement Law in Ireland

General

There are two principal pieces of Irish legislation that implement the EC public procurement Directives. The European Communities (Award of Public Authorities' Contracts) Regulations 2006, SI No 329 of 2006 (the "**2006 Regulations**") implemented Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the so-called "Classics" Directive). The Classics Directive applies to the procurement of various works/national infrastructure, such as roads and bridges, as well as the procurement of goods and/or services. The European Communities (Award of Contracts by Utility Undertakings) Regulations 2007, SI No 50 of 2007 implemented Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (the "Utilities" Directive).

Whether the procurement process is governed by EU or Irish law depends upon the value of the contract put to tender by the contracting authority. The current threshold amounts, above which the EU law rules will apply, including, for example, the requirement to advertise the contract in the Official Journal of the EU ("**OJEU**"), are set out in the applicable Commission Regulation.

In addition to the above, two separate sets of Regulations govern remedies and enforcement and implement Directive 2007/66/EC (the "Remedies" Directive).

Contracting Authorities

The EC thresholds apply to "*contracting authorities*", defined in the 2006 Regulations as "the State, a local authority or a public authority, or an association comprising one or more local authorities or public authorities, or local authorities and public authorities." A "*public authority*" is in turn defined as "any body corporate, not having an industrial or commercial character, that is established for a public purpose, and (a) is financed wholly or substantially by the State, a local or regional authority or another public authority, or (b) is subject to management supervision by such a body, or (c) has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, a local or regional authority or another public authority." This definition is based on the concept of a "body governed by public law" under the Directives.

National Law

At a national level, procurement of public contracts below the EC thresholds is governed by non-binding guidelines issued by the Department of Finance, notably the *Public Procurement Guidelines*, otherwise known as the "Green Book", which was most recently revised in 2004.[37] Although the Green Book and other non-legislative guidelines are non-binding, boards of State bodies are required under the Code of Practice for the Governance of State

[37] These guidelines are available at www.etenders.gov.ie.

Bodies to ensure that the procedures set out in the EU and national procurement rules are adhered to.

The "Green Book" closely mirrors the EU Directives in spirit: its aim is to ensure that all public procurement is conducted honestly, fairly, and in a manner that secures the best value for public money. This is achieved through a competitive process carried out in an open, objective and transparent manner. The level of competitive process required depends upon the value of the contract, i.e., for contracts below €5,000, it may be possible to award the contract in question on the basis of verbal quotes, whereas for contracts between €5,000 and €25,000, at least three written quotes should be obtained prior to an award.

eTenders

eTenders.ie is an online portal for both contracting authorities and suppliers and is the main source for public procurement advertisements in the Irish public sector, displaying all Irish public sector procurement opportunities currently being advertised in the OJEU, as well as other lower-value contracts from contracting authorities. The Irish Government have made a particular effort to encourage the participation of small- to medium-size enterprises in the public procurement process, and as a result all public contracts for supplies and general services above €25,000 are advertised on the eTenders website.

eTenders also provides template contracts that contracting authorities are encouraged to follow when contracting for the provision of goods and services. While there are no templates currently available for the contracting of information and communications technology, the template contract for the provision of services will be useful for those seeking to tender or supply into this sector.

The Procedures

The type of procedure chosen by a contracting authority will depend to some extent on the nature of the contract and its value. The four available procedures are outlined below. While contracting authorities are free to use the open or restricted procedure, the competitive dialogue and negotiated procedure can only be used in specified circumstances. Tenders can be evaluated on the basis of lowest price or most economically advantageous tender (MEAT).

(i) Open

This is a single-stage process. Any interested party may submit a bid based on the publicly available tender document; however, negotiations between the contracting authority and the bidder as to price or the nature of the goods or services to be supplied are not permitted. The contracting authority may, however, clarify aspects of the tender with tenderers. The contracting authority chooses a winning bid solely on the basis of the bids received.

(ii) Restricted

This is a two-stage process. Interested parties may request to participate in the procurement process, but only those parties who pre-qualify are invited to submit bids. There must be a

minimum of five parties invited to tender. The contracting authority chooses the winning bid on the basis of the bids received; as with the Open Procedure outlined above, negotiations between the contracting authority and the bidder are not permitted.

(iii) Negotiated

This is a two-stage process. Interested parties are invited to submit pre-qualification and selection information; following which, those parties who pre-qualify will be invited to submit tenders to negotiate with the contracting authority. The contract terms are then negotiated, unlike the two procedures above. The Negotiated process is used, for example, when the nature of the contract does not allow for prior overall pricing or the specifications of the contract cannot be established with sufficient precision at the outset.

(iv) Competitive dialogue

This is a two-stage process. This procedure allows for dialogue between the contracting authority and the selected bidders before the tender stage. It is used for complex projects, where it is not possible for the contracting authority to formulate the proposed contract without the input of the selected bidders.

It is worth noting that it is not possible to change procedures throughout the procurement process; if this has to be done, then the different procedure has to be selected, and the procurement process has to be recommenced.

Remedies

The European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010, SI 130 of 2010 and the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010, SI 131 of 2010 implement Directive 2007/66/EC. These Regulations provide for the possibility of the review of decisions taken by a contracting authority under the relevant public procurement law rules by way of application by interested parties ("eligible persons") to the Irish courts. Strict deadlines for seeking a review apply: for example, a challenge must be brought within 30 calendar days after the applicant was notified of the decision or knew/ought to have known of the infringement. This period may only be extended by the courts in exceptional circumstances. Once an application for review of the authority's decision has been made to the court, the award procedure is automatically suspended until either the case has been determined/terminated or the court specifically grants leave to lift the suspension.

For further information, please turn to:

Yvonne Cunnane
Matheson Ormsby Prentice
70 Sir John Rogerson's Quay • Dublin 2
D: + 353 1 232 2152 • T: + 353 1 232 2000 • F: + 353 1 232 3333
E: yvonne.cunnane@mop.ie • W: www.mop.ie

Public Procurement Law in Italy

General

The Public Contracts Code[38] has implemented in Italy both Directives 2004/17/EC and 2004/18/EC and it is applicable to public procurements relating to several "special fields" (i.e., gas, thermal energy, water, transport, mail services and exploitation of geographical areas) as well as to public procurements relating to "ordinary fields" (i.e., any matter other than special matters as above described).

With reference to the ordinary fields, the Public Contracts Code provides different regulations depending on the value of the relevant procurement. In particular, public procurements having a value below the following thresholds are subject to a simplified procedure (which includes, among others, an easier framework for the advertising of the call for tenders and reduced procedural terms):

i. EUR 130,000 for public supply and service contracts other than research and development services awarded by central government authorities

ii. EUR 200,000 for any other supply and service contracts

iii. EUR 5,000,000 for public works contracts

The Public Contracts Code is also applicable in the fields of defence and security (i.e., the supply of weapons, ammunitions, military equipment, sensitive equipment and relevant services) only as far as they are not otherwise regulated by Legislative Decree of November 15, 2011, no. 208, which has implemented in Italy the Directive 2009/81/EC.

Finally, the Public Contracts Code shall not apply to some kinds of public procurements (such as those relating to TV broadcasting/producing contracts, arbitration agreements, etc.) although it provides some minimal requirements such as the issuance of invitations to tender to at least five candidates (if possible).

Procedures

The Public Contracts Code offers the following procedures:

i) Open procedure (In Italian "*procedura aperta*"): a procedure according to which any interested economic operator may submit a tender

ii) Restricted procedure (In Italian "*procedura ristretta*"): a procedure according to which any operator may request to participate, but only those economic operators invited by the contracting authority may submit a tender. If the public procurement has a value of at least EUR 40 million, the public contractor has to invite at least 20 candidates among the operators having requested to participate and having met the requirements set forth by the call

[38] Legislative Decree of April 12, 2006, n. 163, as further amended.

iii) Competitive dialogue (in Italian "*dialogo competitive"*): a procedure according to which any economic operator may request to participate, and the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender. This procedure is used for public procurements that are particularly complex

iv) Negotiated procedure (in Italian "*procedure negoziate")*, with or without advertisement: a procedure according to which the contracting authority consults the economic operators and negotiates the terms and conditions of the relevant contract with one or more of the operators that it has selected. There must be at least six candidates

v) Design contests (in Italian "*concorsi di progettazione"*): a procedure according to which the contracting authority is entitled to acquire a plan or design selected by a jury after being put out to competition with or without the awarding of prizes. This procedure applies mainly for public contracts in the fields of town and country planning, architecture and engineering, or data processing

vi) Dynamic purchasing system (in Italian "*sistema dinamico di acquisizione"*): a completely electronic procedure for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority. This is limited in duration and open throughout its validity to any economic operator that satisfies the selection criteria and has submitted an indicative tender that complies with the specification

The procedures under points iii) to vi) can be used only in specific cases as set forth by the Public Contracts Code.

Dedicated bank accounts

Pursuant to the Italian anti-mafia legislation, a dedicated bank account shall be used for any transaction related to public procurements (i.e., the transactions among the bidder, sub-contractors and any other third parties).

In particular, the bidders have to provide the relevant public contractors with the details of their dedicated bank accounts and promptly give notification of any variation in them.

In addition, according to such legislation, any public contract as well as any sub-contracts shall expressly include a clause according to which the relevant parties shall comply with specific traceability obligations for any transactions relating to a public procurement as set forth by Law of August 23, 2010, no. 136. In case of breach of the above-mentioned obligations, the contract will be terminated. The bidders shall also notify the public contractor and the police if they become aware that a subcontractor is not complying with the above-mentioned traceability obligations.

Contractual Terms

Public contracts are generally subject to the Italian Civil Code, unless otherwise regulated by the Public Contracts Code.

Please also note that, for ICT supplies and services contracts, the National Center for Informatics in the Public Administration (now renamed as National Agency for Digitalization of the Public Administration) has issued some guidelines relating to the drafting of ICT public contracts. Such guidelines do not contain any mandatory provisions, but they suggest the inclusion of specific provisions regulating: (i) non-disclosure obligations, (ii) risks of destruction of devices containing data during maintenance activities, (iii) restrictions on the possibility of performing remote maintenance activities, etc.

Remedies

Italian regulation of public contracts provides for both administrative and judicial remedies, depending on the object of the claim.

In particular, any controversies regarding irregularity in procedures are subject to the pertinent Administrative Courts (i.e., Regional Administrative Court in the first instance and the Counsel of State in appeal).

Should the irregularity concern infringements of the rules on competition in public procurements carried out by public entities, it is possible to file the relevant claim also before the Authority for the Supervision of Public Contracts for Works, Services and Supplies.

Any other disputes between the parties arising out of a public contract (including, for example, any disputes as to its validity, enforceability, interpretation, performance and termination) should be filed before the pertinent ordinary Courts. Please note that jurisdiction issues in relation to public contracts are currently still highly debated among case law legal experts and commentators.

For further information, please turn to:

Luca Gambini
lgambini@portolano.it
ORTOLANO COLELLA CAVALLO Studio Legale
www.Portolano.it
Via Santa Maria in Via, 12
00187 Roma
+3906696661

Domenico Colella
domenico.colella@orsingher.com
ORSINGHER - Avvocati Associati
www.orsingher.com
Via Marco De Marchi, 7
20121 Milan, Italy
T +39 02 89075050

Public Procurement Law in Norway

General

Although not a member of the EU, Norway has fully adopted the European Public Procurement Directives via the EEC agreement. Public Procurement Law in Norway is, as in many European jurisdictions, divided into two major legal areas; Local and European Public Procurement Law.

Local Procurement Law is applicable below the respective threshold amounts for public contracts issued by the EU, while European Public Procurement Law is applicable for any public contracts above these thresholds (EU Thresholds).

The Norwegian Public Procurement regulations below the EU Thresholds are, however, very similar to the regulations above the EU Thresholds. The main differences are that negotiated procedure (see below) is one of the standard procedures the contracting authority may freely choose from when publishing a tender below the EU Thresholds (whereas it is an exception above the EU Thresholds), and that the general legal framework is somewhat more flexible with respect to deadlines and formal requirements for procurement procedures below the EU Thresholds.

Procedures

Norwegian Public Procurement Law offers the following common procedures:

a. "Open Procedure" means a procedure whereby any interested tenderer may submit a tender. Consequently, any interested tenderer may issue an offer, leading to -- theoretically -- an unlimited number of offers

b. "Restricted Procedure" means a two-step procedure for tenders where a certain level of qualification is required. First, any tenderer may request to participate, and after a qualitative selection only those suppliers invited by the contracting authority may submit a tender

c. "Negotiated Procedures" means those procedures whereby the contracting authorities have the opportunity to negotiate with the tenderer of their choice about all aspects of both the delivery and the terms of contract

d. "Competitive Dialogue" means a two-step procedure where any tenderer may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more solutions capable of meeting its requirements, and on the basis of which the tenderers chosen are invited to tender

All of these procedures have in common that any tender submitted must strictly comply with the specifications issued and must comply with the formal requirements, such as templates, time schedule and accompanying documentation**.** Any substantial changes to the requirements, non-compliance with formal requirements, timelines, missing documentation or

information will lead to exclusion from the competition. Submitting supplier's Terms & Conditions may be deemed an illegitimate deviation from the tender documents, and may also lead to exclusion from the tender if the deviation is concerned to be substantial. Generally, participating in public tenders is a "take it or leave it" decision based on risk management principles. However, during the bid phase the suppliers may pose questions to the contracting authority in order to clarify the tender's specifications. This is highly recommended for participating in a public procurement procedure.

Contractual Terms

Public procurements of IT often include the use of Government standard terms and conditions that are made by the Norwegian Agency for Public Management and eGovernment (DIFI). These contracts (often shortened as SSA) have in general a high standing in the market, and the IT suppliers on the Norwegian market generally know the contents of these terms and conditions quite well. The contracting authorities may, however, decide to alter some of the provisions, so it is well worth checking to see if there are any changes to the standard terms and conditions before submitting a tender. Such deviations are mostly found in Appendix 8. The last general revision of the contracts was in 2009, and the author of this article participated in the revision.

There are also other standard terms and conditions regularly used on the Norwegian IT market; such as the Norwegian Computer Society's standard terms and conditions (e.g., PS2000 for purchase of software development) or the Norwegian IT business interest organisation's (IKT Norge) standard agreements for a wide range of IT purchases of software and services. The two latter organisations' standard terms and conditions are in general known as more supplier-friendly than the SSA, and they are not that common when it comes to public procurement.

List of currently existing Government standard terms and conditions (SSA):

Subject-matter of a contract	Available Template
Purchase of equipment, software and/or other deliverables Maintenance and servicing of equipment and software	SSA-K/SSA-K (condensed) SSA-V/SSA-V (condensed)
Purchase of operational services relating to hardware, infrastructure and software Delivery of standard systems that need customisation Development of software Assistance to be provided by a Consultant Research and development work to be performed by a Consultant	SSA-D SSA-T SSA-U SSA-B SSA-O

All of the templates may also be found on Difi's home page: http://www.difi.no/statens-standardavtaler-ssa.

Remedies

Norway has established a Complaints Board (KOFA) in order to handle complaints of violations of the law on public procurements. The Complaints Board is meant to be a cheaper alternative than the courts, making it easier for a passed-over supplier to examine its legal rights pertaining to a decision from a contracting authority. KOFA's decisions are only advisory (apart from a fine, which KOFA can inflict on a contracting authority), but the opinions are in practice usually obeyed by the parties concerned. If a contract is not signed, a passed-over supplier may file a claim for an interim court order to stop the procurement till a court has reviewed the legality of the procurement in question. After a contract is signed, passed-over suppliers are limited to bringing an action for damages against the contracting authority, if they are of the opinion that the procurement procedure was not in accordance with the procurement regulations.

It is expected that Norway will implement the directive 2007/66/EC to improve the effectiveness of review procedures concerning the award of public contracts in 2012. This will lead to some changes concerning remedies and review procedures. Most importantly, the implementation of the directive will lead to a new remedy: ineffectiveness of contract in certain situations. Most notably, this would be the case when a contracting authority has awarded a contract without prior publication of a contract notice. It may also be the case if the court finds that the contracting authority has breached the standstill or suspension periods after award of contract, also being introduced with the implementation of the directive. Furthermore, KOFA will no longer have the authority to issue a fine (as mentioned above) to contracting authorities that have breached the public procurement legislation. This authority will be the sole domain of the ordinary courts when the new legislation is implemented.

For further information, feel free to contact:

Torstein Arendt, Partner
Kluge Advokatfirma DA (Law Firm)
torstein.arendt@kluge.no
+47 23 11 00 00

Public Procurement Law in Poland

General

Public procurement in Poland is regulated by the Act on Public Procurement Law, dated January 29, 2004 (Journal of Laws from 2010 No 113, item 759 uniform text – as amended (PPL).

Public procurement procedures in Poland may follow the European procedures or the local procedures. Into the first category fall those tenders where the value of the object of the tender exceeds the thresholds provided in the respective regulations. The contracting entities need to announce such tenders in the European magazine TED. Tenders where the value does not exceed this threshold are published in the local magazine, BZP.

The EU thresholds are calculated in Polish currency according to the exchange rate regulated by the law. The aforementioned contract value is the expected total remuneration for the realization of the tender contract as assessed by the contracting entity.

There are certain differences in the procedures for local and European tenders. For European tenders, the contracting entity must demand that the tender participants provide documents to prove that the conditions for participation in the tender are fulfilled. In the local procedures, the contracting entity may demand such documents; however, it may rely instead only on the respective declarations. Another difference is that the possibility of appealing the decisions of the contracting entity before the arbitration court (see below for details) is limited to certain categories of decisions in local tenders. There is no such limitation in the European tenders. Additionally, the procedures differ in other aspects, including various deadlines such as when to submit offers or to respond to inquiries about the specification, provisions concerning the bid bond, etc.

Procedures

Public tenders in Poland may be held according to the following procedures:

1. Open tender – a procedure where any interested entity may submit an offer after a public announcement. This means that the offer contains both the substantive documentation relating to the subject matter of the offer as well as the documentation proving that the conditions for participation in the given public tender procedure are met

2. Restricted tender – a procedure where interested entities submit a motion to be admitted to the tender procedure in which they demonstrate that the conditions for participation therein are met. Only those qualifying are invited to submit offers

   The procedures in items 1 and 2 are the so-called basic forms. This means that there are no conditions for their application and the contracting entity may freely choose to use them.

3. Negotiated procedure with notice – a procedure where, after the announcement and a qualification process similar to item 2, the participants submit initial offers (without the price) and negotiate them with the contracting entity. After the negotiations, they submit the final offers. The negotiations concern the description of the object of the tender and the conditions of the contract

   The conditions for the use of this procedure concern the inability to make the purchase under basic procedures or competitive dialogue. Additionally, it may be used if certain conditions as to the features of the object of the tender are met. No conditions need to be met for such a procedure to be used for local tenders (below the thresholds specified above)

4. Competitive dialogue -- a procedure where, after the announcement and a qualification process similar to item 2, the contracting entity negotiates with chosen participants. After the negotiations, the participants submit offers. The negotiations concern any aspects of the tender. The conditions for using this procedure concern the features of the object of the tender

5. Negotiated procedure without notice – the contracting entity negotiates with participants it chooses itself. After the negotiations, they submit offers. No public announcement is made. The conditions for using this procedure include the inability to make the purchase under other procedures, specific features of the object of the tender, and an urgent need to make the purchase. Such urgency may not be due to circumstances relating to the contracting entity

6. Single-source procurement -- the contracting entity negotiates with participants it chooses itself. After the negotiations, the parties conclude the agreement. There are several conditions for using this procedure. The most commonly used is where the order can be fulfilled by one entity only, due to technical reasons, the protection of exclusive rights, etc.

7. Request for quotation – applies to standard commodities in local tenders only

8. Electronic bidding – bidding in real time on the Internet platform made available by the contracting entity. Applies only to local tenders

To participate in the tender, the bidders need to comply with the conditions for participation. Such conditions are set by the contracting entity and must be relevant for the object of the tender. If they are anti-competitive, a claim may be made before the arbitration court. Entities that do not fulfill the conditions are excluded from the procedure.

The substantive offer must comply with the specification of the tender conditions. If it does not, the contracting entity must reject such offer.

The contracting entity makes the assessment in the two aforementioned aspects based on the documentation submitted by the tender participants. If such documentation is incomplete or in another way erroneous, the contracting entity may not immediately make the exclusion/rejection decision as mentioned above. Before it does so, it must request that the

participant deliver the correct document in place of the missing or erroneous one. This request is obligatory – failure to do so may be brought before arbitrators.

Contractual Terms

In general, the Polish Civil Code applies to contracts made within the public procurement regime. PPL contains only a few provisions with regard to such contracts, which concern the duration of contracts, performance bonds, and prepayments.

There are no fixed standard forms for contracts concluded under the public tender system. Such forms are, however, made by contracting entities and attached to the tender specification. With the exception of the negotiated procedures, the tender participants are asked to declare that they will sign the agreement based on such pattern in the event they win the tender. If they fail to do so, they lose not only the contract but also the bid bond, which they are obliged to submit together with their offer. The possibilities of negotiating such contracts are very limited and boil down to making inquiries about the specification (the draft contract is an attachment to such specification). In practice this procedure allows the removal of certain obvious mistakes from the agreement, but it does not allow changing provisions that are unfavourable for the tender participants. As a result of this, tender participants must often make a decision on a "take it or leave it" basis, as regards contracts containing provisions that are very difficult to accept (such as, for example, unlimited liability).

There are also certain legal obstacles to modification of an already concluded agreement. Such modifications, if crucial, are allowed only if provided in the tender specification. A crucial modification is one which, if known at the commencement of the tender procedure, would have an impact on the number of the tender participants. Modifications that are not crucial may be made freely.

Remedies

Disputes relating to public tenders are heard by arbitrators at the National Chamber of Appeals (NAC). Appeals may be submitted by a tender participant or another entity having an interest in getting the order, which suffered or could suffer loss due to the decision of the contracting entity. In the appeal one can claim that an action of the contracting entity violated the law, or that the contracting entity failed to perform an action that it was supposed to perform by the force of law. Winning the appeal may mean – depending upon the situation -- that the contracting entity repeats, performs or invalidates its action. NAC may also decide on invalidation of the public tender agreement in full or in part.

The deadlines to submit an appeal vary between five days and six months. They depend upon the nature of the tender (local or European), the subject matter of the dispute and the medium of communication between the contracting entity and tender participants. The submission of the appeal suspends signing of the tender contract.

Tender participants that did not submit an appeal are allowed to join the appeal procedure on the side of one of the parties to the dispute.

It is possible to appeal the verdict to the State Court. Given, however, that the submission of such a complaint does not suspend the signing of the tender contract, such a complaint is not very attractive. Additionally, complaints concerning the decisions of the contracting entity made after the opening of the offers are subject to a significant court fee.

For further information, please turn to:

Krzysztof Stefanowicz
Krzysztof.Stefanowicz@msag.pl
Stolarek & Grabalski Law Office sp. k.
ul.Klonowa 4, 00-591 Warsaw
Tel. +48-22 856 53 35,
Fax +48 22 629 71 70
kancelaria@msag.pl

Public Procurement Law in Portugal

General

Public Procurement Law in Portugal is ruled by Decree-Law 18/2008 (the Code of Public Contracts -- CPC), which establishes the rules applicable to public procurement and the substantive regime governing public contracts that take the form of administrative contracts.

The CPC transposes Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council of 31 March 2004, as amended by Commission Directive 2005/51/EC of 7 September 2005 and corrected by Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005.

With regard to the scope of this Code, objectively it applies to the formation stage of contracts to be entered into between the contracting entities, whatever any such contracts may be called and whether they are administrative (e.g., public concessions) or private (e.g., IT contracts).

The CPC rules apply not only to the traditional public entities but also to the so-called special- purpose vehicles, in accordance with EC principles.

The e-procurement procedure is mandatory for the public entities as well for contractors, and the market for running the platforms is liberalized. Reference to Public Procurement Law and regulations, certified platforms and pending tenders is accessible through the official Public Contracts site http://www.base.gov.pt (no English version available).

Procedures.

The CPC offers the following procedures:

a. Direct negotiation (procedure through which the public entity chooses the contractor after consulting candidates and negotiating the conditions of the contract with one or more of them)

b. Negotiated procedure preceded by the publication of a contract notice (the public entity chooses the contractor after publication of a contract notice)

c. Open tender procedures (any interested economic operator may submit a tender)

d. Restricted procedure subject to prequalification (any economic operator may request to participate but needs to prove its qualification. After a qualitative selection, only the qualified economic operators are invited by the contracting authority to submit a proposal)

e. Competitive dialogue (procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more

suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender)

The CPC establishes rules according to which the choice of these procedures depends on the value of the contract (which is the value of the maximum economic benefit that may be obtained by the awarded tender with the provision of all the services that are the subject of the contract) and special rules on the choice of the procedure depending on the type of contract to be entered into or contracting entity involved. In case of SW contracts (including licensing and in some cases maintenance and support), the exclusivity of IP rights may give rise to direct negotiation despite the amount of the awarded contract.

With regard to the pre-qualification procedure, the CPC adopts two qualification models:

- A simple one, where the minimum requirements with respect to technical and financial capacity set out in the procedure programme must be met
- A complex one, where a pre-established number of candidates qualified according to highest technical and financial capacity are selected, by resorting to a model to evaluate their candidatures

CPC establishes two tender evaluation methods or contract award criteria:

a. When the award is made to the tender most economically advantageous from the point of view of the contracting authority (various criteria linked to the subject matter of the public contract in question; for example, quality, price, technical merit, together with the relevant weightings)

b. The lowest price only

With regard to the rules applicable to the procedure documents, the CPC provides that the schedule of conditions clauses relating to the performance of the contract subject to the competition may establish parameters with which the tenders are required to comply. These parameters -- which may concern price, performance time limit or technical or functional characteristics -- must be defined by minimum or maximum caps and serve to delimit the competition. Tenders that fail to comply with this requirement will be excluded.

In the pursuit of its goal of simplifying pre-contract procedures, the CPC establishes that the negotiated procedure preceded by the publication of a contract notice, open tender procedures, the restricted procedure subject to prequalification, and competitive dialogue take place by electronic systems.

Contractual Terms

Part III of the CPC contains the rules common to all contracts taking the form of administrative contracts and regulates the rules applicable to contracts such as: public works contracts, concession of public works and public services, acquisition and leasing of movable property (hereby included HW contracts) and acquisition of services (hereby included SW contracts).

As for administrative contracts in general, the CPC submits these to imperative reasons of public interest, maintains the public contractor's significant powers throughout their performance, creates figures such as benefit sharing and special rules applicable to the public contractor's failure to perform, and introduces rules aimed at the contracting parties sharing risks.

Regarding the substantive regime governing public contracts, we would like to point out the following topics:

i. Elimination of the dichotomy "turnkey contract, T&M, price list contract or percentage contract", without prejudice to the awarding entity being entitled to design the works on the basis of any of these models

ii. Increased restrictions of additional works or functionalities (in SW contracts) that will henceforth depend on tighter pre-conditions and no longer include the works required to remedy errors and omissions

iii. Redefinition of the liability for errors and omissions system

iv. Increased restrictions on subcontracting, which is a particular constraint in Outsourcing contracts

v. Substantial reformulation of the defects liability system (makes applicable consumer law and particularly the two years warranty applicable for IT contracts)

vi. Clarification of the system governing contract cancellation by the owner and by the contractor

vii. Penalties with a legal ceiling of 20%

viii. No liability limitation clauses as a rule, in case of termination by default

IT contracts, either referring to HW, SW, turnkey systems and platforms, and Outsourcing, do not have standard model clauses. Therefore, it is for each public entity to draft the contract terms.

Litigation over IT public contracts is residual, which means that administrative case law is almost non-existent.

For further information, please turn to:

Jaime Medeiros
Luis Melo
Coelho Ribeiro & Associados (Law Firm)
COELHO RIBEIRO E ASSOCIADOS, SOCIEDADE CIVIL DE ADVOGADOS
Ph. (+351) 21 383 90 60 • Fax. (+351) 21 385 32 02 • www.cralaw.com
Av. Eng. Duarte Pacheco, Emp. Amoreiras, Torre 2 - 13º A • 1099-042 Lisbon – Portugal

Public Procurement Law in the Russian Federation

General

Public Procurement Law in Russia is currently being revised. The existing Federal Law Dated 21 July 2005 No. 94-FZ On the Placement of Orders for the Supply of Goods, Performance of Works, Provision of Services for State and Municipal Needs (Russian Public Procurement Law No. 94) might be either changed or replaced by the Federal Contract System prepared by the Ministry of Economic Development. It is the Federal Antimonopoly Service that is in charge of the Russian Public Procurement Law No. 94.

Apart from that there exists a recent Federal Law Dated 18 July 2011 No. 223-FZ with regard to purchases of goods, works and services by state companies, natural monopolies, state enterprises, and their subsidiaries.

Procedures

Russian Public Procurement Law No. 94 offers the following procedures:

(a) With bidding («торги») in form of a tender[39] («конкурс») or auction («аукцион»), including an electronic auction («электронный аукцион»)

- Tender means a procedure in which the winner is a company that offered the best conditions. The tender may be in an open or closed form. There is a restricted number of cases when a closed tender is possible
- Auction means a procedure in which the winner is a company that offered the best price. There is a special list of goods and services that shall be bought by means of an auction
- An electronic auction is a special procedure that is to be held on the Internet. There is a special website where all the orders shall be published – www.zakupki.gov.ru. There are special electronic platforms as well: www.roseltorg.ru; www.ets-micex.ru; www.zakazrf.ru; www.sberbank-ast.ru; www.rts-tender.ru

(b) In exceptional cases without bidding: request for quotation[40] («запрос котировок»), by a single seller («у единственного поставщика»), at a commodity market (на товарных биржах)

- A request for quotation is possible if the contract price is less than RUR 500.000

[39] Art. 20 Russian Public Procurement Law No. 94

[40] Comparable to Art. 50 of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

Contractual Terms

Orders for the supply of hardware and software are in most cases conducted in the form of an auction.

From a contractual perspective, public contracts generally follow Civil Code. Drafts of public contracts are part of the documentation to be published by the governmental body. Specifications with regard to the detailed description of the required product are part of the documentation as well.

The suppliers are entitled to pose questions to the contracting authority in order to clarify the tender's specifications. However, the number of questions with regard to one bid from one supplier is limited to three.[41]

There is no list of approved drafts of contract with regard to IT suppliers and services. However, the Federal Antimonopoly Service published on its official website recommendations with regard to public procurement of personal computers. The recommendations concern first of all the description of the type of microprocessors required.

Public contracts entered into as a result of electronic auctions are to be signed by means of electronic signatures.

Remedies

The suppliers are entitled to file an application for remedy with the Federal antimonopoly authority and/or its territorial divisions with regard to violations during the tender process, including infringements in the documents specifying the necessary goods, works, and services. Apart from that, an application to court for remedy is possible.

For further information, please turn to

Alexander Titov LL.M.
Associated Partner
Noerr OOO
I-ya Brestskaya ul. 29
125047 Moscow / Russian Federation
T +7 495 7995696
F +7 495 7995697
alexander.titov@noerr.com
www.noerr.com

Tatiana Kazankova LL.M.
Associate
Noerr OOO
I-ya Brestskaya ul. 29
125047 Moscow / Russian Federation
T +7 495 7995696
F +7 495 7995697
tatiana.kazankova@noerr.com
www.noerr.com

[41] Art. 41.7. Russian Public Procurement Law No. 94

Public Procurement Law in Spain

Spain has incorporated into its national legislation the Directives over public contracts[42] through **Law 30/2007 of October 30th of Contracts of the Public Sector[43].**

This law brings important features about the obligation of creating a "*profile of the contracting party*"[44], about the use of the Internet throughout the formalization of the contracts, the consideration of social and environmental issues at the time of awarding the contracts, its legal categorization of new figures, and about the contract of cooperation between the public and the private sectors.

As a way of identifying the range of the set of rules subject to the prescriptions of the Community Directives, Law 30/2007 introduces the legal category of "*contracts subject to harmonized regulation*", which defines the businesses that, for reasons of the contracting party, their type and their significance, are subject to European Directives. Thus, the following are subject to the above harmonized regulation:

- Construction contracts and contracts awarding public projects for which estimated value is equal to or over € 4.845.000[45]
- Supply and services contracts with an estimated value equal to or over the following amounts: (i) €125.000[46] in the case of contracts awarded by the General Administration of the State, its autonomous organizations, or the Administration Entities and Common Services of the Social Security (excluding the contracts awarded by organizations that belong to the area of defense, unless aiming for specific products); (ii) €193.000[47] when dealing with supply contracts that are different, for reasons of the contracting subject or their purpose, from those contemplated under the above type
- Contracts subsidized, directly and in more than 50% of their value, by entities considered to have adjudicators faculties, provided they belong to any of the following categories: (i) construction contracts of civil engineering of Section F, Division 45, Group 45.2 of the General Catalogue of Economic Activities of the European Communities (NACE), or the construction of hospitals, sports, recreational or leisure centers, buildings destined for schools or universities and buildings for administrative use, provided their estimated value is equal to or over €4.845.000; (ii) services

[42] In particular, Directive 2004/18/EC of the European Parliament and the Council of March 31st 2004, over the coordination of the awarding procedures of public contracts, of supply and of services.

[43] Published by the Official State's Official Gazette Nº 261 of October 31st 2007

[44] In order to assure transparency and public access to the information concerning the contractual activity, the contracting organizations, through the Internet, will disclose their contracting party profile. The method of access to the profile of the contracting party must be specified on the corporate web pages kept by the organizations of the public sector, in the Estate's Contracting Platform and on the sealed letters and announcements of the bid. Order EHA/1220/2008 of April 30th approves the precise instructions that must be met to operate in the Contracting Platform of the State.

[45] Specification of this figure as per Order EHA/3497/2009 of December 23rd.

[46] Specification of this figure as per Order EHA/3497/2009 of December 23rd.

[47] Specification of this figure as per Order EHA/3497/2009 of December 23rd.

contracts associated with a construction contract for an estimated value equal to or over € 193.000

The estimated value of the above indicated contracts is determined by the total amount, and does not include Value Added Tax.

Types of Public Contracts

The following types of contracts exist in Spain:

- Construction contracts: those involving the construction of a project or the execution of any of the works listed in the Law, or the realization, by any means, of a project responding to the specific needs of the entity of the contracting public sector. Besides the above, the contract may include, as the case may be, the preparation of the relevant project

- Contracts assigning a public work: contracts involving the realization by a licensee of some of the services to which the construction contract refers, including the refurbishment and repair of existing constructions, as well as the conservation and maintenance of the elements already built, where the compensation in favor of the above licensee consists either only in the right of exploiting the project, or the right of exploiting the project plus the right of obtaining a price

- Contract for the administration of public services: a contract through which a Public Administration or the Labor Accidents and Professional Diseases Mutual of the Social Security entrust to an individual or legal entity the management of a service that has been assumed as its own by the granting Administration of Mutual Society

- Supply contract: a contract that involves the acquisition, leasing or renting, with or without purchase option, of products or movable assets

- Services contract: a contract for which the purpose is the rendering of services consisting of the development of an activity or that are addressed to obtaining a result different from that of a construction or supply contract

- Contract of cooperation between the public sector and the private sector: a contract in which a Public Administration or a public entity or similar organization of the Autonomous Community commends to a company of the private sector, for a specific period that will depend on the duration of the amortization of the investments of the financing formulas contemplated, the realization of a general and integrated performance that, besides the financing of nonmaterial investments, the projects or the supplies required to comply with specific purposes of public service or associated with performances of general interest, includes some services such as, among others, the fabrication of assets and services that include technologies specifically developed with the purpose of providing more advanced solutions that prove to be economically more advantageous than those existing in the market

Contracts of the public sector may be of administrative nature – subscribed to by a Public Administration -- or of private nature –subscribed to by entities, organizations and public sector companies that do not meet the requirements of Public Administrations.

Capacity and Solvency of the Business Entity/Operator

In Spain any individual or legal entity, either Spanish or foreigners, may contract with the public sector, provided they have the capacity to operate, are not affected by any prohibition of contract, accredit their economic, financial and technical solvency or, in the case of being demanded by the Law, are properly classified.

The non-Spanish companies of the Members States of the European Union shall have the capacity to contract with the public sector in Spain, provided they are qualified to carry out the assignment involved in agreement with the legislation of the State where they are located. When the legislation of a State demands a special authorization or to belong to a specific organization in order to be able to provide the service, these companies must prove they meet this requirement. The certificates of classification or similar documents that prove the inscription in official listings of companies authorized to contract established by the Member States of the European Union set an aptitude assumption of the operators included thereof in connection with the non-existence of prohibitions for contracting, the holding of the conditions or capacity to act, as well as the professional qualification and the solvency required.

Awarding of Contracts

The subscription of contracts by Public Administrations requires previously obtaining the relevant file to which the sealed document with specific administrative clauses and the technical specifications that will govern the contract will be attached. The handling of the file may be ordinary or abbreviated in those cases where formalization must be undertaken as a matter of urgency or as an emergency.

The procedures for the awarding of contracts of the Public Administrations must be announced in the Official Bulletin of the State (*BOE*), or, when involving contracts with the Autonomous Communities, in the autonomic or provincial official newspapers or bulletins.

When the contracts are subject to harmonized regulation, the tender must be published, in addition, by the Official Gazette of the European Union.

The awarding of contracts may be made through four different procedures:

- **Open Procedure:** in which any interested operator may present an offer, with any negotiation of the terms of the contract with the bidders being excluded
- **Restricted Procedure**: in which only those operators that at their request may present offers and, depending on their solvency, will be chosen by the contracting organization. In this procedure, any negotiation of the terms of the contract with the petitioners or candidates will be forbidden

- **Negotiated Procedure:** awarding of a contract will fall on the bidder fairly chosen by the contracting organization, after consultation with several candidates and negotiating the conditions of the contract with one or several of them

- **Competitive Dialogue:** in which the contracting organization conducts a dialogue with the chosen candidates, following their requests, in order to develop one or several solutions susceptible of satisfying their needs that will be the basis for the candidates chosen to present an offer, with the contracting organizations being allowed to establish premiums or compensations for those participating in the dialogue

In compliance with the standards of transparency in the contracting process and the effectiveness of the administration's performance, the use of computers and electronic means by the bidders or the candidates is encouraged in our country within the above-mentioned awarding procedures, of which the Official Registry of Bidders and Classified Companies of the State is a good example[48].

In Spanish legislation, the contentious administrative jurisdictional order is competent to deal with controversial issues concerning the preparation, awarding, effects, fulfillment and termination of administrative contracts. Likewise, the above jurisdiction will be competent to deal with issues derived from the preparation and awarding of private contracts of the Public Administrations as well as contracts subject to the harmonized regulation, including subsidized contracts.

Law 2/2011 of March 4th of Sustainable Economy provides specific rules for so-called "*pre-commercial contracting*", considered by the European Commission as an essential instrument to encourage innovation and promote public services of quality and sustainable nature, and to allow a higher implication of public contracting in the implementation of investigation, development and innovation policies.

Lastly, we must point out that Law 24/2011 of August 1st, of contracts of the public sector in the areas of defense and security, which will be enforced in November 2011, incorporates in Spanish legislation the Rules of Directive 2009/81/EC of the European Parliament and the Council, approved on July 13th 2009, about the coordination of awarding procedures in specific contracts for projects, supplies and services for the entities or adjudicators in the areas of defense and security.

Platform of Public Contracting of the Spanish State

In order to comply with the aim formulated by the European Commission of enabling the e-contracting mode one hundred per cent and to reach 50% of the contracts subject to harmonized regulation by electronic means, the Contracting Platform intends to embrace all the elements required for developing electronic contracting as well as a number of incentives

[48] Order EHA/1490/2010 of May 28th that regulates the operation of the Official Registry of Bidders and Classified Companies of the State

for the use of electronic means in public contracting, fundamentally in matters concerning publicity, notices and reduction of time periods for presentation of proposals.

Within this virtual space, the following links are included:

(i) **Official Registry of Bidders and Classified Companies of the State: (ROLECE)** http://registrodelicitafdores.gob.es/rolece/public/inicio.action, where operators may be registered, and which certificates prove to all contracting organizations of the public sector, unless proof to the contrary, the aptitude conditions of the operator as far as its personality and capacity to operate, representation, professional or corporate qualification, economic and financial solvency¸ and classification as well as the existence/nonexistence of prohibitions to contract that must be recorded on that registry. The Registry is of electronic nature and applications for registration as well as the procurement of certificates are made through electronic means, recognizing the identity of the applicant by using an electronic ID or the electronic certificate of identity of the individual of the FNMT

(ii) **Advisory Board of Administrative Contracting** http://www.meh.es, advisory organization of the General Administration of the State, its autonomous organizations and other public entities in matters concerning administrative contracting

(iii) **Electronic Classification of Companies** https://eclasificacion.meh.es, which allows preparation and sending by electronic means to the Advisory Board of Administrative Contracting the applications for classification of contractors for projects and of service companies, handling their communications with the Board during the process, and receiving in electronic format the agreements, certificates and notices released by the Board

(iv) **Public Registry of Contracts** http://www.meh.es, which gathers the information concerning the contracts awarded by the contracting organizations (located in the center as well as in the suburbs), autonomous organizations and remaining Entities of Public nature. To such purpose, the Ministry of Economy and Treasury Office makes available to all the contracting organizations of the several Public Administrations the electronic applications required to handle these communications

For further information, please contact:

Batalla Abogados
Enrique J. Batalla
enrique.batalla@lawoffice-batalla.com

Public Procurement Law in Switzerland

General

Public Procurement Law in Switzerland is extremely fragmented. There is a division into Federal and Cantonal law. Federal law[49] applies exclusively to federal contracting authorities. Each of the 26 Cantons has its own public procurement law applying to cantonal, regional and communal contracting authorities of the respective Canton. There is also an inter-cantonal agreement in place regulating certain common principles that have to be incorporated into its legislation by each Canton.

Public Procurement Law is further divided into an international and a national field. International Agreements applicable in Switzerland are 1. the Government Procurement Agreement of the WTO, 2. the Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement[50] and 3. the EFTA Convention[51], which grants access to markets between Switzerland and the EFTA Member States in the same way as stipulated in the bilateral Agreement between the EU and Switzerland. As Switzerland is not an EU Member State, the EU Directives on public procurement do not apply in Switzerland.

The applicability of international agreements depends primarily on whether the value of a contract exceeds certain threshold amounts.

Threshold amounts for contracting authorities subject to federal law:

Procurement of goods[52]	Procurement of services[53]	Procurement of goods or services by public or private organizations doing business in the fields of the supply of water, energy, transport or telecommunications[54]	Procurement of construction services[55]
CHF 230,000	CHF 230,000	CHF 700,000	CHF 8,700,000

[49] Federal Act on Public Procurement, SR (Classified Compilation of Federal Legislation) 172.056.1, Ordinance on PublicProcurement and supplementary ordinances.

[50] OJ L 114/430, 30.4.2002

[51] See Art. 37 of the Convention and Annex R thereto.

[52] Procurement of goods by military authorities is only subject to international agreements and the Federal Act on Public Procurement if the goods in question belong to one of the categories of goods listed in Appendix 1 of the Ordinance on Public Procurement.

[53] The procurement of services is subject to the international agreements and the Federal Act on Public Procurement if the services in question belong to one of the categories of services listed in Appendix 1a of the Ordinance on Public Procurement.

[54] Telecommunications providers are exempt from the applicability of the procurement law, based on an opt-out clause provided for in the bilateral agreement with the EU, which allows exemption of certain public or private companies if they are operating under competitive conditions.

[55] The procurement of construction services is subject to international agreements and the Federal Act on Public Procurement if the services in question belong to one of the categories of services listed in Appendix 2 of the Ordinance on Public Procurement.

In federal law, the scope of applicability of international agreements corresponds to the applicability of the Federal Act on Public Procurement. Contracts below the aforementioned threshold amounts are, however, only subject to Chapter 3 of the Ordinance on Public Procurement. The main difference is that, within the scope of applicability of international agreements and the federal act, decisions taken by contracting authorities in the context of, or in relation to, a contract award procedure may be appealed to the Federal Administrative Court. This is not possible for tenders below the aforementioned threshold amounts.

Threshold amounts for contracting authorities subject to cantonal law:

- Applicability of the GPA

Contracting authority	Procurement of goods	Procurement of services	Procurement of construction services
Canton	CHF 350,000	CHF 350,000	CHF 8,700,000
Public organizations doing business in the fields of supplying water, energy, transport or telecommunications	CHF 700,000	CHF 700,000	CHF 8,700,000

- Applicability of the EU Switzerland bilateral agreement

Contracting authority	Procurement of goods	Procurement of services	Procurement of construction services
Regions / Communities	CHF 350,000	CHF 350,000	CHF 8,700,000
Private companies doing business in the fields of supplying water, energy or transportation	CHF 700,000	CHF 700,000	CHF 8,700,000
Public or private companies doing business in the fields of supplying rail transport, gas or heat supply	CHF 640,000	CHF 640,000	CHF 8,000,000
Public or private companies doing business in the field of telecommunications[56]	CHF 960,000	CHF 960,000	CHF 8,000,000

Procedures

Swiss Public Procurement Law offers the following procedures:

a. Open procedure (Offenes Verfahren) -- a procedure whereby any interested economic operator (after the publication of the planned procurement together with the invitation to participate by the contracting authority), may submit a tender. Consequently, any interested tenderer may issue an offer leading -- theoretically -- to an unlimited number of offers

[56] With regard to the exemption of telecommunications providers, see footnote 5 above.

b. Selective procedure (Selektives Verfahren) -- a two-step procedure for tenders where a certain level of qualification is required by the supplier. Firstly, any economic operator (after the publication of the planned procurement together with the invitation to participate by the contracting authority) may request to participate and must prove its qualification, and secondly, after a qualitative selection only those economic operators invited by the contracting authority may submit a tender

c. Invitation procedure (Einladungsverfahren) – a procedure in which the contracting authority chooses without prior publication of the planned procurement which economic operators shall be invited to submit a tender. If possible, the contracting authority must obtain tenders from at least three different economic operators

d. Limited procedures (Freihändiges Verfahren) -- those procedures whereby the contracting authority consults the economic operators of its choice and negotiates the terms of contract with them

e. Contest procedure (Planungs- und Gesamtleistungswettbewerb) -- a procedure in which proposals are requested either only for the solution of certain tasks (ideas contest) or additionally also for possible economic operators that are able to realize the proposed solution (project contest). The details of the contest procedure may be regulated by the contracting authority on a case-by-case basis. Cases where this procedure can be applied include, for example, architectural competitions

The invitation procedure and the limited procedure are not applicable in the international field, with the exception of those cases mentioned in Art. XV of the GPA where the limited procedure may apply.

In Cantonal law, however, the open and selective procedure already apply to contracts below the threshold amounts defining the applicability of international agreements, and the thresholds for the applicability of the invitation procedure and limited procedure are even lower.

Threshold amounts in Cantonal law for the applicability of different procedures:

Procedure	Procurement of goods	Procurement of services	Construction services	
			ancillary construction trades	main construction trades
Limited procedure	below CHF 100,000	below CHF 100,000	below CHF 100,000	below CHF 300,000
Invitation procedure	below CHF 250,000	below CHF 250,000	below CHF 250,000	below CHF 500,000
Open/selective procedure	from CHF 250,000	from CHF 250,000	from CHF 250,000	from CHF 500,000

Contractual Terms

At the federal level the following General Terms and Conditions (GTC) exist for the ICT sector:

1. GTC for the Purchase and Maintenance of Hardware
2. GTC for the Procurement and Maintenance of Standard Software
3. GTC for IT Works Contracts and the Maintenance of Individual Software
4. GTC for IT Services

At the Cantonal level the Swiss Informatics Conference has published the following GTCs:

1. GTC for the Purchase of Complete Informatics Systems and the Manufacture of Individual Software
2. GTC for the Procurement and Maintenance of Standard Software
3. GTC for IT Works Contracts and the Maintenance of Individual Software
4. GTC for IT Services

Usually the contracting authorities require acceptance of these GTCs by the economic operators as a precondition for participating in the contract award procedures. However, contracting authorities have the option of permitting deviations from the GTCs if the possibility of such deviations is indicated in the publication notice for the planned procurement.

Remedies

At Cantonal level, decisions by contracting authorities, in particular unlawful awards, may be appealed to the Cantonal (administrative) courts. An appeal of decisions by cantonal courts to the Federal Supreme Court is only possible under specific circumstances (contract value above the thresholds for international agreements, basic legal issue, violation of rights under the Federal Constitution). At the federal level, an appeal of decisions by the contracting authorities to the Federal Administrative Courts is only possible for procedures relating to contracts with a value above the threshold amount for international agreements. An appeal of decisions by this court to the Federal Supreme Court is only possible in cases where basic legal issues are at stake.

For further information, please contact

Dr. Ursula Widmer
Dr. Widmer & Partners, attorneys-at-law
Berne
ursula.widmer@widmerpartners-lawyers.com

Public Procurement Laws in Turkey

General

Public Procurement in Turkey is governed by Public Procurement Law no. 4734([57]) as well as by Public Procurement Contracts Law no. 4735,([58]) both dated 2002. These Laws apply to all public procurements, with a few exceptions regarding purchase of goods and services involving state security, public health, cultural properties, natural resources, protection of witnesses, etc.

The Public Procurement Law foresees threshold amounts that are reviewed and reset on a yearly basis. In this respect, applicable from January 1, 2012, these threshold amounts are as below:

- 792,482 TL (approximately €396,000) for purchase of goods and services by administrations included i the general budget
- 1,320,805 TL (approximately €660,500) for purchase of goods and services by other administrations included to the scope of the Law
- 29,057,835 TL (approximately €14,530,000) for construction work of administrations included to the scope of the Law

The above threshold amounts are taken into account when assessing approximate costs for submitting proposals to public tenders and local bidders with local goods.

Procedures

Turkish Public Procurement Law offers the following procedures:

(a) Open procedure

This means the procedure whereby any interested economic operator may submit a tender.

(b) Restricted procedure

This means a two-step procedure for tenders where a certain level of qualification is required by the supplier. First, any economic operator may request to participate and must prove its qualification, and second, after a qualitative selection, only those economic operators invited by the contracting authority may submit a tender. The economic operators rejected at the end of the first step are notified in writing, with grounds of the rejection. Construction works, works involving purchase of goods and services that require expertise and/or advanced technology and which cannot be processed with open procedure, and construction work

[57] Please see the following link for the English translation of the Public Procurement Law no. 4734. Do kindly note that the Law may be subject to amendments and the referred English text may not be necessarily accurate: http://www1.ihale.gov.tr/english/4734_English.pdf

[58] Please see the following link for the Turkish text of the Public Procurement Contracts Law no. 4735. Do kindly note that the Law may be subject to amendments and the referred text may not be necessarily accurate: http://www1.ihale.gov.tr/mevzuat/kanun/4735_27075_rg.doc

tenders for which the approximate cost passes half of the threshold amount may be conducted according to the restricted procedure.

(c) Negotiated (bargain) procedures

This means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these, for the best and most favorable bidder. The Public Procurement Law foresees negotiated (bargain) procedures in restricted opportunities that the Law enumerates.

Turkish Public Procurement Law foresees a final procedure as "**direct purchase**" for limited cases and circumstances, where the needs are met by price search in the market. Some of these cases, which are enumerated as 10 cases in the Law, are given below:

- When the need for a good and/or service can be met by only one real person or legal entity
- When only one real person or legal entity has a special right to the needed good and/or service
- When the Administration leases or buys real property for its immediate need

All of those procedures, except direct purchase, have in common that any offer submitted must strictly comply with the specifications issued and must comply with the formal requirements such as templates, time schedule and accompanying documentation**. Any changes to the requirements, non-compliance with formal requirements, timelines, missing documentation or information will lead to mandatory exclusion from the tender process.**

Generally, participating in public tenders is a "take it or leave it" decision based on risk management principles. However, during the bid phase the suppliers may pose questions to the contracting authority in order to clarify the tender's specifications. This tool is strongly recommended.

Contractual Terms

From a contractual perspective, the mandatory terms for public contracts to include are specifically stated in Public Procurement Contracts Law no. 4735. According to the mentioned Law, public contracts cannot contradict tender documents and specifications, amendments can be made only in specific circumstances and as long as the Law allows it, and there can be no additional terms and contracts.

If the articles of Public Procurement Contracts Law do not cover all cases, then the relevant articles of the Turkish Code of Obligations apply.

Remedies

For public tenders above the threshold amounts for public contracts, there is a dedicated review procedure offering the possibility to reverse an unlawful award of a public contract to

a competitor. **This procedure needs scrutiny because it involves very short cut-off periods. Deadlines even apply during the bidding phase.** If during the bidding phase a supplier feels that the tender or the procedure under which the tender is performed violates the procedural rules according to Public Procurement Law, the supplier has to immediately post a notice to the contracting authority claiming the non-compliance. Not meeting either the requirements to immediately notice non-compliance during the bidding phase or any cut-off period makes the case inadmissible or it will be lost.

For further information, please turn to:

Ceylin Beyli, LL.M
ceylin.beyli@beylegal.com
For information on CBL Law Office, please visit http://www.beylegal.com or
http://www.martindale.com/CBL-Law-Office/45766580-law-firm-office.htm

Public Procurement Law in the UK

What are the sources of UK Public Procurement Law?

The UK has implemented the EU Public Procurement Directives through two main sets of regulations.

In England, Wales and Northern Ireland, the public sector directive (2004/18/EC) has been transposed by the **Public Contracts Regulations 2006** (as amended) ("PCRs"), which incorporated the general EU directives. The Utilities Directive (2004/17/EC) is implemented by the **Utilities Contracts Regulations 2006** (UCRs) (as amended).

In Scotland, public procurement is governed by the Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006.

Other domestic laws may affect various aspects of public contracting, including, for example, the Local Government Act 2000 and the Freedom of Information Act 2000.

To whom do the rules apply?

The regulations apply to *contracting authorities*, as defined in Regulation 3(1) of the PCRs and *utilities,* as set out in Regulation 3(1) of the UCRs. These definitions mirror those set out in the parent directives.

In practice, the Regulations apply to a wide range of bodies in the UK, such as Government ministries, local authorities and NHS trusts. The UCRs regulate a wide range of utilities companies, as well as airport authorities.

A number of UK utilities sectors have been exempted from the application of the EU utilities rules, pursuant to the procedure set out in Article 30 of Directive 2004/17/EC. These include power generation companies, oil and gas exploration and production, and the supply of gas and electricity in the UK.

Which contracts are covered?

Public and utilities contracts for supplies, works and services above a certain value are all covered.

In relation to services, the rules distinguish between Part A services contracts (subject fully to the rules) and Part B services (subject to a lighter regulatory regime). There is a list for Part B services that covers contracts such as those for legal services, health services and education services. They are still subject to some regulatory obligations, such as a need for an advertisement.

Although the rules do not apply fully to Part B services contracts or to below-threshold contracts, these may still be subject to the general principles of the EU Treaty (such as transparency, non-discrimination and equal treatment).

The Regulations apply only to those contracts whose values exceed certain monetary thresholds, as set out below:

Table 1: Public Sector Contracts

	Supplies	Services	Works
Entities listed in Schedule 1[59]	£101,323 (€125,000)	£101,3232 (€125,000)	£3,927,260 (€4,845,000)
Other public sector contracting authorities	£156,442 (€193,000)	£156,442 (€193,000)[60]	£3,927,260 (€4,845,000)

Table 2: Utilities Contracts

	Supplies	Services	Works
All sectors (water, energy distribution, transport and postal services)	£313,694 (€387,000)	£313,694 (€387,000)	3,927,260 (€4,845,000)

Below-threshold procurements will also be subject to certain domestic law requirements. These are set out in such legislation as the Equality Act 2010 and the Local Government Act 2000. In some cases the limits on vires are set out in the constitutional document of a contracting authority.

A recent UK case (*Risk Management Partners Limited v London Borough of Brent* ([2008] EWHC 1094 (admin)) established that certain in-house arrangements within contracting authorities fall outside the scope of the PCRs[61].

What are the available procurement procedures?

In compliance with the Directives, the PCRs allow contracting authorities to follow one of four procedures:

- *The open procedure* allows any party to submit a tender and does not include any pre-qualification stages as set out in Regulation 15 of the PCR and Regulation 14 of the UCR
- *The restricted procedure* is a procedure where an interested party can submit a tender but only after passing through a pre-qualification stage as set out in Regulation 16 of the PCR and Regulation 14 of the UCR

[59] Schedule 1 of the Public Contracts Regulations 2006 lists central government bodies subject to the WTO GPA.

[60] With the exception of the following services, which have a threshold of £156,442 (€193,000): Part B (residual) services

- Research & Development Services (Category 8)
- CPC 7524 - Television and Radio Broadcast services
- CPC 7525 - Interconnection services
- CPC 7526 - Integrated telecommunications services

[61] This applied Case C-107/98 *Teckal Srl v Comune di Viano* [1999] ECR I-812.

- *The competitive dialogue procedure* is used on complex projects where the public body cannot accurately specify all its requirements. It will consult with prospective tenders before submitting what is known as a final tender as set out in Regulation 18 of the PCR

- *The negotiated procedure*, though once commonplace for complex PFI procurements, is now restricted in use to the most complex procedures; UK Government guidance means the competitive dialogue process is favoured. Under the negotiated procedure, the contracting authority has more flexibility to engage in discussions with individual contractors before selecting the winner, as set out in Regulation 17 of the PCR and Regulation 14 of the UCR

Once the contracting authority has awarded the contract, it must send out notice that the tender has been awarded. A *standstill* period must then commence between this notice and the conclusion (signature) of the contract itself. The period must be at least 10 calendar days.

Which contractual terms apply?

In the UK, the public procurement rules do not distinguish between ICT contracts (such as hardware and software) and other goods and/or services.

The Office of Government Commerce (OGC) (now replaced by the UK Cabinet Office) has created model contracts for the public procurement of ICT services. These are not mandatory but it is advisable to be familiar with them. The models cover terms and conditions, framework agreements and services agreements. Certain areas such as public finance initiatives have begun to use these standard form procurement agreements, so specific advice is recommended for each public sector.

To the writers' knowledge, model contracts are not currently available online, as the OGC has recently been absorbed into the UK Cabinet Office. However, interested parties should request copies of model contracts from the UK Cabinet Office[62]. Another good resource to see previous ICT contracts entered into is Government's *Contract Finder* website[63].

Under other UK legislation, any ICT contracts above the value of £10,000 (whether or not covered by the EU procurement rules) must be published online on the *Contract Finder* site. It may be possible to have removed from publication information which a contractor can show to be *confidential*, *commercially sensitive* or a *trade secret* within the meaning of the UK Freedom of Information Act 2000. Any requests for redactions from publication should be raised as soon as possible during the negotiation phase.

What are the remedies for claimants?

The UK system allows claimants to seek damages for a breach of the PCRs or UCRs. The most important ones are set out in this section.

[62] www.cabinetoffice.gov.uk/

[63] http://www.contractsfinder.businesslink.gov.uk/Search%20Contracts.aspx?site=1000&lang=en

1. Damages

An award of damages will put the claimant in the position it would have been in had the breach of duty not occurred. Claimants have been awarded damages in a number of previous UK public procurement cases[64].

2. Injunction

It is also possible for a claimant to seek an injunction to restrain the continuation of a procurement where there has been a breach, so that a trial can take place on the substance of the case[65].

The claimant must be willing to give a cross-undertaking in damages: a promise to pay the defendant for any losses suffered if it turns out there has been no breach at trial. An injunction will be granted where the claimant can show that:

- It has a strong *prima facie* case
- Damages would not be an adequate remedy, and
- The injunction would not cause losses to the defendant or others that could not be compensated from the cross-undertaking

3. New Remedies (Ineffectiveness and Automatic suspension)

The Public Contracts (Amendment) Regulations 2009 and Utilities Contracts (Amendment) Regulations 2009 came into effect on 20 December 2009 and apply to procurements commenced on or after that date. These regulations enacted a new Directive[66], which has introduced certain new remedies.

The new Regulations impose an obligation on contracting authorities (under Regulation 47, PCRs) and on utilities companies (Regulation 45, UCRs) to suspend tender procedures where legal proceedings are commenced during the standstill period. If the contracting authority considers the claim to be lacking in merit, it may apply to the Court to have the suspension lifted[67].

Aggrieved parties are now able to go to Court to seek a declaration of ineffectiveness in relation to a signed contract (Regulation 47O of the PCRs and 45O of the UCRs**)**. This remedy is available for certain serious breaches, such as the failure to advertise a regulated contract, the refusal to observe the automatic standstill or contract suspension provisions. A claimant was unsuccessful in seeking this remedy in *Alstom Transport v Eurostar International & Siemens* [2011] EWHC 1828 (Ch).

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[64] See for example Risk Management Partners Limited v London Borough of Brent ([2008] EWHC 1094 (admin), Mears v. Leeds City Council [2011] EWHC 40 (QB) and [2011] EWHC 1031 (TCC), Aquatron Marine v Strathclyde Fire Board [2007] CSOH 185.

[65] See for example Morrison Facilities Services Limited v Norwich City Council [2010] EWHC 487 (Ch).

[66] Directive 2007/66/EC of 11 December 2007.

[67] see Indigo v Colchester [2010] EWHC 3237 (QB) and Excel Europe Ltd v University Hospitals Coventry and Warwickshire Trust [2010] EWHC 3332 (TCC).

The remedy is not discretionary and must be made by the court unless the specific derogations apply. Where it applies, it will apply *prospectively*, cancelling out the rights and obligations of the parties from the point at which it is made.

What are the time limits for bringing action?

Legal actions within the UK must be commenced within short time limits. These were shortened further by the Public Procurement (Miscellaneous Amendments) Regulations 2011, which came into force on 1 October 2011.

Advice should be taken on how these apply in any particular case, but the general limits are as follows:

- For damages actions and injunctions, within **one month** of the time when the grounds for the claim became known under Regulation 12 of the Public Procurement (Miscellaneous Amendments) Regulations 2011
- For applications for ineffectiveness declarations, either **30 days** (where a contract award notice was placed) **or six months** (where there is no notice)

For damages and injunctions cases under the PCRs and UCRs, the Court may extend the time limit where there is good reason to do so. Any such extension cannot exceed three months[68].

The UK system therefore requires claimants to take action early, on the basis of appropriate advice, in order to preserve important legal rights.

For further information, please contact:

Robert Bell
Partner
Speechly Bircham LLP
Direct line: +44 (0)20 7427 6625
Fax number: +44 (0)20 7427 6600
mailto:Robert.Bell@speechlys.com
www.speechlys.com

Paul Henty
Solicitor
Speechly Bircham LLP
Direct line: +44 (0)20 7427 6506
Fax number: +44 (0)20 7427 6600
mailto:Paul.Henty@speechlys.com
www.speechlys.com

[68] Regulation 5(4) of the Public Procurement (Miscellaneous Amendment) Regulations 2011.

Public Procurement Law in the United States

General

In the United States, public procurement by the federal government is authorized by statute[69] and largely governed by the Federal Acquisition Regulation ("FAR"), codified at title 48 of the Code of Federal Regulations ("CFR").[70] Public procurement by state government is controlled by each state's specific procurement laws. For example, in California, public procurement is governed by the Public Contract Code, as well as the Government Code, the Public Utilities Code, the Code of Regulations, and state government administrative and contracting manuals.[71] Nevertheless, many of the fifty states have modeled their procurement procedures on the FAR.

Public Procurement Under the FAR

The FAR defines the process of public procurement, provides guidance, implements special preference programs, and gives specific contractual language for different agreements. Many government agencies also have supplemental regulations—called FAR Supplements—that are specific to the agency. For example, the FAR Supplement for the Department of Defense is called the Defense Federal Acquisition Regulation Supplement ("DFARS").[72]

The authority for each federal agency to contract is vested, in the first instance, in the head of the agency, who typically delegates this authority to contracting officers. Only contracting officers may authorize contracts on behalf of the federal government,[73] and each contracting officer's authority is limited and specifically set out in applicable agency laws and regulations.[74] An action taken by a contracting officer that exceeds the contracting officer's authority is not binding on the government, even if all parties consent to the action and the action benefits the government. This is important because contractors are expected to know the scope of authority of the contracting officers with whom they are dealing and, therefore, have an incentive to make sure contracting officers do not exceed their authority. A contracting officer's representatives ("CORs") and technical representatives ("COTRs") assist in the technical monitoring and administration of contracts and keep a file on every assigned contract.[75]

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[69] *See, e.g.*, Federal Property and Administrative Services Act, Armed Services Procurement Act, Federal Acquisition Reform Act, Federal Acquisition Streamlining Act, Anti-Deficiency Act, etc.

[70] *See generally* 48 C.F.R. § 1.000 et seq., *available at* https://www.acquisition.gov/far/index.html, *also available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=b1b79a2dbcf035a155278004914d318c&c=ecfr&tpl=/ecfrbrowse/Title48/48tab_02.tpl.

[71] *See generally* Calif. Pub. Cont. Code § 100 et seq., *available at* http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=pcc

[72] *See generally* Defense Federal Acquisition Regulation Supplement, *available at* http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html.

[73] *See* 48 C.F.R. § 1.601 (""Contracts may be entered into and signed on behalf of the Government only by contracting officers."").

[74] *See* 48 C.F.R. § 1.602-1 (""Contracting officers may bind the Government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603–1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel."").

[75] *See* 48 C.F.R. § 1.604 (""A contracting officer's representative (COR) assists in the technical monitoring or administration of a contract. The COR shall maintain a file for each assigned contract.""); *id.* § 2.101 (""Contracting officer's representative (COR) means an individual, including a contracting officer's technical representative (COTR), designated and authorized in writing by the contracting officer to perform specific technical or administrative functions."").

Procedures

Federal law requires that, with certain limited exceptions, contracting officers must promote and provide for "full and open competition" in awarding government contracts."[76] The primary methods of procurement used to achieve this are sealed bidding and competitive proposals. Sealed bidding is the process by which the government issues invitations for sealed bids, opens the sealed bids at a public opening, and awards the contract to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the government, considering only price and price-related factors.[77] Competitive proposals include all other competitive procedures other than sealed bidding.[78]

Sealed bidding is the preferred method. This method must be used if (i) time permits; (ii) the award will be based on price or price-related factors; (iii) there is no discussion required with respondents; and (iv) it is reasonably expected that more than one response will be received.[79]

The policies and procedures for procurement by negotiation are found in part 15 of the FAR. The first step in procurement by negotiation is for the government to issue a request for proposals ("RFP"). The RFP includes the government's requirements for the acquisition.[80] In putting together an RFP, the government must (i) specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement; (ii) use advance procurement planning and market research; and (iii) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.[81] Restrictive provisions or conditions are permitted in an RFP only to the extent necessary to satisfy the needs of the agency or as authorized by law.[82]

The specifications in an RFP may be stated in terms of: (1) function, so that a variety of products or services may qualify; (2) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or (3) design requirements.[83] The specifications for competitive proposal RFPs must also at least include (i) a statement of all significant factors the agency reasonably expects to consider in evaluating proposals (including cost or price, cost-related or price-related factors, and non-cost-related or non-price-related factors); (ii) the relative importance assigned to each of those factors; (iii) either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors unless

[76] 10 U.S.C. § 2304; 41 U.S.C. § 253; *see also* 48 C.F.R. § 6.101.

[77] 48 C.F.R. § 14.101 (providing elements of sealed bidding).

[78] 48 C.F.R. § 6.102 (providing competitive procedures available for use in fulfilling the requirement for full and open competition).

[79] 10 U.S.C. § 2304(a)(2)(A); 41 U.S.C. § 253(a)(2)(A); *see also* 48 C.F.R. § 6.401.

[80] 48 C.F.R. § 15.203.

[81] 10 U.S.C. § 2305(a)(1)(A); 41 U.S.C. § 253a(a).

[82] 10 U.S.C. § 2305(a)(1)(B); 41 U.S.C. § 253a(a)(2).

[83] 10 U.S.C. § 2305(a)(1)(C); 41 U.S.C. § 253a(a)(3).

discussions are determined to be necessary; and (iv) the time and place for submission of proposals.

Agency heads and contracting authorities typically are also the source selection authority, i.e., they also award the contract based on review of the proposals submitted.[84] Agencies may use evaluation panels or boards of review to advise the source selection authority to evaluate proposals submitted in response to an RFP.[85] The source selection authority and any review board must follow the evaluation criteria set forth in the RFP.[86] The source selection authority must select the source that represents the "best value" to the government,[87] where "best value" is defined to mean "the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement."[88] Agencies are generally given broad discretion to achieve this goal.

Contractual Terms

FAR Part 52 includes text of various solicitation provisions and contract clauses used in government contracts. These provisions and clauses are systematically numbered to indicate the FAR part that discusses the provision or clause in detail. All FAR provision and clause numbers are in the format 52.2*xx-y*, where *xx* is the section of the subject matter and *y* is the subsection. For example, FAR 52.243-1 (Changes—Fixed-Price) indicates that the subject matter is more fully described in Section 43, subsection 1—i.e., 48 C.F.R. § 43.1.[89] Contracting authorities must add certain provisions and clauses to solicitations and have discretion to add others.

Protests and Disputes

Protests relating to contract bids are generally to be submitted to the contracting officer, but may also be filed with the Government Accountability Office ("GAO").[90] When a protest is filed with a contracting officer, the contracting officer may not award the contract unless there is a written justification of urgent and compelling reasons to make the award or if there is a written determination that an award is in the best interest of the government. Such a written justification or determination must be approved by an official other than the contracting officer.[91] While a protest is pending, the contracting officer should attempt to extend the time for acceptance of offers to avoid resolicitation.[92] The contracting officer is required to make best efforts to resolve disputes within 35 days of filing.[93] If the protestor is unsatisfied by the

[84] 48 C.F.R. § 15.303.

[85] *Id.*

[86] 48 C.F.R. § 15.303(b).

[87] 10 U.S.C. § 2305(b)(4)(B); 41 U.S.C. § 253b(d)(3); *see also* 48 C.F.R. § 15.303(b).

[88] 48 C.F.R. § 2.101.

[89] 48 C.F.R. § 52.101 (explaining numbering system of provisions and clauses).

[90] 48 C.F.R. § 33.102.

[91] 48 C.F.R. § 33.103(f)(1).

[92] 48 C.F.R. § 33.103(f)(2).

[93] 48 C.F.R. § 33.103(g).

contracting officer's resolution of the dispute, the protest can be filed with the GAO within 10 calendar days.[94]

Most disputes arising once a contract is awarded are governed by the Contract Dispute Act of 1978 ("CDA").[95] Claims for such disputes are to be filed initially with the contracting officer. The contracting officer's decision is appealable either to a statutorily authorized agency board of contract appeals or to the United States Court of Federal Claims.[96] Further permitted appeals are to the United States Court of Appeals for the Federal Circuit.[97]

Information Technology Procurement under the FAR

There are many parts of the FAR that speak specifically to public procurement of information technology products and services. For instance, FAR Part 39 is dedicated to "Acquisition of Information Technology." By its terms, this part "applies to the acquisition of information technology by or for the use of agencies except for acquisitions of information technology for national security systems."[98] This part also directs agencies to follow OMB Circular A-130, which establishes a number of policies for the management of federal information resources.[99]

There are also a number of FAR 52.2 solicitation provisions and contract clauses relevant to information technology contracts. Here is a non-exhaustive list of such provisions and clauses:

FAR 52.2 Number	Description
52.223-16	IEE 1680 Standard for the Environmental Assessment of Personal Computer Products
52.227-14	Rights in Data – General
52.227-15	Representation of Limited Rights Data and Restricted Computer Software
52.227-16	Additional Data Requirements
52.227-17	Rights in Data – Special Works
52.227-18	Rights in Data – Existing Works
52.227-19	Commercial Computer Software License
52.227-20	Rights in Data – SBIR Program
52.232-6	Payment Under Communication Service Contracts With Common Carriers

Additionally, FAR Supplements for particular agencies include specific policies and regulations regarding the acquisition of information technology. These policies and regulations are typically found at part *x*39 of each Supplement. For example, Part 239 (Department of Defense), Part 339 (Department of Health and Human Services), Part 439

[94] 4 C.F.R. § 21.2(a)(3).

[95] 41 U.S.C. §§ 601-613.

[96] 41 U.S.C. §§ 606, 609; 28 U.S.C. § 1491.

[97] 41 U.S.C. § 607(g)(1); 28 U.S.C. § 1295(a)(3), (10).

[98] 48 C.F.R. § 39.001.

[99] OMB Circular A-130, *available at* http://www.whitehouse.gov/omb/Circulars_a130_a130trans4.

(Department of Agriculture), Part 539 (General Services Administration), Part 1339 (Department of Commerce), etc.

Resources

Here is a list of helpful resources for further reading on public procurement under the FAR, particularly with regard to information technology and telecommunications:

- General Services Administration portal on IT and telecommunications – http://www.gsa.gov/portal/content/105195
- General Services Administration portal on technology programs – http://www.gsa.gov/portal/category/20999
- Federal Business Opportunities – https://www.fbo.gov/
- Acquisition Central – https://www.acquisition.gov/
- Central Contractor Registration – https://www.bpn.gov/ccr/

For further information, please contact:

Matthew Mousley
Duane Morris LLP
30 S. 17th St.
Philadelphia, PA 19103
mcmousley@duanemorris.com
(215) 979-1804

Urmika Devi
Duane Morris LLP
30 S. 17th St.
Philadelphia, PA 19103
udevi@duanemorris.com
(215) 979-1950