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Ashurst LLP

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Expert Analysis Chapter

Q&A Chapters

From the Publisher

Dear Reader,

Welcome to the 16th edition of *ICLG – Public Procurement*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to public procurement laws and regulations around the world, and is also available at www.iclg.com.

This year, in their Expert Analysis chapter, Ashurst LLP provide an insight into EU public procurement rules.

The question and answer chapters, which in this edition cover 17 jurisdictions, provide detailed answers to common questions raised by professionals dealing with public procurement laws and regulations.

As always, this publication has been written by leading public procurement lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editor Euan Burrows of Ashurst LLP for his leadership, support and expertise in bringing this project to fruition.

James Strode
Publisher
Global Legal Group

International Comparative Legal Guides

EU Public Procurement Rules


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1 Introductory Comments

Public procurement is about how public authorities spend public money. The European Commission ("Commission") estimates that total general government expenditure on works, goods and services, excluding utilities, is approximately €2,000 billion each year, which represents more than 14% of the gross domestic product ("GDP") of the European Union ("EU").[1] Nearly 200,000 contracts were advertised EU-wide in 2017.[2]

However, most EU procurement markets remain substantially "national" in scope, notwithstanding the fact that EU public procurement policy aims to open up national markets to EU-wide competition. The Commission estimates that the total value of invitations to tender for contracts subject to the EU rules in 2017 was approximately €545 billion, i.e., 3.1% of the EU's GDP.[3] Direct cross-border procurement (i.e., public contracts awarded to operators from other EU Member States) accounted for 3.5% of the total value of awards between 2009 and 2015.[4] Indirect cross-border procurement, via corporate affiliates or partners situated in the Member State of the contracting authority, is more frequent (more than 20% of awards by value between 2009 and 2015).[5]

2 Historical Background and the Legislation in Force Today

EU public procurement law is based on certain general principles derived from the Treaty on the Functioning of the European Union ("TFEU"),[6] and is aimed at ensuring equal access for all operators within the EU internal market to procurement opportunities in other EU Member States, as well as fair competition for public contracts.

The first EU public procurement directive was adopted in July 1971 and covered public works contracts. Supply and service contracts were added in separate 1976 and 1992 directives, with a 1990 directive covering entities operating in the water, energy, transport and telecommunications sectors. The remedies directives, covering the procedures for challenging the award of contracts under these various directives, date from 1989 (public sector) and 1992 (utilities) (respectively, the Public Sector Remedies Directive (89/665) and the Utilities Remedies Directive (92/13)).

In April 2004, two new public procurement directives came into force:

(a) Directive 2004/18, which applied to service, supply or works contracts entered into by public bodies other than utilities in relation to a utility activity (the "2004 Public Sector Directive").
(b) Directive 2004/17, which applied to service, supply or works contracts entered into by utilities (i.e., public and certain private bodies operating in the water, energy, transport and postal services sectors) which relate to a utility activity (the "2004 Utilities Directive").

Together, these are known as the "2004 Directives".

Following a consultation process and legislative proposals, three new public procurement directives came into force in April 2014, with a requirement that they be implemented into the national law of all EU Member States by April 2016:

(a) The Directive on public procurement (2014/24) (the "2014 Classic Directive"), which repeals the 2004 Public Sector Directive.
(b) The Directive on procurement by entities operating in the water, energy, transport and postal services sectors (2014/25) (the "2014 Utilities Directive"), which repeals the 2004 Utilities Directive.
(c) The Directive on the award of concession contracts (2014/23) (the "2014 Concessions Directive"), which sets out new rules for the award of concession contracts.

Together, these are known as the "2014 Directives".

The 2014 Directives set out the rules on the award of contracts, but do not provide a complete public procurement law or code covering all elements of procurement. Member States have some scope for policy choices in national implementing legislation. There is much that is not clear, and the Court of Justice of the EU ("CJEU") delivers regular judgments in procurement cases, which are binding on the EU Member States.

As explained in more detail below, in January 2008, a new directive dealing with remedies under the public procurement rules (2007/66) came into force (the "2008 Remedies Directive"). The 2008 Remedies Directive applies to awards made under the 2014 Directives, and amends both the Public Sector Remedies Directive and the Utilities Remedies Directive, which were criticised for not providing an adequate level of protection of contractors' rights; in particular, in the areas of injunctive relief and remedies post-contract award (it being recognised that damages could not, as a rule, match the commercial benefits of winning a contract).

On 30 June 2022, the Commission, European Parliament and European Council reached a political agreement on the text of the Foreign Subsidies Regulation (the "FSR"). See section 4 below for more details.

3 The Parallel Application of the EU General Principles

Public sector contracting authorities are subject to certain general principles derived from the TFEU ("EU General Principles"), even if a particular procurement falls outside the 2014 Directives. For example, a procurement will fall outside the 2014 Directives but remain subject to the EU General Principles where:

- the value of the contract to be awarded is below the relevant financial threshold; or
- the contract relates to one of the defined categories of services which are subject to a lighter regime (see section 7 below) and there is a potential "cross-border interest" (i.e., a procurement in relation to which it is reasonably foreseeable that there might be interest from non-national contractors).

This places additional requirements on contracting authorities, since it is not always easy to be certain of complying with the EU General Principles without engaging in a public procurement process in compliance with the 2014 Directives. Therefore, contracting authorities often voluntarily comply with the stricter requirements of the 2014 Directives in situations where a procurement is subject to the EU General Principles only. Where an authority engages in such a voluntary application of the 2014 Directives, the view is that it must then comply with the rules fully (i.e. it cannot "mix and match"). Thus, the application of the EU General Principles can, in practice, significantly extend the scope of coverage of the public procurement regime.

The main EU General Principles at issue are: non-discrimination and equal treatment; transparency; proportionality; mutual recognition; free movement of goods; right of establishment; and freedom to provide services. The Commission has published guidance on how these principles will apply throughout all the stages of an award procedure.[7] Therefore, with regard to public sector procurements which fall outside the strict application of the 2014 Directives, the principles of transparency and equal treatment generally require potential bidders to have access to sufficient information about the scope of the opportunity. This means that there generally needs to be some form of advertising at the outset of the essential details of the contract to be awarded, and of the award method, to ensure that the opportunity is opened up to competition.

4 International Dimension

There are several "international" (i.e. extra-EU) elements to the public procurement rules as they apply in the EU and to EU entities. The revised World Trade Organization ("WTO") Agreement on Government Procurement ("GPA"), which entered into force on 6 April 2014, has the widest scope. It is a plurilateral treaty between 49 WTO Members (including the 27 EU Member States). The GPA is intended to make laws, regulations, procedures and practices regarding government procurement more transparent, and to prevent the protection of domestic products or suppliers, or discrimination against foreign products or suppliers. The GPA has two elements: (i) general rules and obligations; and (ii) schedules listing the national entities in each WTO Member State that are covered by the GPA.

In addition, the EU rules apply to Iceland, Liechtenstein and Norway directly by virtue of the European Economic Area ("EEA") Agreement. There are also at present seven candidate countries seeking to join the EU: Albania; Moldova; Montenegro; the Republic of North Macedonia; Serbia; Turkey; and Ukraine. Countries which apply for EU membership become fully subject to EU law, including EU public procurement law.

Furthermore, the EU has entered into several free trade agreements which cover aspects of public procurement (namely, with the Andean Community, Armenia, Canada, Central America, Chile, Georgia, Iraq, Kazakhstan, Korea, Kyrgyzstan, MERCOSUR, Mexico, Moldova, Singapore, Switzerland, Ukraine, the UK and Vietnam). The EU is currently engaged in negotiations with respect to opening up procurement markets with a number of countries and regions, including Australia, Indonesia and New Zealand.

The Commission is concerned that, in contrast to the EU's policy favouring greater openness, many third countries are reluctant to open their public procurement markets to international competition. In March 2012, the Commission proposed a new EU regulation,[8] aimed at increasing the incentives for the EU's trading partners to open up their public procurement markets to EU bidders, and ensuring that EU companies can compete in the internal market with foreign companies on an equal footing. On 15 January 2014, the European Parliament voted to support the proposal for a regulation. However, the text adopted by Parliament revised the European Commission's proposal by stipulating the parameters within which EU Member States may restrict market access to third-country suppliers.

On 29 January 2016, the Commission adopted an amended proposal for regulation on access of EU goods and services to the public procurement markets of third countries.[9] The aim of the proposal is to establish an instrument which will set new rules relating to international public procurement and provide access to public procurement markets around the world. Specifically, the Commission has proposed the following key measures:

(a) the Commission may investigate alleged restrictive and/or discriminating measures or practices by third countries with a view to identifying restrictions on access to their public procurement markets by economic operators from the EU;

(b) where the Commission has found, as a result of an investigation, that restrictive and/or discriminatory procurement measures or practices have been adopted or maintained by a third country and the Commission considers it is in the EU's interest, the Commission shall invite the country in question to enter into consultations aimed at ensuring that economic operations from the EU can participate in tendering procedures for the award of public contracts; and

(c) where the third country does not cooperate with the Commission or the consultations do not lead to satisfactory results, the Commission may take appropriate measures restricting access of goods and/or services from the relevant third country to EU public procurement markets, such as applying price adjustment measures on those goods and/or services until the country concerned takes satisfactory remedial or corrective actions.

In 2019, the Commission issued a communication providing guidance on the participation of third-country bidders and goods in the EU procurement market.[10]

On 5 May 2021, the Commission published its proposal for a new regulation designed to address distortive effects of foreign subsidies. On 30 June 2022 the European Parliament and the Council reached a political agreement on the FSR. This came into force on 12 January 2023, with the aim of closing the gap of subsidies made by non-EU countries which are not subject to the European State regime, and to tackle the potential distortive effects of foreign subsidies to ensure a level playing field for all companies operating in the EU.

The FSR gives the Commission far-reaching powers to scrutinise transactions – including public tenders – involving companies that have received subsidies from non-EU Member States.[11]

Under the FSR, bidders participating in public procurement processes with an estimated value of at least €250 million will be required to notify the contracting authority of aggregate foreign financial contributions, in the last three years, of at least €4 million per third country (or alternatively provide a declaration that no such contributions were received). The contracting authority must then transfer the notification or declaration to the Commission.

Once notified, the Commission will have 20 working days (extendable by 10 working days) to carry out a preliminary review, which can be extended to 110 working days (extendable by 20 working days) where the Commission considers an in-depth review is required. During the Commission's review, the evaluation of tenders may proceed, provided that the contract is not awarded to the bidder in receipt of foreign financial contributions. Following its review, the Commission may decide not to object, require structural and/or behavioural remedies or prohibit the award of the contract to the undertaking. The Commission will also have the power to request notification in any non-notifiable public procurement procedure, where it suspects an undertaking may have benefitted from foreign financial contributions. Failure to notify when required could result in fines of up to 10% of worldwide turnover.

5 Brief Overview of the EU Institutional and Enforcement Structure

The Commission is one of the four main institutions of the EU, the others being the European Parliament (comprising elected representatives from the Member States of the EU), the Council of the EU (representing national governments, also known as the EU Council) and the CJEU in Luxembourg (made up of the Court of Justice, the General Court and the Civil Service Tribunal).

In terms of public procurement law, the Commission has four main roles. First, it proposes legislation and engages in related consultations. Second, it provides guidance on EU law through, for example, publishing explanatory notes or communications. Third, it enforces EU law using its legal powers under the TFEU. Fourth, it negotiates international agreements.

The Commission's enforcement powers in this area are directed against Member States and it regularly makes use of these powers to investigate potential infringements of the EU public procurement rules (following complaints or at its own initiative). The powers it uses are contained in Article 258, and the procedure is referred to as the "infringement procedure". That procedure provides the Commission with powers to take enforcement action before the CJEU against Member States that fail to comply with EU law. The CJEU may, in parallel, grant an injunction to suspend execution of a contract pending judgment on the merits of the case (even after it has been awarded), but in practice this is unlikely unless the infringement is blatant, and the matter comes before the court quickly.

Member States are, in theory, obliged to comply with CJEU judgments by taking "necessary measures" pursuant to Article 260. However, if the Member State fails to do so, the Commission has the power to take further action before the CJEU. This action takes the form of a request to the CJEU to impose fines on the Member State for non-compliance with the CJEU's judgment.

6 Entity Coverage

The 2014 Classic Directive applies to "the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law", unless the body in question is engaged in a utility activity (see below). Annex I of the 2014 Classic Directive provides an "indicative" list of central government authorities. In essence, all public bodies that spend public money are covered.

There has been a large amount of EU case law on this definition of "body governed by public law" and the CJEU has consistently taken a broad view as to which bodies are covered. The 2014 Directives codify EU case law and define "bodies governed by public law" as: "bodies that have all of the following characteristics: (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) they have legal personality; and (c) they are financed, for the most part, by the State, regional, or local authorities, or other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law".

The 2014 Utilities Directive applies to the same list of public bodies, operating in the water, energy, transport, and postal services sectors, but to this are added "public undertakings" (separate legal entities owned or controlled by a public body) and entities which "operate on the basis of special or exclusive rights granted by a competent authority of a Member State". In all cases, the entity or public body must be active in relation to one of the utility activities covered by the 2014 Utilities Directive.

Under the 2014 Utilities Directive, "special or exclusive rights" are defined as the rights granted by a Member State by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of utility activities to one or more entities, and which substantially affects the ability of other entities to carry out such activity. However, entities which enjoy rights based on objective criteria and obtained pursuant to a competitive tender process will not be said to hold "special and exclusive rights" – meaning that such entities will not be caught by the procurement regime.

The "special or exclusive rights" provision is broadly intended to cover private entities which act as utilities. The Commission's guidance states that the existence of such rights must be considered on a case-by-case basis. This analysis will include, in particular: (i) how the rights have been obtained; (ii) on what basis the selection was made; (iii) what the rights allow for; and (iv) how the rights restrict the activities of third parties and the ability of others to obtain the same rights in the future. The list of relevant entities is not closed and will change over time in any particular Member State.

The 2014 Concessions Directive sets out a basic framework for the award of works and services concessions in the public and utilities sectors, subject to certain exemptions. See section 14 below for more details.

7 Contract Coverage

The 2014 Classic Directive applies to "public contracts", which must be for "pecuniary interest" and "in writing" between a public body (or bodies) and a provider (or providers) and relate to the execution of works, the supply of products or the provision of services.

These three types of contract (works, supplies and services) are mutually exclusive; a contract can be only one type even if it includes a combination of elements. In order to determine the appropriate classification, it is first necessary to determine whether the contract is a works contract, which requires consideration of whether the main object of the contract is the works to be carried out. If the contract is not a works contract, it may be a supply or service contract, and in this case, the classification

is expressly based on the element which has greater value. The classification is important for various reasons, including the threshold value to be applied to it (see the table below) and the designation of the contract in the public notices which are required to be published. The position under the 2014 Utilities Directive is essentially the same.

As regards services contracts, a further level of categorisation is necessary. This is on the basis that: (a) the 2014 Directives provide for a "lighter touch" regime in respect of "social and other specific services" (listed in Annex XIV of the 2014 Classic Directive and Annex XVII of the 2014 Utilities Directive); and (b) certain types of services have been excluded altogether from the scope of the 2014 Directives (see further at section 8 below).

The 2014 Directives only apply to contracts with a value above certain financial thresholds, which differ according to the classification of the procurement. The value of a contract for the purposes of the thresholds is its estimated value net of value-added tax, at the time at which the contract notice is sent or, in circumstances where such a notice is not required, at the moment when the contracting authority commences the contract award procedure. The calculation of the estimated value must take account of the expected total value of the consideration (including, for example, options, renewals, insurance or banking payments and the value of any supplies made available to the contractor), even though this may be difficult to determine. It is, therefore, necessary to make a reasonable and genuine estimate, based upon the information that is currently available.

The financial thresholds function as a filter to identify those contracts which, in principle, are capable of having an impact on competition and affecting trade between EU Member States. As such, contracts are more likely to attract bidders from other Member States. The EU's policy is to keep the financial thresholds in line with those set in the GPA. The Commission revises the EU thresholds accordingly from time to time. The table below sets out the thresholds applicable as of 1 January 2022. In addition, non-eurozone EU Member States receive a revision of the financial thresholds every two years converted into their national currencies, based on the exchange rate published in the Official Journal of the EU ("OJEU").

Contracting entity	Supplies (€)	Services (€)	Social and other specific services (€)	Works (€)
Public sector bodies subject to the GPA[12]	140,000	140,000	750,000	5,382,000
Other public sector bodies[13]	215,000	215,000	750,000	5,382,000
Utilities (public or private)	431,000	431,000	1,000,000	5,382,000

Although value estimates are, in principle, confined to the value of each single procurement, the 2014 Directives contain an express "splitting" prohibition, which requires the aggregation of the values of a number of similar procurements in certain circumstances. The aim is to prevent the artificial splitting up of procurements into lower-value procurements, which would fall below the relevant thresholds and, thus, outside the scope of the 2014 Directives. In practice, this means that in circumstances in which a contracting authority/utility intends to award more than one procurement for a single overall requirement (for example, in phased construction projects), the value of these procurements must be added together. The aggregate figure will determine whether or not the relevant threshold has been met.

Although the 2014 Directives do not apply to low-value contracts below the thresholds, the EU General Principles will apply if the procurement has a potential cross-border interest (see above at section 3).

8 Principal Exclusions

Certain procurements may be excluded from the scope of the 2014 Directives on the grounds of secrecy and security. For instance, this exclusion can be used in the context of procurements relating to military security or anti-terrorist measures. In principle, derogations from the general rules must be narrowly interpreted. However, contracting authorities have a margin of discretion in determining whether the exclusion is necessary in the light of the extent of any potential security and secrecy concerns.

Procurements of defence equipment (and services related to such equipment) can also be excluded based upon the general exemption set out in Article 346. A specific directive, Directive 2009/81/EC on defence and sensitive security procurement ("the Defence Directive"), which entered into force on 21 August 2009, sets out specific rules for the procurement of arms, munitions and war material (plus related works and services) for defence purposes, as well as for the procurement of sensitive supplies, works and services for non-military security purposes. The Defence Directive is in force alongside the 2014 Directives.

The Defence Directive was adopted due to concerns that EU Member States were avoiding the application of EU public procurement rules in the defence sector by too frequently relying on the national security exemption under Article 346. In practice, most defence contracts are awarded to national suppliers, allowing EU governments to protect their domestic markets (the EU defence equipment market is estimated to be worth approximately €90 billion annually). The Defence Directive's aim is to open up the EU's largely fragmented defence sector to competition, while safeguarding Member States' control over essential defence and security interests. Due to the sensitivity and complexity of defence and security procurements, the Defence Directive:

(a) allows EU Member States to use the simplified negotiated procedure and publish a contract notice without providing a specific justification;
(b) contains specific provisions on security of information and security of supply;
(c) sets out several safeguards and exemptions to ensure the protection of vital national security interests or public security; and
(d) excludes certain contracts altogether from the new regime (for example, contracts related to intelligence activities).

The applicable financial thresholds are €431,000 for supply/services procurements and €5,382,000 for works procurements. The Defence Directive is complementary to the European Defence Agency's Code of Conduct on Defence Procurement, launched in July 2006.

The acquisition or rental of land, existing buildings or interests therein are also, in principle, excluded from the 2014 Classic Directive. Nevertheless, despite this exclusion, some land development agreements (such as, for example, where a developer erects a building to a contracting authority's requirements on the developer's own land, and then transfers the land (plus building) to the authority) are still subject to the 2014 Classic Directive

upon the basis that they amount to public works contracts. The CJEU rendered two significant judgments relating to land developments in 2007 and 2010.

The first case, *Auroux v. Commune de Roanne*,[14] concerned the construction of a leisure centre and related facilities around a railway station. The contracting authority engaged a semi-public development company to acquire the land, obtain funding, carry out studies, organise an engineering competition, undertake the construction works, coordinate the projects and liaise with the authority. The authority itself was not intending to become the owner of the various facilities, apart from elements such as the public spaces and the car park. The CJEU held that the project was a public works contract, which fulfilled an economic function and corresponded to the requirements of the contracting authority, and was therefore, regardless of whether the contracting authority would own or even use the completed works, subject to the public procurement rules.

The second, more recent judgment, *Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben*,[15] concerned the sale to a private party by a German federal agency of land which had been used formerly as a barracks. The sale contract did not contain any reference to the land's future use. The CJEU ruled that the sale contract did not qualify as a public works contract because there was no "direct economic benefit" to the local authority, and, further, the mere fact that the local authority, in the exercise of its urban-planning powers, had examined certain building plans presented to it did not mean that the local authority had specified requirements attached to the redevelopment works. The two judgments have added legal clarity on the dividing line between land transactions falling outside the public procurement rules and the procurement of works subject to the public procurement regime, and confirmed that the CJEU will take a broad purposive approach.

The procurement by a utility of water, energy or fuel for the production of energy is also excluded. Furthermore, a procurement awarded by a utility to an affiliated undertaking, or by a joint venture utility to one of its members or an affiliated undertaking of those members, may be excluded, provided the undertaking in question essentially exists to provide services/supplies/works to that group and not to the open market. Finally, Member States may apply for a general sector exemption (pursuant to Article 34 of the 2014 Utilities Directive) where the market has been liberalised and opened up to competition. The Commission will consider whether the required competitive market conditions are met in that particular Member State and confirm whether the exemption applies by way of a formal decision. Even if an exemption is in place, public utilities (but not private utilities) will still have to observe the EU General Principles in undertaking procurements. The existing national exemptions pursuant to the current Article 30 of the 2004 Utilities Directive remain in place under the 2014 Utilities Directive.

Certain types of services have been excluded altogether from the scope of the 2014 Directives, such as certain audio-visual and radio media services, legal services designated by a court or tribunal, financial instruments and public passenger transport services by rail or metro (such services being covered by sector-specific legislation, namely Regulation 1370/2007). Moreover, the exploration of oil and gas has been added to the existing exclusions from the utilities regime (namely, contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy).

9 In-house Awards

In its judgment in *Teckal*,[16] the CJEU recognised that, in some situations, a contracting authority may directly award a contract to a legally distinct third party who, in practice, is not an independent body, without a competitive tendering process. The applicable test is twofold. First, the "control test" requires that the authority exercise over the third party awarded the contract "a control which is similar to that which it exercises over its own departments". Second, the "function test" requires that the third party "carries out the essential part of its activities" for the authority (the controlling entity). When these two conditions are met, the contract will be treated as an "in-house" administrative arrangement which falls outside the scope of the 2014 Directives. The CJEU has also held that these principles apply to contracts subject only to the EU General Principles (*Parking Brixen*).[17]

This exemption is strictly interpreted, and in a national court, it would usually be for the contracting authority to establish its application to a particular procurement. For the first condition (control) to apply, there must be a power of decisive influence over both the strategic objectives and significant decisions of the body the contract is awarded to. It is not enough that a contracting authority, together with other contracting authorities, owns all of the share capital in a company awarded a contract: all of the relevant legislative provisions and surrounding circumstances will be taken into account. However, even a minority interest in the third party held by a private entity rules out the *Teckal* exemption. The second condition has been interpreted as essentially requiring that the activities of the third party are devoted principally to the contracting authority, and that any other activities are only marginal. The Commission Staff Working Paper on public-public cooperation[18] offers useful guidance on the application of the in-house *Teckal* test.

The 2014 Directives essentially codify the *Teckal* test, and provide that a contract awarded by a contracting authority to another legal person governed by private or public law will fall outside the procurement regime if the following cumulative conditions are met: (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; (b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and (c) there is no direct private capital participation in the controlled legal person.

10 Award Procedures

The fundamental principle underlying the EU public procurement rules is that a qualifying contract must be opened up to an EU-wide competitive tender. As a result, in most circumstances, a contract notice must be published in the OJEU in the standard form[19] at the outset of a tender process. In some situations, set out in the 2014 Directives, a contract, although falling subject to the rules, does not have to be advertised and can be negotiated directly with a chosen provider; for instance, where, "for technical or artistic reasons, or for reasons connected with the protection of exclusive rights", there is only one possible provider.

Contracting authorities are obliged to follow one of five types of tender procedure (which will be identified in the contract notice):

- "Open procedure": the procurement is advertised and all interested providers tender a single, fully priced offer.
- "Restricted procedure": this requires interested bidders to "pre-qualify" before being invited to submit a fully priced tender.
- "Competitive procedure with negotiation" (under the 2014 Classic Directive) or "Negotiated with prior call for Competition" (under the 2014 Utilities Directive): while there are differences between the two, each involves a

pre-qualification stage followed by a negotiation stage with the pre-qualified group of tenderers (although contracting authorities may award a contract without negotiation, provided they have reserved the right to do so).

- "Competitive dialogue": this allows a dialogue to be conducted in successive stages, with the aim of reducing the number of bidders.
- "Innovation partnership": this allows tenderers to submit a request to participate in response to a contract notice with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works. The partnership is structured in successive stages following the research and innovation process, and the contract will be awarded in accordance with the rules of a competitive procedure with negotiation.

There are also various important explicit and implied obligations concerning the conduct of the selection process following publication of the contract notice including, in particular, the minimum timescales with which authorities must comply. These are essentially designed to ensure that, at all stages (specification of requirements, selection stage and award stage), the contract award process is run fairly and transparently.

11 Qualification and Award Criteria

Under the EU procurement regime, there are discretionary grounds and mandatory grounds for the disqualification of bidders. Contracting authorities may derogate from the mandatory grounds only on an exceptional basis for "overriding reasons relating to the public interest", or where an exclusion would be "clearly disproportionate". The 2014 Directives clarify that the power to exclude bidders can apply throughout the procurement process (not only during the pre-qualification stage) and may also extend to sub-contractors and consortia members.

The 2014 Directives require contracts to be awarded to the tenderer which supplies the "most economically advantageous tender" ("MEAT"), which must be based on "price or cost" and may include the best price-quality ratio. Where costs are taken into account, the 2014 Directives specify that a "cost-effectiveness" approach should be used, based upon an evaluation of certain costs over the life cycle of a product, service or works, such as: (i) costs relating to acquisition; (ii) use (e.g., consumption of energy); (iii) maintenance; (iv) end of life (e.g., collection and recycling); and (v) environmental externalities which can be valued (e.g. emissions of greenhouse gases or other pollutants).

The 2014 Directives specify that contracting authorities may take into account, as part of the MEAT criteria, the characteristics of the production process of the works, goods or services to be purchased, such as working conditions and staff health protection. The 2014 Directives expressly allow contracting authorities to take into account the organisation, qualification and experience of staff assigned to performing the contract as an award criterion, recognising that this may affect the quality of the contract performance.

As regards the assessment of the best price-quality ratio, the 2014 Directives provide that any qualitative, environmental or social criteria must be linked to the subject matter of the contract, which controls the ability of contracting authorities to take account of wider social, political and environmental considerations.

12 Modification of Contracts

The 2014 Directives include express provisions regulating the circumstances in which contracts may be modified during their term without triggering an obligation to carry out a new tender procedure – an issue that has given rise to much debate and litigation. The 2014 Directives define a "substantial" modification, requiring a new award process, as one that renders the contract substantially different from the one initially concluded, i.e. one which would: (i) result in the selection of other operators, or the award of the contract to another tenderer; (ii) change the economic balance of the contract in favour of the contractor; or (iii) include supplies, services or works which were not covered by the original OJEU process.

As well as codifying relevant case law, the 2014 Directives provide for a "safe harbour" within which a minor modification would not require a new award process. The safe harbour is set at a low level and applies where the value of the change: (i) does not exceed the value of the relevant threshold for the application of the procurement regime; and (ii) is below 10% of the initial contract value (15% for public works contracts).

More helpfully, the 2014 Directives provide that contract modifications will not be considered to be substantial where they have been provided for in the procurement documents in clear, precise and unequivocal review clauses or options. Such clauses or options must state the scope and nature of possible modifications, as well as the conditions under which they may be exercised, and may not alter the overall nature of the contract.

The 2014 Directives also allow modifications in circumstances in which, despite reasonably diligent preparation of the initial award by the contracting authority, the modifications are required as a result of unforeseen circumstances. In such cases, a new procurement procedure will not be required so long as the modification(s) do not alter the overall nature of the contract.

In addition, the 2014 Directives clarify that a new award procedure will not be required in the event that additional works, services or supplies are necessary, and where a change of contractor cannot be made for technical or economic reasons and would cause significant inconvenience or duplication of costs.

It is also helpful that the 2014 Directives expressly provide that a successful tenderer may undergo structural changes during the performance of the contract, such as internal reorganisations, mergers and acquisitions or insolvency, without giving rise to a requirement to conduct a new award process.

13 Enforcement

An aggrieved operator can either make a complaint to the Commission or bring proceedings before a national court for infringement of the national implementing legislation and/or the EU General Principles.

A complaint to the Commission is the cheapest and most straightforward option. However, it will usually be slow; therefore, in many cases, it may not be very effective. There is always a risk that the Commission will not consider that the case is worthy of investigation at the EU level (the Commission will not and cannot pursue all complaints). Moreover, there is no effective mechanism for injunctive relief (interim measures at the EU level are very difficult to obtain). There is no fixed timescale for the procedure, and generally the process will be slow and certainly outside the control of the complainant, who will have limited visibility over the conduct and progress of the case.

If successful, a complaint may ultimately lead to the Commission taking action before the CJEU under Article 258 against a Member State for infringement of the relevant directive (see the description of the procedure above at section 5, paragraph 3). In its judgment under Article 258 proceedings, the CJEU cannot order a Member State to act or to refrain from acting in a particular way. However, the Member State would, under Article 260(1), "be required to take the necessary measures to comply". The CJEU's judgment in *Commission v. Germany*[20] clarifies what those "necessary

measures" may involve in circumstances in which a contract has been concluded unlawfully. The CJEU held that Germany was under an obligation to remedy the infringement in question by taking all appropriate measures, which might include the rescission of a contract which had already been concluded, irrespective of whether German national law provided for this possibility.

The Public Sector Remedies Directive and the Utilities Remedies Directive require Member States to make certain minimum remedies available before national courts. In particular, contracting authorities are required to provide an automatic debrief to all tenderers and there is a mandatory "standstill" period between the award of a contract and its signature. There is an automatic suspension of the contract award if proceedings are brought against the contracting authority's award decision, shifting the burden onto the contracting authority to apply to court to lift the injunction.

The minimum remedies include "ineffectiveness", i.e. contract nullity (the prospective cancellation of all unperformed obligations) coupled with a fine on the contracting authority. This remedy is available on limited grounds after a contract has been entered into in breach of the applicable directive. Alternative penalties (contract shortening, fines, or both) are also available instead of ineffectiveness, in situations where ineffectiveness is inappropriate.

A likely outcome of any challenge is for the court to declare that a public contract must be re-tendered to the market as a whole – particularly in cases where a public contract is amended in a way which is materially different in character from the original contract. Material changes and changes in scope can result in a procurement being qualified as a new procurement requiring a new tender process. In *Wall*,[21] the CJEU held that the replacement of a specified sub-contractor may require a new award procedure to restore transparency. The CJEU affirmed that an essential change had taken place requiring a new award procedure to ensure compliance with the principle of transparency.

14 The Concession Regime

Under the 2004 Directives, the award of service concessions was excluded from the public procurement regime, and the award of works concessions was subject only to a narrow set of specific rules.

The 2014 Concessions Directive sets out a basic framework for the award of works and services concessions in the public and utilities sectors, subject to certain exemptions in respect of water (such as the disposal or treatment of sewage) with a value of €5,350,000 or more. The choice of the most appropriate procedure for the award of concessions is left to contracting entities, subject to basic procedural guarantees, including:

(a) the publication of a "concession notice" in the OJEU, advertising the opportunity;
(b) certain minimum time limits for the receipt of applications and tenders;
(c) the selection criteria must be related exclusively to the technical, financial and economic capacity of operators;
(d) the award criteria must be objective and linked to the subject matter of the concession; and
(e) acceptable modifications to concessions contracts during their term, in particular, where changes are required as a result of unforeseen circumstances.

The 2014 Concessions Directive seeks to clarify the concept of a "concession" itself, based on EU case law. The rules specify that the main feature of a concession – the right to exploit the works or services – always implies the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup all the investments made and the costs incurred in operating the works or services covered by the award. However, this does not exclude the award of concessions in sectors such as those with regulated tariffs, to the extent that an operating risk, however limited, can still be transferred to the concessionaire.

15 Public Procurement and State Aid

The TFEU includes specific provisions (Articles 107–109) restricting the ability of Member States to grant aid (of whatever form) which "distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods [...] insofar as it affects trade between Member States". Broadly, the provisions are intended to stop Member States from unfairly supporting their own companies to the detriment of competing companies from other Member States.

In the context of public procurement, aid can arise where the terms of a contract for works, services or supplies are not aligned with normal market-based commercial terms as to price or other matters, or where the contract does not reflect a genuine need. The advantage must come directly or indirectly from the resources of the State, and the measure providing for this must be imputable to the State.

The basic test is whether the purchaser acted as a "market purchaser" would have done. If it did, aid is not involved. If it did not, aid is involved – the aid being the difference between the actual value of the contract and the value of a contract that a market purchaser would have entered into (with the difference being repayable). If the purchaser has run an open, transparent and non-discriminatory procurement procedure (for example, one in accordance with the public procurement rules) and the contract price is established through that procedure, then there is generally accepted to be a presumption that State aid is not involved.

If the purchaser has properly used the open procedure, the contract should be at market value and not involve aid. The position is less clear for cases in which the restricted, negotiated or competitive dialogue procedures are used. However, the Commission has been flexible and has generally not sought to challenge public bodies in relation to purchase contracts. In several cases, it has accepted that a negotiated procedure used in public-private partnership transactions has delivered a market result. The Commission explained the above principles in a November 2007 document titled "Frequently Asked Questions Concerning the Application of Public Procurement Rules to Social Services of General Interest"[22] as follows: "... a tender procedure guaranteeing full competition can be taken as an important indicator that the [contract is at] market price and that there is no State aid. Complying with procurement rules will in these cases therefore also help in ensuring respect of the State aid provisions."

See also section 4 above on the Commission's proposal for a regulation which would require bidders to notify contracting authorities of all foreign financial contributions in the last three years.

Acknowledgment

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Bulgaria

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Bulgarian public procurement law transposes all applicable European Union (**EU**) Directives (i.e., Directives 2014/24/EU, 2014/25/EU, Directive 2009/81/EC and the two Remedies Directives 92/13/EEC and 89/665/EEC). The requirements of these Directives were introduced in a single piece of legislation – the Bulgarian Public Procurement Act (in force since 15 April 2016, as amended (**PPA**)).

Special rules for contracts awarded by sectoral contracting authorities, as well as by authorities operating in the field of defence and security, are set out in separate parts of the PPA.

There is one main by-law to the PPA – the Rules for application of the PPA – which defines: some exceptions from the scope of the PPA; the planning, preparation and implementation of the separate procedures; and the content of documents, etc.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The principles of the regime are in line with the Treaty on the Functioning of the European Union (**TFEU**), in particular those on the free movement of goods, freedom of establishment, freedom to provide services, and mutual recognition, as well as the ensuing principles of equality and non-discrimination, free competition, proportionality, publicity and transparency.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

Please see question 1.1 above.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The rules on public procurement comply with the legislation on protection of competition, protection of personal data, as well as all other laws that would be relevant to a specific procurement and which require enhanced transparency.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The Bulgarian public procurement legislation is in line with EU regulation on the matter and therefore is in full compliance with the World Trade Organization Agreement on Government Procurement (**GPA**).

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The PPA differentiates between public and sectoral contracting authorities:

- public contracting authorities are, among others, the President, the Prime Minister, ministers, mayors and other public authorities and their associations; and
- sectoral contracting authorities are the sectoral purchasers operating in the water, energy, transport or postal services.

Recently the PPA has provided also for the concept of a "contracting authority for a specific case" (i.e., entities which are not contracting authorities, but assign an activity financed with public funds), although this new type of a contracting authority is not used very often.

2.2 Which types of contracts are covered?

The following contracts are covered by the PPA: works; supplies; services; and design contests, concluded by contracting authorities in order to ensure efficiency in the spending of (generally) public funds, funds provided by the EU and funds related to the implementation of activities in the sectors of water supply, energy, transport and postal services.

2.3 Are there financial thresholds for determining individual contract coverage?

The PPA provides for the relevant thresholds based on the type of contract. They were last updated in 2023 and will come into force as of 1 January 2024. The thresholds are summarised overleaf.

Contracting authority	Works	Supplies	Services	Design contest
Public contracting authorities and associations	BGN 10,526,116 (approx. EUR 5,381,918)	BGN 273,812 (approx. EUR 139,998)	BGN 273,812 (approx. EUR 139,998) BGN 1,466,850 (approx. EUR 749,988) for social and other specific services	BGN 100,000 (approx. EUR 51,129)
Contracting authorities for a specific case				
Public contracting authorities when carrying out actions in the field of defence		BGN 273,812 (approx. EUR 139,998) BGN 420,497 (approx. EUR 214,998) in the case of contracts awarded by public contracting authorities outside of the field of defence		
Sectoral contracting authorities		BGN 842,950 (approx. EUR 430,993)	BGN 842,950 (approx. EUR 430,993) BGN 1,955,800 (approx. EUR 999,984) for social and other specific services	
Public and sectoral contracting authorities when awarding contracts in the field of defence and national security				

For public competition and direct negotiation, the thresholds are as follows:

- For works – BGN 300,000 to 10, 526,116 (approx. EUR 153,388 to 5,381,918).
- For supplies and services – from BGN 100,000 (approx. EUR 51,129) up to the corresponding threshold depending on the type of contracting authority and the subject of the order.

The PPA also sets threshold values for the direct awarding of public contracts, as well as for some other specific cases.

2.4 Are there aggregation and/or anti-avoidance rules?

The basic rule is not to divide or combine contracts and/or lots in order to circumvent the applicability of the law.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

Concessions are subject to a separate Concession Act, in force as of 2 January 2018, as amended (**CA**). In Bulgaria, concessions are not treated as a type of public procurement, although there are similarities in some of the procedures and rules.

According to the CA, there are two types of concessions – for works and for services.

A construction (works) concession is a public-private partnership in which a contracting authority entrusts an economic operator with the execution of a construction, against which it grants the economic operator the right to operate the construction while assuming operational risk.

A service concession is a public-private partnership in which a contracting authority entrusts an economic operator with the provision and management of one or more services other than construction, against which it confers on the economic operator the right to receive revenue assumption of operational risk (as well as "operation of services"). The operation of services includes the right of the concessionaire to carry out one or more economic activities other than the services assigned for their provision and management.

2.6 Are there special rules for the conclusion of framework agreements?

Contracting authorities may conclude framework agreements on the basis of the PPA's procedures and in the presence of preconditions for their implementation.

A framework agreement determines the conditions of the contracts to be awarded during a certain period, including the prices and, if possible, the envisaged quantities. The term of the framework agreement must not be longer than four years (eight years for sectoral contracting authorities). In exceptional cases, and for reasons related to the subject of the framework agreement, the term may be longer.

After concluding a framework agreement, the inclusion of new contractors is inadmissible. Contracting entities are not permitted to use framework agreements in a way that distorts competition.

2.7 Are there special rules on the division of contracts into lots?

In the process of preparation for awarding a public contract, contracting authorities assess the possibility of dividing it into separate lots. When awarding contracts by lots, they must determine the subject and volume of each position and, where applicable, the estimated value.

The Council of Ministers may determine areas in which a public contract must be divided into separate lots according to the specialised sectors of activity of small and medium-sized enterprises and their capacity.

Where contracting authorities have indicated that tenders may be submitted for several or all of the lots, they have the right to limit the number of lots to be awarded to a single contractor.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

A bidder or participant in a procurement procedure may be any Bulgarian or foreign natural or legal person (including from an EU Member State, a state party to the GPA or another country) or their associations, as well as any other entity entitled to perform works, supplies or services in accordance with the legislation of the country in which it is established.

All bidders or participants are treated based on the general EU principles and the TFEU without restricting competition between them.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The PPA procedures are: (i) open procedure; (ii) restricted procedure; (iii) competitive procedure with negotiation; (iv) negotiation with a preliminary invitation for participation; (v) negotiation with publication of a procurement notice; (vi) competitive dialogue; (vii) innovation partnership; (viii) negotiation without prior notice; (ix) negotiation without prior invitation to participate; (x) negotiation without publication of a procurement notice; (xi) competition for a project; (xii) public competition; and (xiii) direct negotiation.

- The open procedure and public competition are procedures in which all interested parties may submit a tender.
- The restricted procedure is a procedure in which tenders can be submitted only by bidders who have received an invitation from the contracting authority after a preliminary selection.
- In procedures (iii)–(v), the contracting authority negotiates with bidders who have received an invitation following a pre-selection process. As a basis for conducting the negotiations, the bidders submit initial bids.
- Competitive dialogue is a procedure in which the contracting authority conducts a dialogue with the pre-selected bidders in order to determine one or more proposed solutions that meet its requirements, and then to invite the bidders to submit final tenders.
- An innovation partnership is a procedure in which the contracting authority negotiates with the eligible bidders after pre-selection, in order to establish a partnership with one or more partners to carry out a specific research and development activity.
- In the negotiated procedures (listed at points (viii)–(x) and (xiii) above), the contracting authority conducts negotiations to determine the terms of the contract with one or more specific persons.
- A design competition is a procedure in which the contracting authority acquires, mainly in the fields of urban planning, architecture, engineering or data processing, a plan or conceptual design selected by an independent jury on the basis of a competition with or without awards. The competition for a project can be open or limited.

3.2 What are the minimum timescales?

The relevant timescales are as follows:

- Open procedure – 30 days from the date of dispatch of the procurement notice for publication (it may be shortened on some occasions, but not by more than 15 days).
- Restricted procedure and competitive procedure with negotiation – 30 days from the date of dispatch of the procurement notice for publication or the invitation for confirmation of interest (it may be shortened on some occasions, but not by more than 10 days).
- Competitive dialogue and innovation partnership – 30 days from the date of dispatch of the procurement notice for publication.

Contracting authorities send a contract award notice for publication within 30 days of the conclusion of a public procurement contract or framework agreement.

3.3 What are the rules on excluding/short-listing tenderers?

All economic operators should be economically and financially reliable. The suitability criteria are part of the official documentation and coincide with the general requirements of the EU legislation and the PPA: not to have been convicted with an effective sentence for certain crimes; not to have outstanding obligations for taxes or compulsory social security contributions; and not to be in a conflict of interest, etc.

There are mandatory and optional grounds for exclusion. For example, if a bidder is declared bankrupt or deprived of the right to pursue a certain activity, the contracting authority may nevertheless decide not to exclude it.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

Public contracts are awarded on the basis of the most economically advantageous tender. It is determined on the basis of one of the following award criteria: (a) the lowest price; (b) the level of costs, taking into account cost-effectiveness, including life-cycle costs; and (c) an optimal quality/price ratio, which is assessed on the basis of price or cost level, as well as indicators including qualitative, environmental and/or social aspects related to the subject of the procurement.

3.5 What are the rules on the evaluation of abnormally low tenders?

When a tender related to price or cost is over 20% more favourable than: (a) the average value of the offers of the other participants according to the same evaluation indicator – when evaluating three or more offers; or (b) the announced estimated value, and when this is not applicable – from another appropriate and objective basis for comparison previously determined by the contracting authority, specified in the announced terms of the order – when evaluating one or two offers, the contracting authority requires a detailed written justification of its formation.

The justification refer to the economic features of the production process, the services provided or the construction method; the chosen technical solutions or the presence of extremely favourable conditions, etc.

The justification obtained is assessed in terms of its completeness and objectivity. The justification may not be accepted and the bidder may be removed only when the evidence provided is not sufficient to justify the proposed price or cost.

3.6 What are the rules on awarding the contract?

The contracting authority designates as a contractor a bidder for whom the following conditions are met:
- there are no grounds for removal from the procedure; and
- the tender of that bidder has received the highest evaluation in applying the conditions and the selected award criterion.

3.7 What are the rules on debriefing unsuccessful bidders?

PPA procedures end with a decision on:
- determination of a contractor;
- ranking of the participants and/or awarding of prizes and/or other payments in a project competition; and
- termination of the procedure.

In all cases, the parties are duly notified and any interested party (e.g., unsuccessful bidder) has the right to appeal against the decision.

3.8 What methods are available for joint procurements?

Two or more contracting authorities may enter into a joint procurement contract which regulates all organisational, technical and financial matters relating to the conduct of the procedure.

Contracting authorities have the right to award public contracts, conclude framework agreements or manage a dynamic purchasing system together with contracting authorities from other Member States.

3.9 What are the rules on alternative/variant bids?

Contracting authorities may authorise or require the submission of variants in the bid. They indicate this information in the notice announcing the opening of the procedure. The options must be related to the subject of the contract. The contracting authorities describe the minimum requirements that the variants must meet in the documentation, as well as all the specific requirements for their presentation.

3.10 What are the rules on conflicts of interest?

Under the PPA, a conflict of interest exists when the contracting authority, its employees or persons employed by it outside its structure, who participate in the preparation or award of the public procurement or may influence its outcome, have an interest that may lead to a benefit, and for which could be considered to affect their impartiality and independence in relation to the award of the public contract. Each contracting authority is obliged to avoid conflicts of interest in the award of contracts.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

In preparation for the award of a public contract, the contracting authority may hold market consultations by seeking advice from independent experts or bodies from the market organisations. Consultation may be used provided that it does not distort competition and the principle of non-discrimination and transparency. The contracting authority must ensure that persons involved in market consultations and/or in the preparation of the procedure are not preferred over other bidders.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

The exemptions to the applicability of the regime are defined in the PPA and are categorised into groups: general exemptions; and those relating to a particular type of contracting authority (public or sectoral). Such exemptions have been fully introduced, according to the transposed EU Directives. Among the generally applicable exemptions are those related to employment contracts, land lease, procedures conducted under special rules of international organisations, legal representation, contracts related to national security, arbitration and conciliation services, etc.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

In-house award is possible in contracts awarded by a public contracting authority, including when performing a sectoral activity, to a legal entity, if the following conditions are simultaneously met:
- the contracting authority exercises control over the legal entity similar to that which it exercises over its own structural units;
- more than 80% of the activity of the legal entity is formed by the implementation of activities assigned by the contracting authority or its separate structures or by other legal entities controlled by the contracting authority; and
- there is no direct private capital participation in the legal entity/contractor (exceptionally, direct private equity participation is permitted when required by provisions of national law, in accordance with the Treaty on European Union and the TFEU, and where it does not involve controlling or blocking powers and does not have a decisive influence on the activities of the legal entity).

An exception to the applicability of the PPA is also possible for contracts concluded between two or more contracting authorities, including when carrying out a sectoral activity, where the following conditions are simultaneously fulfilled:
- cooperation is established between them to ensure that their public service obligations are fulfilled in order to achieve common goals;
- the implementation of such cooperation is governed by considerations of public interest; and
- in the last three years, the participating contracting entities have carried out on the free market less than 20% of the cooperative activities.

The legal entity-contractor has no right to subcontract the subject of the contract or parts of it to other persons and submits a declaration that it can fulfil the order with its own resources.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

Any decision of the contracting authorities under a procedure for: (i) award of a public contract, including on the basis of a

framework agreement, a dynamic purchasing system or qualification systems; (ii) concluding a framework agreement; (iii) creation of a dynamic system for purchases or qualification systems; and (iv) competition for a project, is subject to appeal.

Actions or inactions of the contracting authority, which impede the access or participation of bidders in the procedure, are also subject to appeal.

Decisions not subject to appeal are those made on:

1. determination of a contractor by internal competitive selection, when the total value of the contracts awarded under the framework is lower than (in force as of 1 January 2024):
   - for works contracts – BGN 300,000 (approx. EUR 153,388); and
   - for supplies and services – BGN 100,000 (approx. EUR 51,129); and
2. the opening of a procedure, in the part regarding the reasons for the impossibility of dividing the subject of the procurement into separate lots.

Decisions are appealed to the Commission for Protection of Competition (**CPC**) regarding their legality.

An appeal may be lodged by any interested person, bidder or participant in the award procedure.

An appeal against the decision declaring the winning bidder has an automatic suspensive effect, unless its provisional enforcement is permitted by the CPC or with respect to certain specific cases, listed in the same provision. In all other cases suspension may be (rarely) declared by the CPC as an interim measure, if requested.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

In theory, the rights of participants, bidders and contractors can also be protected before a civil court (for example, for damages or lost profits), but practice has shown that these are not common cases.

5.3 Before which body or bodies can remedies be sought?

In the first instance, remedies may be sought before the CPC, as described in question 5.1 above.

The decision of the CPC is subject to appeal before a three-member panel of the Supreme Administrative Court (**SAC**).

5.4 What are the limitation periods for applying for remedies?

An appeal may be filed within 10 days from:

1. the expiration of the term for making changes under the type of procurement procedure announced;
2. the publication of certain material decisions (i.e., to conduct a negotiated procedure; to extend the time limit of a procedure, etc.);
3. the service of the respective decision of the contracting authority; or
4. the publication of a voluntary transparency notice.

5.5 What measures can be taken to shorten limitation periods?

The limitation periods cannot be shortened.

5.6 What remedies are available after contract signature?

Subsequent external control over the implementation of the PPA, including control over the implementation of the contracts, is carried out by the National Audit Office (**NAO**) and the bodies of the State Financial Inspection Agency (**PFIA**).

Both institutions monitor the lawful implementation of public procurement. The NAO also has some limited functions in verifying the appropriate expenditure of funds.

In case of violations, acts for establishing administrative violations are issued. Written instructions are also issued to prevent violations from being committed, and/or to eliminate their harmful consequences. Financial inspections, in which the presence of data for a committed crime has been established, are sent to the prosecutor's office.

5.7 What is the likely timescale if an application for remedies is made?

The deadlines regarding the administrative and judicial proceedings for review are short. A dispute is usually resolved within three months. As per the PPA, the CPC should issue a decision within 15 days after the open proceedings (except for cases related to procurements with values above the EU thresholds where the deadline is one month). The decision should be prepared and announced within seven days of it being made.

The CPC's decision can be appealed before the SAC within 14 days of its notification to the parties. The court must issue its ruling within one month. The ruling is final.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

It is difficult to single out leading examples of cases. Appeals against public procurement are of a significant volume and follow almost every procedure. Usually, the CPC is relatively successful in outlining procedural violations.

5.9 What mitigation measures, if any, are available to contracting authorities?

The contracting authority is obliged to comply with the decision of the CPC and/or the SAC.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

The contracting authority may, on its own initiative or at the request of an interested party, make changes to the terms of the procedure set out in the notice announcing the opening of the procedure, in the invitation to confirm interest, in the

procurement documents and in the descriptive document. Such amendments may be made once within 14 days of the publication of the notice announcing the opening of the procedure.

All interested parties are immediately informed about the changes, and if necessary, the deadline for submission of tenders is extended.

The contracting authority cannot introduce conditions that would change the circle of interested parties.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

Negotiating with bidders is an exception to the general rule not to negotiate separately with any participants in the procedures, so as not to violate the principles of equality and transparency. Negotiations are possible only in (i) a competitive procedure with negotiation, (ii) negotiation with a preliminary invitation to participate, (iii) negotiation with the publication of a contract notice, and (iv) innovation partnership.

6.3 To what extent are changes permitted post-contract signature?

Exceptions are possible only in the following cases:

- the changes are provided through clear, precise and unambiguous clauses, including price modification (no change in the subject of the contract is permitted);
- due to unforeseen circumstances additional supplies, services or works are needed and a change of contractor:
  (i) is not possible for economic or technical reasons; and
  (ii) would cause significant difficulties related to the maintenance, operation and maintenance, or duplication of costs of the contracting authority;
- there are unforeseen circumstances which did not lead to a change in the subject matter of the contract;
- it is necessary to replace the contractor with a new one, provided that such possibility is provided in the documentation and in the contract;
- it is necessary to replace the contractor with a new one when there is universal or partial succession for the original contractor, or by changing its legal form, as well as in cases where he is in liquidation or in open insolvency proceedings and the following conditions are fulfilled simultaneously:
  (i) the new contractor has no grounds for exclusion; and
  (ii) the change of contractor does not lead to other significant changes and is not intended to circumvent the law; and
- changes that are not significant are required.

An increase in the price may not exceed the value of the main contract by more than 50%. When successive amendments are made, the limit applies to the total value of the amendments. Consecutive amendments should not be aimed at circumventing the law. Changes in the price of the contract as a result of inflation, in which the prices of the main goods and materials that form the value of the contract are significantly increased, are carried out according to a methodology approved by an act of the Council of Ministers.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

Please see question 6.3 above.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The legislation in the field of public procurement in Bulgaria does not regulate privatisation issues.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

There is no specific regulation on PPPs in Bulgaria. In 2017, the CA was adopted, which transposed Directive 2014/23/EU. The CA regulates certain PPPs as described in question 2.5 above.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

The latest changes in the PPA are aimed at harmonising with European legislation and regulations related to the National Recovery and Resilience Plan as well as to the expected membership of the OECD.

The most critical comment was on the fact that all hospitals were left out of the obligations to conduct public procurement procedures for the supply of drugs as it might open corruption loopholes.

Most changes (including financial tresholds) come into force from 1 January 2024, with the exception of some texts related to the control powers of the Public Procurement Agency, which will come into force in July 2024.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

A new advisory council to the Ministry of Finance is being created, which includes all bodies and units with methodological and control powers. The goal is to unify the practice of implementing the PPA. The change is effective from October 2023, but there is still not enough information on how the new structure works and for that reason we single it out more as a future change.

Changes also remain regarding some less precise texts related to purely national specifics such as in-house awarding, appeals, etc.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

Please see question 8.1 above.

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PPG Lawyers is a boutique EU law firm specialised in advising on regulatory matters. We provide full legal support to businesses, while holding true to our philosophy of offering considerable expertise in deeply specialised areas of regulation. It is for this reason that the team at PPG is made up of highly qualified professionals with expertise in specific regulations at EU and national level. Our areas of focus include public procurement, data protection, cybersecurity, and competition and consumer protection; while our litigation team is another of our key strengths. PPG further provides expert services in a number of niche regulatory sectors, such as waste management, electronics, fuels, energy, telecommunications, wholesale and retail trade, labelling, pharmacy, and many others. As an EU law firm, PPG Lawyers partners with other established law firms in the CEE region, as well as the US; we are thus well positioned to advise clients on cross-border matters.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The Public Contracts Regulations 2015 (SI 2015/102) (as amended) (the "PCRs") establish rules relating to the procurement of services, supply or works contracts by public bodies, other than by utilities in relation to a utility activity.

The Utilities Contracts Regulations 2016 (SI 2016/274) (as amended) (the "UCRs") establish rules relating to the procurement of services, supply or works contracts by utilities that relate to a utility activity.

The Concession Contracts Regulations 2016 (SI 2016/273) (as amended) (the "CCRs") establish rules relating to the procurement of services concessions and works concessions by public bodies.

The Defence and Security Public Contracts Regulations 2011 (SI 2011/1848) (the "DSPCRs") establish rules relating to the procurement of services, supply or works contracts for activities or projects in relation to defence and/or security that have been commissioned by public bodies.

The PCRs, the UCRs, the CCRs, and the DSPCRs are collectively referred to hereafter as the "Regulations".

Following the end of the Brexit Transition Period, the Regulations were amended by the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 SI 1319 ("PPAR 2020") to address deficiencies in the law on public procurement in the UK arising from the UK's withdrawal from the EU. The Regulations were then amended by the Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021, which inserted, among other things, conditions relating to the World Trade Organization Government Procurement Agreement ("GPA") into the PCRs and the UCRs, and a duty owed to economic operators from GPA parties into each of the Regulations.

In terms of non-GPA international agreements, the Regulations were amended by the Public Procurement (International Trade Agreements) (Amendment) Regulations 2021, which inserted conditions into the PCRs and the UCRs relating to non-GPA international agreements to which the UK is bound, and a duty owed to economic operators from countries with whom the UK has a non-GPA international agreement into each of the Regulations.

On 11 May 2022, the UK's own Procurement Bill was first introduced in the House of Lords. As of 26 October 2023, the Bill received Royal Assent; enabling it to form the new Procurement Act 2023 (the "2023 Act") which now takes effect as primary legislation in the UK.

The Explanatory Notes to the 2023 Act set out that: "[t]he purpose of the Procurement Act 2023 is to reform the United Kingdom's public procurement regime following its exit from the European Union (EU), creating a simpler and more transparent system not based on transposed EU Directives". The 2023 Act establishes a simpler single legal framework for the award of public contracts and so-called "special regime contracts" (for utilities, concessions, defence and security, and light touch contracts) in the UK; and ultimately repeals the EU-derived Regulations.

It retains a number of key features of the Regulations, but makes a number of notable changes, including:

- limiting the number of competitive tendering procedure options to two (as opposed to the five under the Regulations), being (i) single-stage or, alternatively, (ii) a flexible procedure which conforms to the process which the relevant contracting authority deems appropriate;
- requiring contracting authorities to publish a number of key documents – such as pipeline notices, contract award notices before the contract is entered, copies of public contracts valued in excess of £2 million within 90 days of entering the contract, contract implementation/change/termination notices;
- additional rules debarring suppliers and giving contracting authorities enhanced powers of discretion over supplier exclusions;
- adjusting the standstill period between contract award and entering the contract to eight working days (from 10 calendar days); and
- introducing new set-aside remedies.

The 2023 Act is intended to be more transparent, commercially appropriate, and flexible than the Regulations. Whilst still designed to align with EU law as per the EU/UK Trade and Cooperation Agreement of 30 April 2021 ("TCA"), it is designed to be better tailored to the needs of the UK market following Brexit – including by promoting healthy competition, fostering innovation, and reducing costs.

The secondary legislation (in the form of two separate statutory instruments/regulations) that will implement the 2023 Act

is currently in development. It is anticipated that the 2023 Act and accompanying secondary legislation will be brought into force in October 2024 (following a six-month notice period), and the Cabinet Office has stated that they will provide guidance on the changes to all contracting authorities in the public sector in the form of a centrally funded learning and development package.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic principles underpinning the regime (and which are key to its interpretation) are: non-discrimination; equal treatment; transparency; and proportionality. These underlying principles apply in all situations in which an authority procures works, services or supplies from a third party, including where the contract falls outside the scope of the Regulations. These principles originated in the European Court of Justice's jurisprudence. While the UK is no longer subject to EU law, the fundamental tenets and foundations of a fair procurement process remain applicable to the UK regime. It is also necessary for the UK to comply with its international obligations and similar principles also appear in the GPA (to which the UK is a party).

The government's Green Paper on "Transforming public procurement", dated 15 December 2020, proposed "enshrining in law the principles of public procurement: the public good, value for money, transparency, integrity, fair treatment of suppliers and non-discrimination" and the Explanatory Notes to the 2023 Act state that the reforms are guided by these principles.

Contracting authorities are currently obligated, under Regulation 67(1) of the PCR, to award public contracts to the tenderer(s) who have submitted "Most Economically Advantageous Tender": the "MEAT" principle.

The 2023 Act replaces "MEAT" with "MAT" ("Most Advantageous Tender") at section 19(1), indicating that authorities will be required to place slightly less relative emphasis on economic value and/or other financial criterion when assessing tenders. Whilst this does not preclude an authority from evaluating tenders on financial terms, it suggests that authorities might give greater weight to other aspects of tenders in the future, such as social value.

However, value for money remains a key focus under the 2023 Act, with the reforms designed to include new rules for introducing contracts of lower value. This is intended to make public procurement more accessible and equitable for newer market entrants and small and medium-sized businesses ("SMEs"); with the hope that they might be able to secure a greater share of the government's annual spend of near c. £300 billion worth on public contracts.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

The DSPCRs currently establish specific rules for the procurement of arms, munitions and war material (plus related works and services) for defence purposes, as well as for the procurement of sensitive supplies, works and services for non-military security purposes. However, once in force, the 2023 Act will govern any such procurements, as provided for in section 7.

The 2023 Act also makes specific provisions in respect of the "special regime contracts" (for utilities, concessions, defence and security, and light touch contracts), as noted in the response to question 1.1 above.

There are also special rules in relation to healthcare procurements. On 1 July 2022, significant elements of the Health and Care Act 2022 (the "HCA") came into force (with other measures intended to come into force at a later date). Under the HCA, "clinical commissioning groups" are replaced with "integrated care boards". The provisions of the HCA also set out that the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (S.I. 2013/500) will be revoked. The HCA also sets out the power to remove healthcare services procurements from the PCRs, while keeping non-clinical services and clinical supplies in scope.

Regulation (EC) No. 1370/2007 on public passenger services by rail and road, as amended by Regulation (EC) No. 1370/2007 (Public Service Obligations in Transport) (Amendment) (EU Exit) Regulations 2020, applies to certain types of concession contract for public passenger transport services by rail or metro.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The Freedom of Information Act 2000 ("FOIA") establishes a general right of access to information held by public authorities about public contracts and procurement activities, subject to certain conditions and exemptions (the principal exemptions being trade secrets and commercially sensitive information). The FOIA therefore provides a means to obtain information which the authority is not generally required to disclose under the Regulations.

In 2011, the UK government implemented specific measures to ensure greater transparency across all government operations. For instance, central government tender documents for contracts over £10,000 must be published in full on the "Contracts Finder" (see https://www.gov.uk/contracts-finder). For "high value" UK contracts (in excess of £138,760 including VAT) with procurement processes beginning on or after 1 January 2021, the government's "Find a Tender" service (see https://www.gov.uk/find-tender) was introduced. In Walex, the Welsh government stated in its Welsh Procurement Policy Note WPPN 02/22 that central government bodies should publish a contract award notice for any contract over £12,000 including VAT (£30,000 including VAT for sub-central government bodies) on "Sell2Wales".

The Protection of Freedoms Act 2012 (Commencement No. 8) Order 2013 (SI 2013/1906) brought into force several provisions of the Protection of Freedoms Act 2012 ("POFA"), which require public bodies to provide datasets in response to FOIA requests in a re-usable form as far as reasonably practicable, licensed for re-use (if the public body owns the copyright).

The Public Services ("Social Value") Act 2012 introduced a statutory requirement for public authorities to have regard to economic, social and environmental well-being in connection with public services contracts.

The Infrastructure (Financial Assistance) Act 2012 was adopted to enable the government to provide financial assistance of up to £50 billion in support of infrastructure investment, thereby supporting major infrastructure projects that have struggled to access private finance because of adverse credit conditions.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The Regulations implement the EU public procurement directives. Under the Agreement on the withdrawal of the United

Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 ("Withdrawal Agreement") between the UK and the EU, the Regulations continued to apply during the implementation period. Following the end of the implementation period, which took place at 23:00 on 31 December 2020, the Regulations continue to apply. However, the PPAR 2020 made certain amendments to the Regulations to address deficiencies arising from the UK's withdrawal from the EU and to give effect to the public procurement chapter of the Withdrawal Agreement.

As of 1 January 2021, the UK has been an independent member of the GPA. The UK procurement market is therefore open to operators from the other countries that are parties to the GPA. The UK government has implemented its obligations under the GPA through the PPAR 2020 and the Public Procurement (Agreement on Government Procurement) (Amendment) (No. 2) Regulations 2021.

The TCA entered into force at 23:00 on 30 April 2021 and contains specific provisions relating to public procurement. The TCA incorporates the GPA rules and provides further rights, protections and clarifications in relation to UK/EU procurement. At a high level, UK/EU procurement activity that is caught by the TCA is wider than the activity covered by the GPA, and the TCA provides for national treatment beyond "covered procurement" where the activity does not fall within a specific exception.

The 2023 Act has been designed to give UK contracting authorities the freedom to carry out public procurements in way which is better tailored to the needs of the UK market; but that remains compliant with the UK's international obligations as part of supra-national regimes. Part 7 of the 2023 Act provides scope for "Treaty State Suppliers" (suppliers from other countries than the UK that are also members of the same international agreements) to enter into UK-run public procurements, and contracting authorities are expressly prohibited from discriminating against such suppliers or treating them less favourably than UK suppliers.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The PCRs apply to public sector "contracting authorities", which comprise:

- state, regional and local authorities;
- bodies governed by public law; and
- associations formed by one or several of such authorities or bodies.

Schedule 1 of the PCRs lists relevant entities either by category or name. In addition to entities expressly referred to, the PCRs apply to "bodies governed by public law", which are bodies set up for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and which are either: (i) financed wholly or mainly by another contracting authority; (ii) subject to management supervision or control by another contracting authority; or (iii) where more than half of the board of directors or members, or, in the case of a group of individuals, more than half of those individuals, are appointed by another contracting authority.

There are also limited circumstances in which a private entity can be subject to the Regulations, such as where a public authority awarding a subsidy is obliged to require that the subsidised body comply with the PCRs as if it were a public authority, or where it is procuring on behalf of a contracting authority.

The UCRs apply to "utilities", which comprise:

- the same list of public bodies covered by the PCRs, as well as public undertakings (i.e. undertakings over which the State exercises a "dominant influence"), provided that they are performing a "utility activity"; and
- certain private entities performing a "utility activity" "on the basis of special and exclusive rights granted by a competent UK authority".

A "utility activity" comprises procurements related to certain specified activities in the water, energy, transport and postal sectors.

The 2023 Act, which amalgamates and varies aspects of the PCRs and UCRs, defines "contracting authorities" covered by the 2023 Act (whether carrying our procurement for itself or others) as inclusive of:

- public authorities (being persons wholly or mainly funded by public monies; or subject to public authority oversight but not operating on a commercial basis); and
- for utilities contracts:
  - public authorities;
  - public undertakings (being persons subject to public authority oversight but operating on a commercial basis); and
  - private utilities (being persons who carry out utility activities and are not public authorities or public undertakings).

2.2 Which types of contracts are covered?

Contracts must be classified as either a works contract, a supply contract, a service contract, a service concession contract or a works concession contract. These categories are mutually exclusive, i.e., a procurement can only be for one type of contract. This classification will determine which set of rules will apply and the applicable financial thresholds.

"Works contracts" are contracts carried out in connection with the execution or realisation of a work or works for a contracting authority; for example, general building and civil engineering works (including demolition, installation and building completion work). "Supply contracts" are contracts for the purchase, lease, rental or hire of goods. "Service contracts" are contracts engaging an entity to provide a service. Where a procurement is for both goods and services, it will qualify as a services procurement, rather than a supply procurement, if the value attributed to the services exceeds that of the goods.

The CCRs apply to concession contracts. The definition of a "concession" in the CCRs (and similarly in the 2023 Act) is based around the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup all the investments it has made and the costs it has incurred in operating the works and services covered by the award.

If a procurement is for both works and services, it will qualify as a services procurement, provided that the works are only incidental to the provision of services. As regards service concession contracts and works concession contracts, see the response to question 2.5 below.

2.3 Are there financial thresholds for determining individual contract coverage?

A procurement will only fall within the scope of the Regulations if its value exceeds a specific financial threshold, which varies according to the classification of the procurement. The value of a procurement for the purposes of the threshold rules set out under the Regulations is its estimated value inclusive of value-added tax.

Public contracts that are below the financial thresholds ("below-threshold contracts") are regulated in part 6 of the 2023 Act.

The thresholds are updated from time to time, by way of supplementary regulations. As per the Public Procurement (Agreement on Government Procurement) (Thresholds) (Amendment) Regulations 2023, the following thresholds will apply as of 1 January 2024:

Subject to	Contracting entity	Supplies (£)	Services (£)	Social and other specific services / light touch (£)*	Works (£)
PCRs	Entities listed in Schedule 1 of the PCRs	139,688	139,688	663,540	5,372,609
	Other public sector contracting authorities (such as local authorities)	214,904	214,904	663,540	5,336,937
UCRs	Utilities (public or private)	429,809	429,809	884,720	5,372,609
CCRs	N/A	5,372,609	5,372,609	5,372,609	5,372,609

Please note that the 2023 Act presently retains the thresholds that took effect from 1 January 2023, as at Schedule 1 (see below). However, these will likely change by the time the 2023 Act comes into force, or shortly thereafter.

2.4 Are there aggregation and/or anti-avoidance rules?

The Regulations contain an express "splitting" prohibition, which requires the aggregation of the values of similar contracts in certain circumstances. The aim is to prevent the artificial splitting up of contracts into lower-value contracts, which would fall below the relevant thresholds and, thus, outside the scope of the Regulations.

Schedule 3 of the 2023 Act contains a similar anti-avoidance provision with the same objective and function; requiring that where a contracting authority is awarding multiple contracts for goods/services/works that could reasonably be supplied under a single contract, it must (in the absence of good reasons not to) estimate the value of each contract as inclusive of the value of all of the contracts.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

The CCRs establish special rules for the award of concession contracts. The definition of a "concession" in the CCRs is based around the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup all the investments it has made and the costs it has incurred in operating the works and services covered by the award.

The regime leaves the choice of the most appropriate procedure for the award of concessions to contracting entities, subject to some basic procedural guarantees.

Section 8 of the 2023 Act defines a "concession contract" on very similar terms; noting that under the contract the economic risk that the supplier is exposed to is a "real operating risk", defined as one where the factors from which it could arise are outside the control of the contracting authority; but are reasonably foreseeable at the time of the contract award.

2.6 Are there special rules for the conclusion of framework agreements?

The Regulations include express rules on the award and use of framework agreements. The procuring authority does not need to establish the precise scope of the products or set a fixed price when it awards a framework agreement. The purpose of a framework agreement is to establish a mechanism to determine

Schedule 1	Type of contract	Threshold amount
1.	Defence and security contract that is a works contract	£5,336,937
2.	Defence and security contract that is a concession contract	£5,336,937
3.	Defence and security contract not within row 1, 2 or 8	£426,955
4.	Utilities contract that is a works contract	£5,336,937
5.	Utilities contract that is a light touch contract	£884,720
6.	Utilities contract not within row 3, 4 or 5	£426,955
7.	Light touch contract that is a concession contract	£5,336,937
8.	Light touch contract not within row 5 or 7	£663,540
9.	Concession contract not within row 2, 6 or 7	£5,336,937
10.	Works contract not within row 1, 4 or 9	£5,336,937
11.	Contract for the supply of goods, services or works to a central government authority not within any other row	£138,760
12.	Contract for the supply of goods, services or works to a sub-central government authority not within any other row	£213,477

the basis upon which works/services/supplies will be provided as and when a requirement arises. In particular, framework agreements can provide a streamlined process for procurements that are required on a regular basis.

The Regulations impose certain restrictions on the use of frameworks. In particular, framework agreements may not be used with a view to preventing, restricting or distorting competition. This means that, in practice, limits on the duration and the scope of the products or services covered by the framework need to be established.

Framework agreements may be either single- or multi-supplier. Multi-supplier agreements are often favoured where the authority wants to retain a competitive element throughout the term of the framework.

Framework agreements may also be either single- or multi-purchaser (i.e. they can be created for the benefit of one or more contracting authorities). Multi-purchaser frameworks may involve either a single contracting authority acting as a central purchasing body for a number of contracting authorities, or all of the relevant contracting authorities entering into an agreement with one or more suppliers. Chapter 4 of the 2023 Act contains provisions in respect of such agreements – varying them slightly so as to allow an increased duration where required in light of what is being procured. The 2023 Act also introduces provision for "open frameworks", which, as it sets out, are a "scheme of frameworks that provides for the award of successive frameworks on substantially the same terms"; with some rules as to when awards, expiry, and reopening might occur.

2.7 Are there special rules on the division of contracts into lots?

The Regulations provide that contracting authorities may divide the scope of contracts into different lots based on, for example, value or geographical area.

Contracting authorities are encouraged to divide contracts into lots whenever possible in order to facilitate the access of SMEs to public sector contracts.

If a contracting authority divides a contract into lots, it must set out:

- whether tenders may be submitted for one, several or all of the lots available; and
- the maximum number of lots each tenderer can win, if any limits apply.

According to section 18 of the 2023 Act, contracting authorities are duty-bound to consider, before they publish a contract notice, whether several contracts might reasonably be awarded, and, if so, by reference to lots. If they are so compelled, they are then obligated to make the award(s) using lots unless they can then provide reasons for not doing so.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Contracting authorities are required to provide access to public contract opportunities to suppliers established in a jurisdiction or country which is a signatory to the GPA.

Suppliers from a jurisdiction or country which is not a GPA signatory are not, as a matter of law, prevented from bidding for and performing public contracts in the UK. However, contracting authorities may not owe the same duties to bidders from non-GPA jurisdictions, and may choose to treat bidders established in non-GPA jurisdictions less favourably, at least at the outset of a tender process.

Where the procurement falls under the UCRs, a supplier from a non-GPA country risks being treated less favourably where it sources more than 50% of the products to be supplied under the contract from non-GPA countries.

As noted in the response to question 1.5 above, the 2023 Act mandates that contracting authorities must consider "Treaty State Suppliers" (suppliers from other countries than the UK that are also members of the same international agreements) who enter into UK-run public procurements, and must not discriminate against such suppliers on the basis of not being part of the UK jurisdiction (or, indeed, any other basis) by treating them less favourably than they would a UK supplier.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

There are five different types of competitive procurement procedure available to contracting authorities under the PCRs:

- Open procedure: the procurement is advertised and all interested providers tender a single fully priced offer. This procedure is generally used only for simple procurements, as it does not permit any negotiation with interested providers.
- Restricted procedure: the contract is advertised and bidders are invited first to pre-qualify. Only those tenderers who pre-qualify are invited to submit a fully priced tender. The procedure offers no scope for substantive negotiation or dialogue between the contracting authority (or utility) and the tenderers.
- Competitive procedure with negotiation: the initial stages of the procedure mirror the restricted procedure; however, further tender stages are permitted to negotiate with interested parties in order to improve the content of their bids. The procedure provides a number of safeguards to protect against unequal treatment and discrimination of bidders during any negotiations.
- Competitive dialogue procedure: interested bidders must first pre-qualify before being invited to enter into a dialogue with the contracting authority in order to identify and develop a solution. This procedure is very flexible and the dialogue may be conducted in successive stages, with the aim of reducing the number of solutions/bidders. This procedure is designated for use in the award of complex contracts.
- Innovation partnership: this may be used where a contracting authority requires a partner to develop an innovative product, service or works. The contract is awarded in accordance with similar rules to the competitive procedure with negotiation. However, the procedure also sets out certain provisions governing the structure and operation of the partnership with the contractor in the contract execution phase. The procedure is only available in limited circumstances and, in particular, where a solution is not readily available in the market.

The UCRs make the following procedures available to contracting entities: (i) the open procedure; (ii) the restricted procedure; (iii) negotiated procedure with prior call for competition; (iv) the competitive dialogue procedure; and (v) the innovation partnership. The key difference from the PCRs is that the UCRs provide for the competitive dialogue procedure (instead of the competitive procedure with negotiation), under which interested bidders must first pre-qualify before the contracting authority enters into negotiations with a group of pre-qualified tenderers, by way of an invitation to negotiate ("ITN").

The CCRs do not specify award procedures, meaning procuring authorities have broad discretion to design the award procedure, subject to ensuring that there are basic procedural guarantees in place for the purposes of complying with the general principles.

The new regime under the 2023 Act revises and simplifies the five existing procurement procedures. It sets out two types of competitive tendering procedure, at section 20:

- a single-tendering procedure "without a restriction on who can submit tenders"; or
- a "competitive flexible procedure", which is defined as: "such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the contract", which may involve the authority limiting the number of participants across multiple stages.

Essentially, this is intended to give contracting authorities greater scope to design procurements to suit their particular needs (although they will still need to ensure consistency with procurement law principles and objectives).

3.2 What are the minimum timescales?

The PCRs and the UCRs set out minimum timescales for the conduct of each procedure. The minimum timescales are broadly the same under the PCRs and UCRs, however, it is possible to have shorter timescales under the UCRs, due to the fact that the utilities regime as a whole is more flexible.

The standard minimum timescales are as follows:

- open procedure: 35 days between the dispatch of the contract notice and the receipt of response (the timescale can be reduced by five days where the contracting authority accepts that tenders may be submitted by electronic means); and a 10-day standstill period before the award of the contract;
- restricted procedure: 30 days between the dispatch of the contract notice and the receipt of response; 30 days between the invitation to tender and the receipt of bids; and a 10-day standstill period before the award of the contract;
- competitive procedure with negotiation (under PCRs)/ negotiated procedure with prior call for competition (under UCRs): 30 days between the dispatch of the contract notice and the receipt of expressions of interest; unspecified but sufficient time between the issue of the ITN and the receipt of responses; and a 10-day standstill period before the award of the contract;
- competitive dialogue procedure: 30 days between the dispatch of the contract notice and the receipt of expressions of interest; unspecified but sufficient time for the competitive dialogue to take place; and a 10-day standstill period before the award of the contract; and
- innovation partnership: 30 days between the dispatch of the contract notice and the receipt of response; unspecified but sufficient time between the issue of the ITN and the receipt of responses; and a 10-day standstill period before the award of the contract. The procedure allows research and development ("R&D") phases to take place following contract award.

In the case of the open and restricted procedures and the competitive procedure with negotiation, the above timescales between the publication of a contract notice and the receipt of tenders/selection questionnaire ("SQ") responses can be reduced by publishing a Prior Information Notice ("PIN") between 35 days and 12 months before the date of publication of the contract notice, which gives the market advance notice of an intended procurement. The form of a PIN is standardised and includes outline information about the nature and scope of the works/ supplies or services that the authority intends to procure, as well as the scheduled date for the start of the award procedure.

In cases of urgency, an accelerated timetable is available under each of: the open procedure; the restricted procedure; and the competitive procedure with negotiation. Where the accelerated procedures are used, the minimum time for receipt of responses is reduced to 15 days from the publication of the contract notice.

The CCRs set out very few time limits; instead, the contracting authority's design of the procurement procedure should reflect the complexity of the concession. However, they do stipulate that:

- the minimum time limit for receipt of applications (whether or not this includes tenders) is 30 days from the date on which the concession notice is sent for publication;
- if the procedure includes successive stages, then the minimum time limit for receipt of initial tenders is 22 days;
- if the whole process is conducted electronically, time limits for receipt of tenders can be reduced by five days; and
- the usual standstill periods apply – i.e., 10 days if the information has been provided electronically.

Chapter 6 of the 2023 Act stipulates revised minimum timescales for all types of procedure which urge contracting authorities to have regard to wider considerations such as the complexity of the contract and tender process/documents, and any practical aspects/steps that it might wish take as part of the process. Contracting authorities will therefore have some discretion and flexibility to select the timescales that are best suited to their particular procurement.

The Participation period (the time between contract notice and receipt of responses) is generally 25 days, however for light touch contracts there is no minimum period. Where an authority perceives of a state of urgency for the procurement that renders the 25 days "impractical", the minimum participation timescale is 10 days.

The Tendering period (the time between invitation to tender and receipt of tenders) varies according to a number of different nuances:

- No minimum tendering period for: (a) light touch contracts; (b) utilities contracts subject to negotiation; and (c) contracts from authorities that are not central government subject to negotiation.
- The minimum tendering period is 10 days for: (a) utilities contracts with only pre-selected suppliers tendering; (b) contracts from authorities that are not central government with only pre-selected suppliers tendering; (c) contracts where a qualifying planned procurement notice has been issued; (d) contracts where the authority conceives of urgency that renders other periods impractical; and (e) contracts where the suppliers' market is a "dynamic market".
- The minimum tendering period is 25 days where tender notice and tender documents are provided simultaneously and tenders can be submitted electronically.
- The minimum tendering period is 30 days where: (a) tender notice and tender documents are not provided simultaneously but tenders may be submitted electronically; and (b) tender notice and tender documents are provided simultaneously but tenders may not be submitted electronically.
- The minimum tendering period is 35 days where tender notice and tender documents are not provided simultaneously and tenders may not be submitted electronically.

Notably, the 2023 Act has reduced the standstill period that applies following the award of contract and entering into it (except where the contract award notice sets out a longer "voluntary standstill period").

The "mandatory standstill period", under the new provisions (section 51) is now eight working days starting from the date of the publication of the contract award notice; and any

"voluntary standstill period" may not be less than that. In the following limited and "special" cases however, authorities are not required to abide by any standstill (unless provided for in the contract award notice): where there is a direct award for reasons including "extreme and unavoidable urgency", to "protect life", switch to direct award by a private utility; or where the contract is either light touch, being awarded in accordance with a framework agreement, or in a "dynamic market".

3.3 What are the rules on excluding/short-listing tenderers?

In open procedures, bids are directly submitted after publication of the contract notice, without any shortlisting stage. The contracting authority has no opportunity to limit participation to pre-qualified providers and can therefore only assess issues such as the economic and financial standing of a bidder once bids have been submitted. In contrast, the restricted procedure, the competitive procedure with negotiation, the competitive dialogue procedure and the innovation partnership procedure allow the contracting authority to select which bidders may participate in the tender process during a pre-qualification stage which takes place before any bids are submitted.

The pre-qualification stage consists of the assessment of SQ forms completed by prospective bidders. SQ forms are issued to all prospective bidders who respond to a contract notice.

The purpose of the SQ is, firstly, to enable the contracting authority to identify any material legal reasons why it may be required to exclude a bidder. The SQ will cover the criteria set out in the Regulations for the mandatory exclusion of bidders, which apply where a contracting authority has actual knowledge that the bidder has been convicted of offences such as conspiracy to participate in a criminal organisation, corruption, bribery, fraud or money laundering.

The SQ will also cover the criteria set out in the Regulations for the discretionary exclusion of bidders. These criteria cover factors such as: lack of financial standing or technical capacity/ability; conviction for a criminal offence relating to the conduct of a business or profession, or to an act of grave misconduct in the course of a business or profession; failure to fulfil obligations relating to the payment of taxes; or serious misrepresentation in providing any information required under the Regulations.

In addition, contracting authorities may exclude a bidder where it can demonstrate by any appropriate means that the bidder is in breach of its obligations relating to the payment of taxes or social security contributions.

Bidders are subject to an ongoing obligation to satisfy the conditions for participation during the award procedure. This means that contracting authorities are required to exclude bidders if they become aware during the procedure that the bidder satisfies one of the mandatory exclusion grounds. Similarly, contracting authorities may exclude a bidder where they become aware of it satisfying one of the discretionary exclusion grounds.

The Regulations provide "self-cleaning" rules which provide bidders with an opportunity to provide evidence to the effect that they have taken measures to demonstrate their reliability to perform a contract, despite the existence of the relevant grounds for exclusion. The contracting authority must evaluate the measures taken by the bidder to rectify the breach, taking into account the seriousness of the criminal offence or misconduct. Once a decision to exclude a bidder has been taken, the period of exclusion can be up to five years from the date of conviction for the mandatory grounds for exclusion and up to three years from the relevant event in the case of the discretionary grounds for exclusion.

The SQ may also set out minimum standards required from bidders in respect of (i) economic and financial standing, (ii) technical or professional ability, and (iii) suitability to pursue a professional activity. This may consist of questions regarding: background corporate information; turnover, financial history and current financial position; contractual performance history; statements of compliance; customer details for reference purposes; and any particular questions relating to the specific product/service required.

In addition, the SQ may contain a list of documents and supporting material to be submitted with the SQ response, such as quality certification(s), annual accounts and health & safety and environmental policies.

The SQ responses will be evaluated on the basis of a scoring weighting which the contracting authority is required to disclose in advance to the prospective bidders. The contract notice will have indicated the estimated number of bidders to be invited to tender, and bidders will be ranked and selected to meet that estimate.

The new regime under the 2023 Act introduces a central list of debarred suppliers, and contracting authorities will have broader rights to exclude suppliers for prior poor performance (e.g. failure to meet key performance indicators). Authorities must give suppliers whom they are considering excluding or making excludable a reasonable opportunity to make representations and give evidence in relation to the application of exclusion grounds. See more detail on exclusion grounds and debarment in the response to question 4.1 below.

3.4 What are the rules on evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

As noted in the response to question 1.2 above, the basic principle is that the contracting authority must select the MEAT. The contracting authority is required to identify the MEAT on the basis of the price or cost of the tender. In addition, the MEAT may be identified based on the best price-quality ratio, which is assessed on the basis of criteria linked to the subject matter of the contract. Such criteria are typically required to be qualitative in nature, or relate to environmental or social policy considerations.

The contract notice and related tender documentation must specify the basis on which the contract will be awarded. Where cost or the price-quality ratio is relevant, the authority must disclose the scoring and the relative weighting given to each award criterion and sub-criterion. Where this is not feasible, the award criteria must be stated in descending order of importance.

The Regulations permit the use of life-cycle costing in the evaluation of the MEAT. Life-cycle costing may include: costs of use (such as consumption of energy and other resources); maintenance costs; and end-of-life costs (such as collection and recycling costs).

The 2023 Act introduces subtle changes to terminology and existing concepts. For example, it will require contracts to be awarded to the MAT rather than the MEAT, which implies the importance – going forward – of considering factors other than price, as noted in the response to question 1.2 above. The 2023 Act does not stipulate which other factors should be taken into account (beyond technical ability relative to specifications) but emphasises the need for contracting authorities to set award criteria which will allow them to identify the tender that best satisfies that criteria, and to award on the basis of the tender that best satisfies its criteria.

The 2023 Act also newly permits, at section 24, contracting authorities to refine award criteria in the context of a competitive flexible procedure, provided that: this is provided for in the tender notice and tender documents; the process has not yet reached the stage of inviting suppliers to tender; the impact

of the refinement would not be that tenderers who failed/were excluded at an earlier stage might not have done so had the refinement happened earlier; and the authority republishes any relevant documents affected by the refinement.

3.5 What are the rules on the evaluation of abnormally low tenders?

Contracting authorities may require tenderers to explain the price or costs proposed in a tender where the tender appears to be abnormally low. The explanations given may relate to: the economics of the manufacturing process, services provided or construction method; the technical solutions chosen; any exceptionally favourable conditions available to the tenderer for the supply of products or services or for the execution of the work; compliance with applicable environmental, social and labour law obligations; and the possibility of the tenderer obtaining State Aid. The right to reject arises when the evidence supplied does not satisfactorily explain the low price or costs.

The 2023 Act requires contracting authorities to notify tenderers of abnormally low prices and allow the supplier reasonable opportunity to show that it is capable of performing the contract for such a low price – an authority may not disregard such tenders where it is satisfied of the tenderer's capability.

3.6 What are the rules on awarding the contract?

Whenever a contracting authority makes a decision to award a contract which is covered by the Regulations, it must send a standstill letter to any unsuccessful tenderers at least 10 days before entering into the contract with the successful tenderer. Further information in relation to the content of that letter is set out in response to question 3.7 below. In addition, contracting authorities are required to publish a Contract Award Notice ("CAN") detailing the contract award. The CAN must be published within 30 days of the date of the contract award decision. The 2023 Act subtly revises some of the existing rules here, requiring contracting authorities to provide each tenderer with an "assessment summary" (as noted in question 3.7 below) before publishing its CAN. Although the 2023 Act does not require the assessment summaries to be provided to tenderers at a particular time before the CAN is published, in practice the assessment summaries are likely to be provided close to the publication of the CAN which then sets of the revised "mandatory standstill period" of eight working days. See question 3.2 above for more detail on the standstill periods.

3.7 What are the rules on debriefing unsuccessful bidders?

The reasons for the award decision must be provided to unsuccessful bidders. The debrief should include the following information:

- the award criteria;
- the reasons for the decision, including narrative descriptions of the characteristics and relative advantages of the successful tender;
- the scores obtained by the recipient of the debrief and by the successful tenderer;
- the identity of the successful tenderer; and
- a precise statement of when the mandatory standstill period will end.

In essence, the contracting authority must provide the information necessary for an unsuccessful bidder to determine whether or not the decision is well founded. The debrief will therefore be case-specific, and will also be specific to each unsuccessful bidder.

As noted at response to question 3.6 above, under the 2023 Act debriefs should take the form of "assessment summaries" which must be provided prior to CAN publication. The assessment summaries should provide details of the contracting authorities' assessment of the recipient's tender, as well as the winning or "MAT" bidder. The 2023 Act notes that the latter requirement applies where "different", indicating that contracting authorities must provide successful tenderers with an assessment summary in addition to those that are unsuccessful.

There remains no statutory requirement for contracting authorities to provide any form of debrief any earlier on in the procurement process than after reaching an award decision and before publishing the requisite CAN.

3.8 What methods are available for joint procurements?

Joint procurements (for the purchase of "shared services") will usually be undertaken in the UK through either an administrative model (two public bodies collaborate to provide services to each other without any structural change), a corporate model (an entity with a separate legal personality is used as the medium to supply services to various purchasers), or a contractual model (services are procured on the basis of a detailed written contract).

The 2023 Act indicates that procurements may be carried out jointly by contracting authorities with or through one or more other contracting authorities or persons, or via a centralised procurement authority.

If the arrangement is between a purchaser and an "in-house entity" (refer to the response to question 4.2 below), then the public procurement rules will not apply in certain circumstances.

3.9 What are the rules on alternative/variant bids?

There are specific requirements which must be followed if the purchaser is willing to accept variant bids (i.e., bids which provide a different solution to a requirement than that set by the purchaser). The purchaser must indicate in the contract notice (commencing the award procedure) whether or not it will accept variants. Variants must be linked to the subject matter of the contract. The purchaser must also provide details of the minimum requirements to be met by a variant and the specific requirements for the presentation of a variant. Only variants meeting those minimum requirements may be taken into consideration.

In practice, purchasers commonly face the issue of whether they can "cherry-pick" and change their requirements based on the tenders received. The position is complex, but arguably it is permissible to allow this if all tenderers are permitted to re-tender on the same basis. However, even in this situation, issues may arise, for example, in relation to the confidentiality of tenderers' solutions or the perception that the purchaser has shaped the requirements to give an advantage to one particular tenderer.

There is no express provision in the 2023 Act for addressing alternative/variant bids. Under the 2023 Act, contract notices and associated tender documents are simply required to detail the goods/services/works contracting authorities intend to procure – and there is no indication that authorities will need to state whether or not they will accept alternative solutions.

3.10 What are the rules on conflicts of interest?

The Regulations include an express rule which requires contracting authorities to take appropriate measures to prevent, identify and

remedy actual or potential conflicts of interest arising in the conduct of procurement procedures, in order to avoid any distortion of competition and to ensure equal treatment of all operators. The Regulations provide examples of the circumstances in which a conflict of interest may arise. These circumstances relate primarily to situations where staff members' personal interests might compromise the independence of the award procedure.

Part 5 of the 2023 Act emphasises the existing additional duties on contracting authorities, and also imposes some additional requirements; including for contracting authorities to: make conflicts of interest assessments, keep potential conflicts under review, and take reasonable steps to mitigate in circumstances where a conflict of interest arises (so as not to disadvantage tenderers). Contracting authorities must also exclude tenderers where a conflict with a tenderer is found to exist and has the result of causing unfair advantage/disadvantage that cannot be avoided.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

The Regulations contemplate contracting authorities conducting market consultations for the purposes of preparing procurements. Contracting authorities may also seek advice from third parties when planning a procurement, provided that the involvement of those third parties does not have the effect of distorting competition.

Where a bidder (or an entity related to a bidder) has been involved in some way in the preparation of the procurement procedure, the contracting authority is required to take appropriate measures to ensure that competition for the contract would not be distorted as a result of that bidder's prior involvement in any preparatory activities. Such measures include communication to the other bidders of relevant information exchanged in the context of or resulting from the involvement of the bidder in the preparation of the procurement procedure.

The bidder should only be excluded as a result of its involvement in the preparation of the procurement where there are no other means of ensuring that all bidders are treated equally. However, prior to any decision to exclude a bidder on this basis, the relevant bidder must be given the opportunity to prove that its involvement in preparing the procurement would not be capable of distorting competition.

As per sections 16–17 of the 2023 Act, contracting authorities may undertake "preliminary market engagement" with suppliers/tenderers, as long as it provides notice of its intention to do/the fact it has done the same. Contracting authorities are obliged to publish such notice before publishing a contract notice; or, alternatively, if they have not done so, to set out why it did not do so in the contract notice. The overriding purpose of any "preliminary market engagement" is for the contracting authority to prepare for the procurement, by developing its requirements, proposed approach, award criteria, and documentation. It also serves to build interest amongst potential suppliers/tenderers.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

The most important exclusions relate to:

- secrecy, security and other essential national security interests;
- hard defence equipment (and services related to such equipment);
- the acquisition of land, including existing buildings, and rights related to land – unless the main object of the procurement is to acquire works built to the contracting authority's specifications; and
- public passenger transport services by rail or metro, which are subject to the award requirements under Regulation (EC) No. 1370/2007 on public passenger services by rail and road.

In addition, there are specific exceptions that only apply to the utilities sector:

- utility procurements covered by a general sector exemption, i.e., where the specific activity takes place in a market that has been liberalised and opened up to competition. In the UK, there are currently three exemptions: procurements which relate to the exploration for and exploitation of oil and gas; the supply of electricity and gas; and electricity generation;
- a procurement awarded by a utility to an affiliated undertaking or by a joint venture utility to one of its members or an affiliated undertaking of those members, provided that the undertaking in question essentially exists to provide services/supplies/works to that group and not to the open market; and
- a procurement by a utility for the purchase of water, energy or fuel for the production of energy.

In addition to the specific exclusions noted above, the Regulations provide for the possibility of avoiding a competitive procurement and making a direct award to a specific supplier in a range of defined circumstances. The Regulations describe this as the negotiated procedure without prior publication. The key situations in which this exemption arises are as follows:

- where a competitive procurement has failed to attract any regular or acceptable tenders;
- where there is only one supplier for technical reasons or owing to exclusive rights; and
- where the time limits for carrying out a competitive procurement cannot be complied with in cases of extreme urgency brought about by unforeseeable events.

In its Procurement Policy Note 01/20 published in March 2020, the Cabinet Office provided guidance that the COVID-19 pandemic was an "unforeseeable event". As a result, the consequences were not something that contract authorities could have predicted. Guidance was also provided to contracting authorities on how they might make direct awards in response to urgent requirements during the pandemic.

Despite the above guidance, contracting authorities still faced difficulty in making direct awards during the pandemic. The 2023 Act reflects this difficulty by providing that a Minister may, through regulations, specify that particular public contracts may be awarded as if a direct award justification applies. These contracts must relate to human, animal or plant life or health, or public order or safety. Direct awards will still require standstill periods to be observed, unless the award is made on the grounds of extreme and unavoidable urgency or to protect life. See the response to question 3.2 above in relation to direct awards and standstill periods under the 2023 Act.

Exclusion grounds under the 2023 Act are split, into those that are mandatory and discretionary (at Schedules 6 and 7 respectively). The mandatory grounds comprise a number of illegal offences (e.g., corporate manslaughter/homicide, terrorism, theft, fraud, bribery, slavery, human trafficking/exploitation, cartel behaviour/competition infringements, money laundering, national security threats, tax misconduct) – both inside the UK and equivalent offences outside the UK; as well as suppliers' failures to cooperate with any investigation by authorities or other "decision-makers" (i.e., the Crown).

The discretionary grounds are less serious and relate to various forms of misconduct, including in relation to: the labour market, environment, profession; as well as insolvency/bankruptcy, potential competition law infringements, contract breaches, previous improper procurement participation, and previous poor performance.

In respect of some (but not all) of the exclusion grounds, authorities/decision-makers are required to ignore them if they took place more than five years before the procurement process. Otherwise, authorities have some discretion to exclude (although not necessarily disbar) suppliers on the basis of the finding of relevant grounds and concerns regarding repeat infringements etc. Authorities must notify the Crown of the grounds/concerns within 30 days of a decision to disregard a tender/exclude a supplier. According to the 2023 Act, suppliers will be included on the "debarment list" if the Crown (or Welsh/Northern Irish equivalent) is satisfied that such exclusion grounds exist following its own investigation.

In relation to exemptions, the 2023 Act creates a number of these in respect of contracts where the overriding subject matter means it is out of the scope of the 2023 Act (e.g. land and buildings, electronic communications, legal or financial services, employment, international agreements, national security, etc.), There are also certain limitations on which "special regime" contracts (see response to question 1.3 above) are covered by the Act – as certain of these are set out as exempt.

Some exemptions also apply in respect of "in-house" arrangements, as set out in response to question 4.2 below.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The Regulations do not apply to certain "in-house" arrangements and certain arrangements between public bodies.

Broadly speaking, in-house arrangements are characterised either as:

- "vertical" arrangements, involving a single contracting authority or a shared system of control; or
- "horizontal" arrangements, involving a number of contracting authorities co-operating to meet public service obligations.

The vertical exception will apply if the following conditions are satisfied:

- the contracting authority exercises control over the legal person concerned that is similar to the control it exercises over its own departments;
- more than 80% of the activities of the legal person are carried out for the contracting authority or for other legal persons controlled by the contracting authority; and
- there is no direct private capital participation in the controlled legal person.

The PCRs and the UCRs also provide that the vertical exception applies where the controlled legal person awards a contract to the contracting authority it is controlled by, or where it awards a contract to another legal person controlled by the same contracting authority.

The horizontal exception will apply if the following conditions are satisfied:

- the contract establishes or implements co-operation between the participating contracting authorities with the aim of ensuring that the public services which they must perform are provided with a view to achieving objectives which they have in common;
- the contract is governed solely by considerations relating to the public interest; and
- the participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

Schedule 2 of the 2023 Act retains very similar exempted contracts based on refinements of the "vertical" and "horizontal" arrangements detailed above, which it designates "counterparty exempted contracts".

5 Remedies

5.1 Does the legislation provide for remedies and if so what is the general outline of this?

Breaches of the Regulations are actionable by "economic operators" (i.e. suppliers of supplies, services or works) which, in consequence of a breach, suffer, or risk suffering, loss or damage.

An injunction preventing the contracting entity from signing the contract will automatically be granted to the claimant where the challenge is against the contract award decision, providing the contract has not been signed already. To facilitate this automatic injunction, a mandatory standstill period of 10 calendar days following the communication of the contract award decision applies to most contracts. However, the contracting authority may apply to have the automatic suspension set aside on the basis that the test for injunctive relief is not met (based upon the *American Cyanamid* principles).

The 2023 Act changes the mandatory standstill period to eight working days from 10 calendar days. The automatic suspension approach has been retained, but its application has been expanded to include planned modifications to contracts and certain direct awards. If a standstill period has expired, the automatic suspension will not apply. The test for setting aside or modifying the automatic suspension or applying any other form of interim remedy (such as suspending the entire procurement in whole or part itself) has changed – the court will consider:

- the public interest in (i) ensuring the contract is awarded in accordance with the law, and (ii) avoiding adverse consequences caused by delay in performing the contract in question;
- the interests of all bidders including the winning bidder and the claimant, and considering whether damages are an adequate remedy for the claimant; and
- any other issues the court may wish to consider as appropriate.

Where a court finds that breach of duty by a contracting authority has occurred, they may also make orders to set aside the action that constituted the breach, and/or require the authority to take any action, and/or award damages to the claimant and/or anything else it deems appropriate.

The 2023 Act also enables suppliers who have been added to the "debarment list" to seek interim relief from the court in the form of a suspension of the Crown Minister's decision to add them to the list. Courts then have discretion to order the suspension or have the relevant supplier's name removed – even if temporarily. See details on debarment in response to question 4.1 above.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

Recent case law suggests that judicial review (i.e. a public law claim) is also available for breaches of the Regulations, on the

basis that the statutory obligations in the Regulations constitute public law obligations. It is generally accepted that an economic operator should use the statutory cause of action under the Regulations if it is available. However, judicial review may be available to certain parties that do not have standing to bring a claim under the Regulations (e.g. because they are not "economic operators"), providing they can establish sufficient interest in bringing a claim. It is not yet known what alternative remedies might be sought outside of the 2023 Act.

5.3 Before which body or bodies can remedies be sought?

The High Court has jurisdiction to hear claims under the Regulations. Public procurement cases are typically heard by the Technology and Construction Court, which is a specialist court within the High Court.

The Administrative Court reviews the lawfulness of a decision or action taken by a public body under the judicial review procedure.

Appeals are heard by the Court of Appeal, and then by the Supreme Court.

The same bodies as outlined above will retain their jurisdiction in respect of claims brought under the 2023 Act.

5.4 What are the limitation periods for applying for remedies?

Proceedings under the Regulations generally need to be brought within 30 days, beginning with the date when the tenderer first knew or ought to have known that grounds for starting the proceedings had arisen. The court has discretion to extend the time limit to up to three months if there is good reason to do so.

There are specific limitation rules for the remedy of ineffectiveness. An application for a declaration of ineffectiveness must be brought either: (i) within 30 days of the receipt of information from the contracting authority to the effect that the contract has been concluded and a summary of the relevant reasons for award; or (ii) in the case of a contract awarded without publication of a prior contract notice, within 30 days of the publication of a CAN via the Find a Tender Service; and (iii) in any event, within six months (running from the day after the contract is signed).

Section 106 of the 2023 Act provides that the time limit for tenderers to commence proceedings – except "specified set aside proceedings" – is within the 30 days beginning with the date the tenderer first knew (or ought to have known) of the circumstances for bringing the claim. For "specified set aside proceedings" (those to set aside an entire public contract where the authority did not publish a contract notice, or a contract modification) the time limit will be the earlier of the same 30-day window as with other types of proceedings, or the end of the six months from the date of the contract commencement or modification.

5.5 What measures can be taken to shorten limitation periods?

As noted above, the ordinary 30-day limitation period is triggered from the date of knowledge. This period cannot be shortened. Tactically, authorities may seek to put tenderers on notice as to facts relating to potential breaches before they take an award decision with a view to triggering the date of knowledge. The authority would then be in a position to raise a limitation defence if a tenderer subsequently sought to challenge that potential breach several months later (e.g. after it has discovered that its tender was unsuccessful).

There are specific measures that can be taken to shorten the limitation period for the remedy of ineffectiveness in circumstances in which a contract has been awarded without first advertising the opportunity in a contract notice published via the Find a Tender Service (see further question 5.6 below).

First, it is possible to publish a Voluntary Transparency Notice ("VTN") via the Find a Tender Service before the contract is signed. The VTN must explain why the contracting authority considered that the contract opportunity did not need to be advertised in a contract notice. Provided the contracting authority does not enter into the contract within 10 days of publishing the VTN, and the contracting authority considered in good faith that it had grounds for not advertising the contract, the remedy of ineffectiveness will not be available.

The second type of notice is the CAN. The CAN must, like the VTN, explain why the contracting authority considered that the contract opportunity did not need to be advertised in a contract notice. Where a CAN has been published, the limitation period for seeking a declaration of ineffectiveness will be reduced to 30 days from the publication of the CAN.

The 2023 Act also provides, at section 44, for contracting authorities to publish transparency notices, e.g., in relation to direct awards.

5.6 What remedies are available after contract signature?

After a contract is signed, disappointed bidders that have suffered loss as a result of a breach of the Regulations by the contracting authority may claim damages for the loss of opportunity.

In addition, the remedy of ineffectiveness (contract nullity) may be available if one of the three grounds is satisfied. The first ground applies where a contract is concluded without prior publication of a contract notice. The second ground applies where a contract is concluded during the standstill period or during the automatic suspension of the contract award procedure. The third ground applies where a call-off contract based upon a framework agreement is not awarded in compliance with an applicable mini-competition procedure.

In making a declaration of ineffectiveness, the court must also impose financial penalties on the contracting authority. In addition, the court may make orders dealing with issues of restitution and compensation between the contracting parties.

Alternative penalties (contract shortening, fines or both) are also available in specific situations.

The 2023 Act introduces minor changes to available remedies. The ineffectiveness remedy will be replaced with a similar "set aside" remedy. For this remedy to be granted, the court must be satisfied that the claimant was denied a proper opportunity to seek pre-contractual remedies because:

- a required contract award notice was not published;
- the contract was entered into, or modified, before the end of any applicable standstill period;
- the contract was entered into, or modified, during a period of automatic suspension or in breach of a court order;
- the breach only became apparent on publication of a contract award notice or a contract change notice (in the case of (i) certain direct awards – i.e., where standstill periods are not applicable, or (ii) modified contracts); or
- the breach only became apparent after the contract was entered into or modified.

The court may alternatively reduce the duration or scope of the contract if it concludes that there is an overriding public

interest in allowing the contract to continue. In addition, the court has the ability to award damages even if the conditions set out above are not met.

The 2023 Act, at sections 104–105, sets out a number of "post-contractual remedies" that courts may make a number of possible orders when necessary/certain conditions (particularly in respect of set aside proceedings) are met, and having regard to public interest concerns. Such orders may be in relation to:

- setting aside of a contract or modification;
- award of damages;
- reducing the contract terms; and/or
- reducing the goods/services/works to be supplied by way of the contract.

5.7 What is the likely timescale if an application for remedies is made?

The likely timescale is case-specific and depends upon the particular issues in dispute, the speed with which the court can hear the case, and the remedy being sought. It is possible to obtain practical protection for the interests of an aggrieved tenderer very quickly. However, cases typically come to trial on the substance within a six to 12-month timeframe. It is likely to be similar in respect of any such applications for remedies/proceedings brought under the 2023 Act.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

Set aside

In *Woods Building Services v. Milton Keynes Council (2015)*, the High Court set aside the contracting authority's original decision and declared that the claimant's tender was the most economically advantageous tender. The court did not consider it appropriate to make a mandatory injunction in relation to the award of the contract, although it did not rule out the possibility of such an injunction being made in appropriate circumstances. The court ruled that the claimant was entitled to damages, but the amount of those damages will be assessed after the re-run procurement, as the outcome of the re-run procurement could affect the quantum of any claim for loss of profit.

In *Lancashire Care NHS Foundation Trust and another v. Lancashire County Council (2018)*, following an expedited trial, the court set aside the decision to award a contract under the light touch regime for social and other specific services on the basis that the reasons given by Lancashire County Council for the scores it had awarded in respect of the quality evaluation questions were insufficient, which meant that the court could not determine the issue of manifest error in the evaluation of tenders received without conducting a full re-evaluation.

In *MLS (Overseas) Ltd. v. The Secretary of State for Defence (2018)*, the court set aside the Ministry of Defence's ("MOD") award decision after it had unlawfully rejected the claimant's tender. However, the court declined to order the MOD to enter into the contract with the claimant.

Damages

The level of damages recoverable depends on whether the evidence indicates that the claimant would have been awarded the contract in the absence of the breach or merely that he has lost the opportunity to bid in a fair and transparent tender procedure. *Lancashire County Council v. Environmental Waste Controls Limited (2010)* confirms that, in the latter case, the most the claimant can hope to recover is a proportion of the lost profit.

In *Mears Limited v. Leeds City Council (2011)*, the court found that Leeds City Council had failed to disclose the weightings applied to certain award criteria, and that this could have affected the preparation of the claimant's tender. The court concluded that, if this breach had not been made, it is likely that the claimant would have been selected to participate in the next stage of the tender procedure. However, it was decided that the award of damages, rather than setting aside the Council's decision, was the appropriate remedy, as the balance of convenience weighed heavily against restarting the procurement.

In April 2017, the Supreme Court handed down a ruling in *Nuclear Decommissioning Authority v. Energy Solutions EU Ltd. (2017)* concerning the circumstances in which damages may be recoverable for failure to comply with the Regulations. The Supreme Court confirmed that the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions. Therefore, liability is to be assessed by reference to the *Francovich* conditions, namely: the rule of law must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of obligations and the damages sustained by the injured party. Moreover, based on the UK's approach to the transposition of the EU's remedies directives, the Regulations should be read as providing damages only upon the satisfaction of the *Francovich* conditions.

Ineffectiveness

On 14 November 2018, the Court of Appeal made the first declaration of ineffectiveness by an English court in the case of *Faraday Development Ltd v West Berkshire Council and another* (2018). West Berkshire Council had entered into a development agreement with a developer ("SMDL") without first carrying out a regulated procurement. The Council had issued a VTN stating that it believed that the agreement did not need to be procured in compliance with a regulated procurement. The Court of Appeal held, however, that although the development agreement was not a "public works contract" at the time it was entered into, its provisions meant that the council had effectively agreed to act unlawfully in the future. In particular, under the agreement, the council committed itself to acting in breach of the legislative procurement regime, as a "public works contract" would come into existence when SMDL proceeded to draw down the land.

The Court of Appeal concluded that the remedy of ineffectiveness was not time-barred, on the basis that a valid VTN had not been published. The parties agreed, following judgment, that the Public Contracts Regulations 2006 made it mandatory for the court to grant a declaration of ineffectiveness, and to order the payment of a civil financial penalty by the council. The amount of that penalty was fixed at £1.

In *Consultant Connect Limited v. NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board (2022)*, the High Court was satisfied that the relevant breaches were sufficiently serious to justify an award of damages. The grounds of ineffectiveness were also established. The court held that the procurement process undertaken had breached the principles of equal treatment and transparency, as well as the required procedures under the PCRs. This is believed to be the first case in which a court has ordered civil penalties to be paid for a breach of public procurement rules.

5.9 What mitigation measures, if any, are available to contracting authorities?

The types of mitigation measures available depend upon the type of risk. As noted in response to question 5.5 above, VTNs may disengage the ineffectiveness remedy on the grounds that there has been no prior advertisement of a contract, provided the procuring authority considered in good faith that it was not necessary to publish a contract notice via the Find a Tender Service. Likewise, contracting authorities may publish transparency notices under the 2023 Act. As also noted above, CANs, if used correctly, may reduce the time limit within which ineffectiveness proceedings can be brought to 30 days.

Where possible, the contracting parties may sign a contract but suspend or limit the implementation of that contract for the first six months, in order to limit the commercial exposure, should a claim be brought seeking a declaration of ineffectiveness.

In addition, the parties may be able to agree on contractual provisions regulating the consequences of a declaration of ineffectiveness being made.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

The Regulations do not expressly deal with the issue of change during an award procedure. The extent to which changes to specifications or conditions are permitted depends upon a range of factors, including the justification for the change and the effect on the economic balance of the contract.

Before selecting the winning tender, changes that are not material are generally permitted. However, the contracting authority should, in general, ensure that any changes could not have had an impact on the identity of the participating tenderers and that there is no breach of the equal treatment principle.

In practice, this means that it falls on the procuring authority to consider whether any actual or potential tenderer could be prejudiced by any change and, if so, whether it is necessary to rewind the procurement.

The Regulations do not provide any express provisions on changes to the membership of bidding consortia. However, contracting authorities may provide restrictions on changes to consortia arrangements in the tender documents. This may include rules requiring tenderers to demonstrate that the reconstituted consortium continues to meet the pre-qualification criteria and that the changes do not result in breaches of the general principles.

Schedule 8 of the 2023 Act makes provision for a range of "permitted contract modifications". Where scope to make modifications has been provided unambiguously and contractually (i.e. in the tender notice/documents) – and not precluded – such modifications are generally to be accepted as long as they do not change the "overall nature" of the contract. Modifications that have not been contractually provided for may be permitted in a number of specific circumstances as laid out in the 2023 Act. Such modifications relate to: urgency/life protection; unforeseeable events/context; materialisation of known risks; requirement for additional goods/services/works; novation following corporate restructuring; and defence authority necessitation.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

The extent to which changes to final tenders may be permitted depends upon the award procedure.

In the context of the open and restricted procedures, the Regulations do not specify whether changes to final tenders are permissible. It is generally accepted that there is some scope to clarify the content of tenders prior to contract award. However, any clarification process is subject to the equal treatment principle and should not be used to permit tenderers to improve the content of their tenders. Changes post-contract award are, in principle, permissible, provided that those changes result in improvements to the terms of the tender from the perspective of the contracting authority. However, changes that benefit the tenderer are unlikely to be permissible.

In the context of the competitive procedure with negotiation, the Regulations do not provide for a preferred bidder stage. However, in the competitive dialogue procedure, a preferred bidder stage is permitted. This stage allows for limited negotiations with the preferred bidder, provided this does not distort competition or cause discrimination.

The 2023 Act does not specifically prescribe when negotiations may or may not occur during the course of the tendering period, however, the inherent flexibility of the "competitive flexible procedure" (see response to question 3.1 above) implies that there is no limit to the contracting authority doing this as it feels is appropriate, so long as compliant with its contract notice and associated tender documents (i.e., that it has not contractually precluded itself from negotiating after final tender submission). The primary principle behind the procedure is, after all, for contracting authorities to tailor it to the needs of the particular procurement and for it to have greater freedoms and discretions to negotiate and innovate.

6.3 To what extent are changes permitted post-contract signature?

The Regulations define the situations where changes may be made to public contracts without triggering a requirement to run a new procurement process. In particular, a new award procedure may not be required where:

- the changes, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses;
- additional works, services or supplies are required from the original contractor that were not included in the initial procurement, where a change of contractor (a) cannot be made for economic or technical reasons, and (b) would cause significant inconvenience or substantial duplication of costs for the contracting authority;
- the changes have been brought about by unforeseen circumstances (although it should be noted that there is a very high bar for using this exemption);
- the changes are not substantial (the Regulations include various definitions of substantial modifications); or
- the value of the changes is below certain financial thresholds.

The 2023 Act introduces the following changes to the regulation of modifications to public contracts or "convertible contracts" (those that will become public following the modification):

- the definition of a "substantial modification" has been simplified – specifically changes will only be substantial where:
  - in relation to changes to the maximum term of a contract , the change is greater than 10%;

- they would cause the scope to become "materially" different; or
- they would result in a "material adjustment" to the economic balance of the contract in favour of the supplier;

- the definition of "below-threshold modification" has been created to permit modifications in respect of:
  - goods/services contracts where the estimated value would not differ more than 10% as a result of the modification;
  - works contracts where the estimated value would not differ more than 15% as a result of the modification;
  - contracts where the aggregated value of below-threshold modifications (the value attributable to modifications upon a revised estimate after modification) would not exceed the relevant financial threshold for the type of contract; and
  - contracts where the modification would not "materially" change the scope or otherwise fall within the definition of a "substantial" modification;
- a contract may be modified where its purpose could otherwise be achieved through a direct award (in relation to urgency/protection of life);
- a contract may be modified where it is a light touch contract;
- a contract may be not be modified to allow for change of supplier except where in relation to modifications in light of corporate restructuring;
- contracting authorities will generally be required to publish a contract change notice before modifying a public contract (except in relation to "below-threshold modifications" or other "permitted modifications" set out in Schedule 8 of the 2023 Act – see response to question 6.1 above);
- a requirement to observe a voluntary standstill period of no less than eight working days between the publication of a contract change notice and implementing a modification; and
- modifications, where "qualifying" may trigger an obligation on the part of the contracting to republish the contract. This applies in relation to contracts (i) for which a contract change notice is necessary, and (ii) the value of the contract exceeds £5 million – whether before or after modification.

See response to question 6.1 above in relation to "permitted contract modifications" under the 2023 Act.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

The Regulations permit changes to the identity of the contractor in accordance with an unequivocal review clause, or universal or partial succession into the position of the initial contractor, following corporate restructuring – including takeover, merger, acquisition or insolvency – of another contractor that fulfils the criteria for qualitative selection initially established, provided that this does not involve other substantial changes to the contract. As noted at question 6.1 above in relation to "permitted contract modifications" under the 2023 Act, a contract may be transferred/novated/assigned and then modified as needed where it is required as a result of any form of corporate restructuring.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The Regulations do not contain specific rules in relation to privatisations. It is necessary to consider the whole arrangement, in order to determine whether the Regulations apply.

It is arguable that the privatisation of a business (even with the benefit of contracts for the supply of goods, works or services back to the privatising entity) should not amount to a procurement. In particular, it is generally assumed that it will not breach the Regulations to award a contract at privatisation which only covers pre-existing areas of work for which the purchaser has a clear requirement at the time the contract is made, which reflects insofar as possible the provisions of the previous arrangement, and which includes terms that are normal for a contract of the type in question. In addition, the duration of the contract should be as short as possible. This is sometimes called the "privatisation principle". There are no new rules in respect of privatisation in the 2023 Act.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The Regulations do not contain special rules in relation to public-private partnership ("PPP") or private finance initiative ("PFI") arrangements. Where a PPP/PFI arrangement gives rise to a procurement of goods, works and services and is above the relevant threshold value, it is, in principle, within the scope of the Regulations in the same way as any other contract.

The principal issues that arise in relation to PPP/PFI arrangements stem from the fact that these are typically long-term contracts that are exposed to changes in government policies and/or market requirements. This means that there are often difficult issues as to whether these contracts can be adapted to changes in circumstances without fundamentally altering the nature and extent of the original advertised contract, with the result that a quite new contract is created (one that is subject to a new application of the public procurement rules, including a new advertisement).

There are no special rules in respect of public-private partnerships in the 2023 Act, however, in relation to public contracts to be procured by "private utilities" (see response to question 2.1 above), appropriate authorities may use regulations (the Secondary Legislation that is due to incorporate the 2023 Act) to amend the legislation so as to reduce the scope of regulation (by disapplication or modification) on private utilities so as to reduce any burdens arising as a result; given that the 2023 Act is primarily targeted at public contracting authorities.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

As noted in response to question 1.1 above, the 2023 Act is due to come into force/"go live" from October 2024, after a six-month notice period. It will be accompanied by secondary legislation which is currently in development. Government guidance in

the interim is anticipated to be continually evolving in order to support contracting authorities and other interested persons in preparing for the change.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

Two of the most significant changes in the 2023 Act are:

- The switch to a "competitive flexible procedure" which blends, refines, and simplifies the pre-existing award procedures under the Regulations (outlined in response to question 3.1 above). As highlighted in response to question 6.2 above, the outcome of this provision is to entitle contracting authorities to significantly greater freedoms and discretion to make their procurement processes bespoke to what is needed, including by limiting suppliers at different stages as it deems necessary; but importantly, in a way which arguably may give rise to greater co-operation with tenderers, provided compliant with the overarching procurement fairness principles.
- The reduced standstill period from 10 calendar days (under the Regulations) to eight working days (see response to question 3.2 above). This potentially reduces the incentive for authorities to issue CANs just before non-working days (i.e., weekends and public holidays) as this will no longer reduce the time tenderers have to consider whether to commence proceedings in that time.

8.3 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

As noted, it is anticipated that the 2023 Act and accompanying Regulations will be brought into force in October 2024 (following a six-month notice period). Summarily, the 2023 Act reimagines the regulation on public procurement in the UK in a way that is: (i) more compatible with the UK market post-Brexit; and (ii) intended to make it procurement law more user-friendly and accessible for authorities and businesses (of all sizes) alike.

Refer to responses to questions 1.1, 1,2, 8.1, and 8.2 above for more detail on the objectives and expected impacts of the 2023 Act as part of the government's broader work to reform and "transform" public procurement in the UK.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Finnish legislation on public procurement is codified in the Act on Public Procurement and Concession Contracts (1397/2016, "Act on Public Contracts"), the Act on Procurement and Concession Contracts of Entities Operating in the Water and Energy Supply, Transport and Postal Services Sector (1398/2016, "Act on Public Contracts in Special Sectors") and the Public Defence and Security Procurements Act (1531/2011, "Defence and Security Procurements Act").

The Act on Public Contracts covers the general legal framework for procurement threshold values, award procedures and award of contracts by public purchasers, as well as applicable legal remedies. The Act on Public Contracts in Special Sectors essentially covers similar ground, with the exception of being limited to procurement entities operating in the water, energy, transport and postal service sectors. The Defence and Security Procurements Act applies exclusively to defence and security procurements.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic underlying principles of the Finnish public procurement regime are: (i) equitable and non-discriminatory treatment; (ii) transparency; and (iii) proportionality. These principles are of great relevance in the interpretation of procurement legislation.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

The Act on Public Contracts in Special Sectors covers procurements by contracting authorities operating in the water, energy, transport and postal service sectors.

The Defence and Security Procurements Act covers defence and security procurements.

The Act on Public Contracts contains sector-specific rules on social and health services and other specific service procurements.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Other areas of national law relevant to public procurement in Finland include the Act on the Openness of Government Activities (621/1999, "Openness Act") and the Act on the Contractor's Obligations and Liability when Work is Contracted Out (1233/2006, "Contractor's Liability Act").

The Openness Act covers, *inter alia*, when tenders, offers and other documents related to public procurement are to enter the public domain, and the extent of parties' right of access to information compiled in public procurement relating to business or professional secrets of other tenderers.

The Contractor's Liability Act covers the contractors' obligation to ensure that enterprises concluding contracts with them on temporary agency work or subcontracted labour duly observe their statutory obligations as contracting parties and employers.

Also, specific provisions of other acts, such as The Criminal Code of Finland (1889/39, as amended) may have indirect relevance, as the Criminal Code, for example, regulates some of the conduct which may be deemed as grounds for exclusion from the procurement process.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

As a Member State of the European Union, Finland is subject to the applicable EU legislation on public procurement. Finland has implemented the latest EU directives on public procurement, i.e., Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, and Directive 2014/23/EU on the award of concession contracts. Naturally, Finland also follows other relevant EU legislation which may have an impact on public procurement – one example being sanctions.

Under the public procurement legislation, tenderers and tenders from other States Parties in procurements falling within the scope of the World Trade Organization Agreement on Government Procurement ("GPA") must be governed by the same terms and conditions as tenderers and tenders from Finland and other EU Member States.

However, under the Act on Public Contracts in Special Sectors, contracting authorities may reject tenders for the supply of goods wherein the value of products originating in

third countries accounts for more than 50% of the total value of products included in the tender. The above does not apply to tenders containing products from third countries with which the EU has concluded a multilateral or bilateral agreement in order to ensure that European companies are guaranteed equal and effective access to the markets of those third countries.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The public entities covered by the Act on Public Contracts are:

1) authorities of central and local government and joint municipal authorities;
2) the Evangelical-Lutheran and Orthodox churches of Finland and their parishes and other authorities;
3) State commercial institutions;
4) institutions of a public law character; and
5) any party conducting a procurement when it has secured the support in doing so of a contracting authority referred to in points 1–4, amounting to more than half of the value of the procurement.

The public entities covered by the Act on Public Contracts in Special Sectors are: (i) authorities of central and local government and joint municipal authorities; (ii) state commercial institutions; (iii) institutions of a public law character; and (iv) associations formed by the aforementioned entities, which operate in the water, energy, transport and postal service sectors. In addition, the contracting authorities referred to in the Act include public undertakings operating in the aforementioned sectors, as well as entities operating in these sectors under a special or exclusive right granted via public authority.

2.2 Which types of contracts are covered?

Types of contracts covered by the procurement legislation include supply contracts, service contracts, public works contracts, concession contracts and framework agreements.

2.3 Are there financial thresholds for determining individual contract coverage?

The national threshold values (excluding Value-Added Tax, "VAT") included in the Act on Public Contracts are:

1) EUR 60,000 in procurements of goods, services and design contests;
2) EUR 150,000 in public works contracts;
3) EUR 400,000 in certain social and healthcare services procurements referred to in points 1–4 of Schedule E of the Act;
4) EUR 300,000 in the other specific services procurements referred to in points 5–15 of Schedule E of the Act; and
5) EUR 500,000 in concession contracts.

The EU threshold values (excluding VAT) included in the Act on Public Contracts are:

1) EUR 140,000 in public supply, service and design contest contracts awarded by central government authorities;
2) EUR 215,000 in public supply, service and design contest contracts of contracting entities other than those referred to in point 1; and
3) EUR 5,382,000 in public works contracts.

With regard to the EU thresholds, the European Commission ("Commission") revises the threshold values at two-yearly intervals. The EU threshold values presented above are those in force during 2022–2024.

The threshold values (excluding VAT) included in the Act on Public Contracts in Special Sectors are:

1) EUR 431,000 in procurements of goods, services and design contests;
2) EUR 1,000,000 in certain social and healthcare services and other specific services procurements referred to in Schedule C of the Act;
3) EUR 5,382,000 in public works contracts; and
4) EUR 5,382,000 in concession contracts.

The Commission revises these threshold values at two-yearly intervals. The threshold values presented above are in force as of 2022.

The national threshold values (excluding VAT) included in the Defence and Security Procurements Act are:

1) EUR 100,000 in procurements of goods and services; and
2) EUR 500,000 in public works contracts.

The EU threshold values (excluding VAT) included in the Defence and Security Procurements Act are:

1) EUR 431,000 in procurements of goods and services; and
2) EUR 5,382,000 in public works contracts.

2.4 Are there aggregation and/or anti-avoidance rules?

The calculation of the estimated procurement value, including the aggregation of the values of separate lots, is covered by the procurement acts. In general, if a procurement is implemented at the same time in the form of separate lots, then the estimated value of all of the lots must be taken into account when calculating the total value of the procurement agreement.

In addition, the acts contain an explicit prohibition of artificial division or combination of procurements, according to which a procurement may not be broken into lots, nor may its value be reduced by exceptional means in order to evade the application of the procurement acts.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

The procurement acts contain special provisions governing concession contracts. Concession contracts covered by the acts are defined as:

a) works concessions, which denote a written agreement concluded for financial consideration, whereby one or more contracting entities assign(s) the provision and administration of services not pertaining to a public works contract and the associated operational risk to one or more suppliers, and in which the consideration for the assignment consists either solely in the right to exploit the service or in that right together with payment; and
b) service concessions, which denote a written agreement concluded for financial consideration, whereby one or more contracting entities assign(s) the provision and administration of services not pertaining to a public works contract and the associated operational risk to one or more suppliers, and in which the consideration for the assignment consists either solely in the right to exploit the service or in that right together with payment.

2.6 Are there special rules for the conclusion of framework agreements?

According to the procurement acts, the contracting authority must select suppliers for a framework agreement in accordance

with the procurement procedures established in the said acts. The contracting authority may select one or more suppliers for the framework agreement and the number of suppliers must be announced in advance in the contract notice, the invitation to negotiate or the call for tenders.

A framework agreement may remain in force for no longer than four years; however, the agreement may be of longer duration under exceptional circumstances where the procurement justifiably so requires. Integral modifications must not be made to the terms and conditions of a framework agreement while it remains in force.

If the contracting authority has concluded a framework agreement with several suppliers and all of the terms and conditions of the framework agreement and the impartial terms and conditions determining the choice of suppliers for procurements based on the said agreement have been established in the call for tenders, then procurements based on the framework agreement can be made without competitive tendering by selecting a supplier in accordance with the terms and conditions of the framework agreement and with the criteria set out in the call for tenders.

However, if all terms and conditions of the framework agreement have not been established, procurements based on the framework agreement shall be made by competitive tendering between the suppliers selected for the framework agreement, in accordance with the criteria for determining the most economically advantageous tender that were set out when establishing the framework agreement, which criteria may be specified, and with other terms and conditions that were indicated in the call for tenders for the framework agreement.

2.7 Are there special rules on the division of contracts into lots?

According to the procurement acts, contracting authorities may conclude a procurement agreement in the form of separate lots and may determine the size and subject matter of such lots. If a contracting authority does not divide a procurement agreement into lots, it must specify the reasons for not doing so.

Contracting authorities must indicate in the contract notice whether tenders may be submitted for one, for several, or for all of the lots. If tenders may be submitted for several or for all of the lots, the contracting authority may limit the number of lots for which a tender from the same tenderer may be selected. In such cases, the contracting authority must indicate in the contract notice the maximum number of lots for which a tender from the same tenderer may be selected.

The contracting authority must indicate, in the contract notice or call for tenders, the rules that it will apply when deciding the lot for which a tenderers' tender will be selected if the tenderers' tender is selected for more lots than the maximum number indicated in the contract notice. The contracting authority may also combine multiple lots or all of the lots in the same procurement agreement.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

As mentioned in question 1.5, tenderers and tenders from other States Parties in procurements falling within the scope of the GPA must be governed by the same terms and conditions as tenderers and tenders from Finland and other EU Member States.

However, under the Act on Public Contracts in Special Sectors, contracting entities may reject tenders for the supply of goods wherein the value of products originating in third countries accounts for more than 50% of the total value of products included in the tender. The above does not apply to tenders containing products from third countries with which the EU has concluded a multilateral or bilateral agreement in order to ensure that European companies are guaranteed equal and effective access to the markets of those third countries.

Moreover, the applicable sanctions of the EU may affect, on an *ad hoc* basis, the treatment of suppliers established in third countries.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The Act on Public Contracts contains separate award procedures for procurements exceeding national and EU threshold values. In general, the rules are much more pedantic with respect to EU award procedures than national ones. The Act on Public Contracts in Special Sectors contains essentially the same procedures, yet with less stringent regulation both in terms of their content as well as the choice between particular procedures.

With regard to national award procedures, the content and stages of the procedures are not specifically regulated, apart from a general obligation to comply with a procedure that is consistent with the basic underlying legal principles of equitable and non-discriminatory treatment, transparency and proportionality. Moreover, the contracting authority must outline the procurement procedure it applies in the contract notice or in the call for tenders.

With regard to EU award procedures, the procedures available to the contracting authority include:

1) open procedure;
2) restricted procedure;
3) negotiated procedure;
4) competitive negotiated procedure;
5) innovation partnership; and
6) direct procurement.

In an open procedure, the contracting authority publishes a contract notice and places a call for tenders for the receivable, on which basis all prospective suppliers may submit their tenders. After the contract notice has been published and the call for tenders has been placed, the contracting authority may send the call for tenders to the suppliers that it considers suitable.

In a restricted procedure, the contracting authority publishes a notice of a contract in which all prospective suppliers may request to participate. Only the candidates selected by the contracting authority may submit a tender. No fewer than five candidates must be invited to join a restricted procedure unless there are fewer suitable candidates.

In a negotiated procedure, the contracting authority publishes a notice of a contract in which all prospective suppliers may request permission to participate. The contracting authority will negotiate the terms and conditions of the procurement agreement with the suppliers that it selects. No fewer than three candidates must be invited to join a negotiated procedure unless there are fewer suitable candidates. Furthermore, the utilisation of the negotiated procedure by a contracting authority requires certain criteria to be met.

During the course of the negotiated procedure, the contracting authority must request preliminary tenders from the candidates selected for negotiation, which serves as the basis for negotiating. Negotiations may occur in stages, so that the number of tenders included in the negotiations is limited during the negotiations. The contracting authority must send the final call for tenders to the tenderers and set a deadline for submitting final tenders.

In a competitive negotiated procedure, the contracting authority publishes a notice of a contract in which all prospective suppliers may request permission to participate. The contracting authority

negotiates with the candidates admitted to the procedure in order to review and determine the best way of satisfying its requirements. No fewer than three candidates must be invited to join a competitive negotiated procedure unless there are fewer suitable candidates. Furthermore, the utilisation of the negotiated procedure by a contracting authority requires certain criteria to be met.

During the course of the competitive negotiated procedure, a contracting authority must specify its needs and requirements for a procurement in the contract notice. The contracting authority must commence negotiations with the selected candidates with a view to reviewing and determining the best way of satisfying its requirements. Negotiations may occur in stages, so that the number of solutions included in the negotiations is limited during the negotiations. The contracting authority must continue the negotiations until it has selected the solutions that are capable of satisfying the needs that it has specified. The contracting authority must ask the tenderers for their final tenders based on the solutions presented and specified in the negotiations.

In an innovation partnership, the contracting authority publishes a notice of a contract in which all prospective suppliers may request permission to participate. A contracting authority may select an innovation partnership if the needs of the contracting authority cannot be satisfied by procuring goods, services or public works contracts that are already on the market. No fewer than three candidates must be invited to join an innovation partnership unless there are fewer suitable candidates.

During the course of the innovation partnership, the contracting authority must negotiate with the selected tenderers with a view to developing the innovative product, service or public works contract and procuring the resulting goods, services or public works contracts. An innovation partnership is divided into consecutive stages corresponding to the various stages of the research and innovation process. The contracting authority sets intermediate targets to be attained by the partner or partners, and provides for payment of compensation.

In a direct procurement, the contracting authority negotiates the terms and conditions of a procurement agreement with its selected suppliers without prior publication of a contract notice. A contracting authority may opt for direct procurement if certain stringent criteria are met, e.g., that no suitable tenders have been received in an open or restricted procedure, or that only a certain supplier can implement the procurement for technical reasons.

3.2 What are the minimum timescales?

With regard to national award procedures, no explicit minimum timescales have been stipulated. With regard to EU award procedures, the following minimum timescales have been stipulated in the Act on Public Contracts:

- In a restricted procedure, a negotiated procedure, a competitive negotiated procedure, or an innovation partnership, at least 30 days must be allowed for submitting a request to participate.
- The tendering period in an open procedure must not be less than 35 days. The tendering period must not be less than 30 days in a restricted procedure.
- The time limit for preliminary tenders in a negotiated procedure and in an innovation partnership must not be less than 30 days.

3.3 What are the rules on excluding/short-listing tenderers?

The procurement acts contain both mandatory and discretionary exclusion criteria.

According to the mandatory exclusion criteria, the contracting authority must exclude a candidate or tenderer if the contracting authority is aware that the candidate or tenderer, a member of its administration or management, or a person exercising representative, managerial or regulatory authority therein, has a criminal record indicating a legally final conviction for certain criminal and labour offences or failure to pay taxes or social security contributions. Moreover, under the recent proposal for an amendment of the Act on Public Contracts (government bill, HE 115/2022 vp), impairment of the environment and aggravated nature conservation offence would also amount to a mandatory exclusion criteria. However, a candidate or tenderer cannot be excluded from competitive tendering if more than five years have elapsed since the issuing of a legally final judgment concerning the offence.

According to the discretionary exclusion criteria, the contracting authority may decide to exclude a candidate or tenderer which is, *inter alia*: bankrupt; guilty of gross professional misconduct; guilty of concluding agreements with other suppliers seeking to distort competition; if the candidate's or tenderer's participation in the preparation of the procurement procedure has distorted competition; or if the candidate's or tenderer's performance in previous procurement agreements has involved significant or repeated shortcomings. However, a candidate or tenderer may not be excluded if more than three years have elapsed since the event referred to above.

In addition, the acts provide that certain corrective measures of a candidate or tenderer must be given due consideration in the contracting authority's assessment for exclusion (self-cleaning). In particular, a candidate or tenderer may submit evidence of its reliability notwithstanding its encumbrance by any of the grounds for exclusion referred to above.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

Above all, the principle of equal and non-discriminatory treatment must be observed in the tender evaluation process. The most economically advantageous tender must be selected. The most economically advantageous tender is a tender with the lowest price, most affordable cost, or with the best price-quality ratio for the contracting authority. In addition, the contracting authority may impose price-quality ratio comparison criteria related to qualitative, societal, environmental or social considerations, or innovative characteristics. Whereas the proposed amendment (HE 115/2022 vp) attributes greater importance to quality considerations, the most economically advantageous tender may still be the tender with the lowest price, as long as the tender fulfils the contracting authority's quality requirements, as set forth via mandatory requirements or contract clauses.

3.5 What are the rules on the evaluation of abnormally low tenders?

The contracting authority must require the tenderer to provide an account of the prices or costs of any tender that seem to be abnormally low. The request and explanation may relate in particular to: the manufacturing method; the economic and technical solutions for performing a service or for a construction method; exceptionally low-cost terms and conditions of procurement; the originality of public works contracts, goods or services; compliance with environmental, social and labour law obligations; subcontracting; and State Aid received by the tenderer.

3.6 What are the rules on awarding the contract?

The contract must be awarded on the basis of the most economically advantageous tender. A contracting authority must make a written decision on resolutions affecting the status of candidates and tenderers, including procurement procedure resolutions, which must be substantiated.

The decision or its associated documents must state the facts that integrally affected the resolution, which must at least include the grounds for rejecting a candidate, tenderer or tender, and the principal criteria on which the comparison of approved tenders was made.

The contracting authority must conclude a procurement agreement after making the procurement decision. The procurement agreement must be concluded by making a separate written agreement.

3.7 What are the rules on debriefing unsuccessful bidders?

The decision made by the contracting authority with its justifications, and the instructions for appeal and rectification, must be served in writing to the parties concerned.

3.8 What methods are available for joint procurements?

A contracting authority may procure goods and services from a central purchasing body or make procurements of goods, services and public works contracts using a procurement agreement concluded by a central purchasing body. In addition, contracting authorities may agree to implement an individual procurement jointly.

3.9 What are the rules on alternative/variant bids?

In general, the contracting authority may accept alternative/variant bids only if the possibility to submit alternative/variant bids has been explicitly stated in the contract notice.

3.10 What are the rules on conflicts of interest?

Pursuant to the discretionary exclusion criteria, the contracting authority may decide to exclude a candidate or tenderer whose conflict of interest in the procurement procedure cannot be effectively eliminated by other measures.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Before launching a procurement procedure, contracting authorities may conduct market consultations to prepare the procurement, and inform suppliers of the plans and requirements for the forthcoming procurement. Contracting authorities may also utilise independent specialists, other public authorities or suppliers in a market consultation. However, the use of advice from these parties must result neither in a distortion of competition nor in conduct contrary to the principles of non-discrimination and transparency. If a candidate, a tenderer or an enterprise related to a tenderer has participated in preparing a procurement, the contracting authority must ensure that this does not distort competition.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

The procurement acts contain general exemptions as well as particular exemptions applicable to procurement of services and concession contracts. In practice, the principal exemptions are procurements from in-house entities and other contracting authorities.

There are some exemptions to the rule stating that procurements must be called for tender, one of which is related to the production and sale of electricity. In accordance with the Act on Public Contracts in Special Sectors, if a contracting authority considers that a given activity is directly exposed to competition on markets to which access is not restricted, it may submit a request to the Commission.

In the request, it must be established that the Directive on Public Contracts in Special Sectors (2014/25/EU) does not apply to the award of contracts for the pursuit of that activity, where it is appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned. Such requests may concern activities which are part of a larger sector or which are exercised only in certain parts of the Member State concerned. In the request, the Member State or contracting authority concerned must inform the Commission of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in Article 34(1) in the Directive.

Even before the Act on Public Contracts in Special Sectors was enacted, Finland had been given a Commission Decision regarding the production and sale of electricity where a special permit not to call for tenders was granted. This decision was given on 19 June 2006, whereas the Act on Public Contracts on Special Sectors took effect on 1 January 2017.

In accordance with the decision, given the overall picture of the electricity sector in Finland, in particular the extent to which networks have been unbundled from generation/supply and the effective regulation of network access, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC (currently 2014/25/EU) should be considered to be met in respect of production and sale of electricity in Finland. The further condition of free access to the activity must be deemed to be met. Consequently, Directive 2004/17/EC (currently 2014/25/EU) should not apply when contracting entities award contracts intended to enable electricity generation or the sale of electricity to be carried out in these geographical areas.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

Procurements made by a contracting authority from its in-house entity are exempted. The term "in-house entity" denotes an entity that is formally separate and independent for policymaking purposes from the contracting authority. A further condition is that the contracting authority, either alone or together with other contracting authorities, exercises a controlling interest in the in-house entity in the same way as in its own establishments, and that the in-house entity performs no more than 5% and a share of no more than EUR 500,000 of its business operations with parties other than the contracting authorities that exercise a controlling interest over it. An in-house entity may not have capital other than the capital of contracting authorities.

In addition, procurements between contracting authorities are exempted, whereby the contracting authorities collaborate to implement public services in the public interest for which they are responsible, in order to achieve common objectives. A further condition is that no more than 5% and a share not exceeding EUR 500,000 of the services falling within the scope of the collaboration are provided for third parties.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

The procurement acts provide extensive legal remedies, including a demand for rectification addressed to the contracting authority, an appeal procedure in the Finnish Market Court, and claims for damages.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

In addition to administrative proceedings at the Market Court, the Finnish Competition and Consumer Authority ("FCCA") supervises compliance with the procurement acts. Anyone who considers that a contracting authority has contravened the procurement legislation may submit a request to the FCCA for measures to investigate the legality of the procedure. Damages claims can be sought via civil proceedings.

5.3 Before which body or bodies can remedies be sought?

The Market Court serves as the court of first instance in public procurement disputes. The decisions of the Market Court can be appealed to the Supreme Administrative Court. Damages claims are handled by the District Courts, the decisions of which can be appealed to the Court of Appeal and ultimately the Supreme Court.

5.4 What are the limitation periods for applying for remedies?

As a general rule, an appeal must be submitted in writing within 14 days of the date on which the candidate or tenderer received notice of the procurement decision together with instructions for appeal. However, in specific circumstances certain exceptions apply, which may extend the application period to up to 30 days or even six months.

5.5 What measures can be taken to shorten limitation periods?

The limitation periods mentioned above are mandatory.

5.6 What remedies are available after contract signature?

After contract signature, the Market Court may:

1) order the contracting authority to pay a compensatory fine to a concerned party that would have had genuine prospects of winning the competitive tendering under a correct procedure;
2) order the contracting authority to pay an inefficiency sanction;
3) order the contracting authority to pay a penalty fine to the State; and/or
4) shorten the agreement period of the procurement agreement or concession contract to expire within the period stipulated by the court.

5.7 What is the likely timescale if an application for remedies is made?

Following the submission of an application for remedies, the Market Court procedure takes six months on average.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

Overall, in cases where the contracting authority's conduct has, in one form or another, been in breach of the basic principle of equal and non-discriminatory treatment of candidates or tenderers, remedies have been successfully obtained.

5.9 What mitigation measures, if any, are available to contracting authorities?

In general, the procurement acts do not provide any explicit mitigation measures available to contracting authorities. However, when imposing certain sanctions, the Market Court takes into consideration overriding public interest grounds, as well as the nature of the error or default of the contracting authority and the value of the procurement that is the subject matter of the appeal.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

The national procurement legislation does not specifically govern these issues. However, the general underlying principles of the EU directives and case law are applicable.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

In principle, there is very limited scope for further negotiation with the preferred bidder following the submission of a final tender, especially if this would result in manifest alterations of the original tender to the detriment of the equal and non-discriminatory treatment of the other candidates. In the negotiated procedures, however, there is more scope for negotiations to the extent that the above principles are observed.

The contracting authority may, however, allow tenderers to correct a manifest written error or erroneous calculation or some other manifest error in their final tenders.

Moreover, the contracting authority may also request that a final tender is clarified or supplemented, provided this does not lead to discrimination of the other candidates.

6.3 To what extent are changes permitted post-contract signature?

In general, procurement agreements concluded in procurements that exceed the EU threshold value, or in certain service

procurements or concession contracts that exceed the national threshold value, may not be amended in any integral respect during the agreement period without a new procurement procedure.

Nevertheless, a procurement agreement may be amended without a new procurement procedure if:

1) it is based on contractual terms that were known during the procurement procedure and the said terms and conditions are clear, precise and unambiguous, and do not modify the general character of the procurement agreement or framework agreement;
2) it is necessary for the original contractual partner to perform additional work and a change of contractual partner is not possible for financial or technical reasons;
3) the need for amendment is due to circumstances that a diligent contracting authority could not have foreseen;
4) the original contractual partner is replaced with a new contractual partner due to corporate restructuring; or
5) the case concerns a minor contractual amendment (i.e., 10–15% of the value of the original procurement).

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

The legislation permits the transfer of a contract to another entity post-contract signature if the original contractual partner is replaced with a new contractual partner under an unambiguous condition for amending the agreement, or the status of the original contractual partner is wholly or partly assigned to another operator that satisfies the originally established qualitative selection criteria due to corporate restructuring, takeovers, mergers, changes of controlling interest or insolvency, provided that this does not entail other substantial amendments to the agreement and does not seek to circumvent the application of the procurement legislation.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

There are no special rules that apply in relation to privatisations.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

There are no special rules that apply in relation to public-private partnerships.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Yes, as provided for in the Finnish government's new Government Programme. Please see question 8.2 below.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

Changes are proposed concerning the in-house arrangement exemption. These proposals result from two recent decisions taken by the FCCA. In both decisions, the contracting authority claimed that it was not obliged to arrange a formal tender procedure as it had acquired the services from an affiliate company.

The FCCA held that the contracting authorities did not have the ability to exercise decisive and actual influence over the claimed affiliate – their influence was merely formally arranged. The FCCA further clarified that the relevant procurement provisions required the active use of influence. Thus, the mere possibility of exercising influence is not sufficient. The FCCA concluded that the units were not affiliated with the contracting authorities since the authorities could not and had never exercised required influence over the respective units.

8.3 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

In connection to the above, a 10% threshold will, *inter alia*, be imposed to assess whether a unit is an affiliate. Thus, the contracting authority must hold at least a 10% stake in the unit for it to be regarded as its affiliate.

The rule is more clarifying in nature, and it does not result in a significant legal impact. It is set to provide legal certainty and to reduce the putting forth of cases where a contracting authority alleges to hold decisive influence even with a very minor stake (e.g., 0.04% as in a recent Sarastia decision). In those circumstances, it is very unlikely, albeit not impossible, that the contracting authority would hold decisive influence over the unit. The new proposals aim to further eliminate the circumvention of the procurement rules.

The Government Programme also seeks to limit the use of in-house arrangements in case of services for which there is a functioning market. Examples of such services are cleaning, financial management, food and IT services.

Ilkka Aalto-Setälä has 27 years of experience working on antitrust and merger control investigations and has represented clients in almost 100 cases before the Finnish Market Court alone. Ilkka advises companies and governmental agencies on competition law issues at both the domestic and EU levels, including matters involving merger control, abuse of a dominant market position, cartels, State Aid and public procurement. Ilkka also has a solid background in antitrust matters from working at the Finnish Competition and Consumer Authority and the Merger Task Force of the European Commission. After his public service, his first highlight case involved successfully defending the national broadcasting company Yle against the Finnish Competition Authority's first attempt to prohibit a deal involving Digita, Yle and Sonera in Finland. Ilkka is the chairman of the Competition Law Expert Group of the Finnish Bar Association. He is also the founder and a board member of the Finnish Competition Law Association.

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Henrik has recently been involved in precedent-setting COVID-19-related public procurement cases in the healthcare sector. He also has experience of competition and State Aid litigation at the Court of Justice of the European Union. Henrik joined Borenius in 2017 from the FCCA, where he gained practical experience in cartel investigations and dawn raids while working as a Research Officer. Prior to graduation, Henrik worked as an associate trainee at the competition law and public procurement practice of another leading Finnish law firm and as a legal trainee at the FCCA.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The relevant legislation is codified in the French public procurement code ("PPC"). It covers the definition of public procurement contracts, procurement rules *per se* and rules governing public contract execution.

Other legislation can be relevant in specific areas, such as the French general code of local authorities (concession contracts whose subject-matter is public service), the French works and housing code (acquisition of works), the French urban planning code, etc.

Case law is another important source of legal rules on public procurement in France, as well as the European Court of Justice's case law.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic underlying principles of the French public procurement regime are the following (PPC, Art. L. 3):

- Equal treatment: the buyer must treat all bidders fairly and without discrimination.
- Open access to public procurement: each operator should be able to access public tenders openly. Therefore, the buyer must publish tendering documents widely and draft them in terms that are clear, objective and precise enough.
- Transparency: the buyer must issue (and publish) the key rules applying to the tender and cannot modify these rules during the bidding process. The successful tenderer's name must be published too.
- Public procurement efficiency.
- Good use of public funds, which can have multiple meanings.

Furthermore, public authorities are free to choose between using their own resources or awarding a public procurement contract for their needs to be fulfilled.

All these principles are relevant to the interpretation of the legislation, both national and European.

Public procurement must also contribute to the achievement of sustainable development objectives (PPC, Art. L. 3–1).

1.3 Are there special rules in relation to procurement in specific sectors or areas?

There are special rules in relation to procurement in specific sectors or areas, such as:

- activities related to public networks (water, energy, telecommunications, oil, gas, coal, transport, postal service, etc.);
- defence and security contracts;
- research and development contracts;
- design contract;
- innovative purchasing;
- some global public contracts;
- contracts based on an exclusive right; and
- social and other specific services.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Several other areas of French law are relevant to public procurement. The ones that apply most commonly are:

- Labour law (the buyer has to ensure that the bidders do not employ illegal workers and their contributions as employer are up to date.
- Environment law (the buyer can set environmental and/or social criteria in tendering materials).
- Criminal law and government transparency rules (awarding a public contract without respecting public procurement rules may constitute a criminal offence).
- Law n°75–1334 of 1975, 31 December, governing (financial) relationships between contractors, subcontractors and contracting authorities.
- Intellectual Property law, especially in design public contracts.
- Personal Data law, etc.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The French regime directly derives from European rules, the European Court of Justice's case law included. It also takes into account the World Trade Organization Agreement on Government Procurement ("GPA") and all the international agreements binding the EU.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

Public buyers falling into the scope of the PPC are either the "contracting authorities" or the "contracting entities" (public network activities).

The categories or types of entities which shall be regarded as "contracting authorities" are (PPC, Art. L. 1211–1):

- legal persons governed by public law (central government authority or public body, sub-central government authority or public body, other entities governed by public law);
- some legal persons governed by private law, provided that the following requitements are all met:
  - they were specifically established to meet needs in the general interest, and such needs do not have an industrial or commercial character; and
  - they are financed, for the most part, by a "Contracting Authority", or are subject to management supervision by a "Contracting Authority", or have an administrative, managerial or supervisory board whose members are, for more than half of them, appointed by a "Contracting Authority"; and
- legal persons governed by private law which were established by several "Contracting Authorities" to undertake joint projects or activities.

The "Contracting Entities" include the same entities as those mentioned above when pursuing public network activities (PPC, Art. L. 1212–3). This characterisation also applies to a public company, as defined by Article L. 1212–2 of the PPC.

2.2 Which types of contracts are covered?

Public procurement contracts are defined as all contracts awarded by an Awarding Authority for pecuniary interests whose aim is to fulfil one of its need, taking the form of (PPC, Art. L. 2):

- the performance of construction or civil engineering works;
- the supply of services; or
- the purchase of supplies.

2.3 Are there financial thresholds for determining individual contract coverage?

Below €40,000 WT without taxes, public procurement rules do not apply.

Equal to or above €40,000 WT it is mandatory for the buyer to set up an "adapted" procedure to award the contract.

Equal to or above €90,000 WT it is mandatory for the buyer to publish a contract notice in the official publication support for contract notices in France ("BOAMP") or in another legal newspaper.

EU thresholds are common to all Member States and are periodically modified by EU regulation. Equal or above them, it is mandatory for the buyer to set up a "formalised procedure" to award the contract, and to public a contract notice in the official publication support for contract notices in the EU ("JOUE"). The 2024–2025 EU thresholds are:

- Regarding supply or service contracts:
  - for a central government authority or public body: €143,000 WT;
  - for local authorities or public bodies: €221,000 WT; and
  - for public network operators, and national defence and security contracts: €443,000 WT.
- Regarding construction work contracts or concessions: €5,538,000 WT.

2.4 Are there aggregation and/or anti-avoidance rules?

Public buyers are prohibited from aggregating the bid to award it to only one bidder (PPC, Art. R. 2121–4).

Public procurement tenders must be divided into lots, to ease access to public procurement for small and medium-size companies.

The PPC provides for a method to calculate the estimated value of the contract. It is prohibited to use another method to avoid public procurement rules (PPC, Art. R. 2121–1).

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

There are special rules for concession contracts (specific section of the PPC).

The main criterion to differentiate concessions contracts and public contracts is that the former involve the transfer to the contractor of the economic risk, at least a substantial part of it.

2.6 Are there special rules for the conclusion of framework agreements?

There are special rules for this type of contract (PPC, Art. L. 2125–1).

A framework agreement is used when the buyer does not exactly know the extent of its needs in the near future, or when they will occur. Either:

(a) the framework agreement provides for all the provisions of the future procurement contract, and, in this case, it can be executed as soon as the buyer issues the order; or

(b) the framework agreement does not contain all the required provisions, and the buyer will have to enter into a subsequent contract with the previously selected operator (or one of the previously selected bidders following a new tendering selection amongst them) and include the provisions which were lacking.

2.7 Are there special rules on the division of contracts into lots?

To facilitate very small companies, and small and medium-size companies' access to public procurement, public procurement contracts are subject to the allotment principle. They have to be divided into as many lots as there are objectively distinct services or categories of goods.

The use of a global contract is permitted only under strict conditions (when it is not possible to identify separate services or categories of goods, or when setting lots would make the performance of the contract substantially more expensive or technically impossible).

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

In accordance with the EU principle of non-discrimination based on nationality, Awarding Authorities must guarantee

open access to public procurement procedures regardless of bidders' nationality.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The "adapted" procedure, in which the buyer defines the tendering procedure features, is generally a negotiated procedure, to adapt the procedure to the nature and features of the needs to be met, to the potentially bidders (number and localisation), while respecting public procurement principles. This procedure covers three cases:

(1) the procurement estimated value (without taxes) is below EU thresholds;
(2) some specific subject-matters (PPC, Art. R. 2123–1, such as social services, or some legal advice services); and
(3) when the procurement estimated value is equal or above EU thresholds, but given lots estimated value is below €80,000 WT for supplies and services, or €1,000,000 for works, and the total of these lots does not exceed 20% of all lots estimated value.

The buyer must use one of the "formalised" procedures if the estimated value is equal or above EU thresholds. Three types of procedure can apply:

(1) the call for tenders (standard "formalised" procedure): the buyer chooses the most economically advantageous offer, without negotiation, on the basis of non-discriminatory criteria that have been published in the contract notice. The call for tenders can have two forms: an open one (any operator can submit a bid), or a closed one (only the candidates which have been selected by the buyer can submit a bid);
(2) the negotiated procedure is allowed only in a limited number of cases (PPC, Art. R. 2124–3 and R. 2124–4); and
(3) the competitive dialog (PPC, Art. L. 2124–4): the buyer dialogs with the bidders which have been invited to participate to define or develop one or several solution(s) able to meet its needs.

3.2 What are the minimum timescales?

The buyer sets the time limit for bid reception, by taking into account the procurement complexity and the necessary time for operators to prepare a bid (PPC, Art. R. 2151–1).

Various rules in the PPC set a frame to limit this buyer's freedom on the matter:

- In the case of an open call for tenders, the minimum time-limit is 35 days after the publication of the contract notice/30 days if applications and bids are submitted electronically/15 days in case of emergency.
- In the case of a restricted call for tenders (PPC, Art. R. 2161–6 *et seq.*) or in a competitive procedure with negotiation (PPC, Art. R. 2161–12 *et seq.*):
  - For applications: for contracting authorities, 30 days (15 days in case of emergency) and for the contracting entities, 15 days.
  - For bids:
    - for contracting authorities, it is 30 days in principle; it can be reduced to 25 days if applications and bids are submitted electronically/10 days in case of emergency); and
    - for contracting entities, it is 10 days, or as fixed by common agreement between the buyer and the selected candidates (the same duration must apply to all).
- In the case of a competitive dialog: 30 days to submit the applications. Bidders submit their bids within the time limit set by the buyer when the dialog has come to an end (PPC, Art. R. 2161–25).

3.3 What are the rules on excluding/short-listing tenderers?

When a bidder falls with the scope of one of the exclusion cases mentioned in PPC's Articles L. 2141–1 *et seq.*, the buyer must exclude the tenderer from the procedure on this ground (automatic ineligibility criteria, such as: the operator has been convicted for money laundering, criminal association, non-compliance with tax or social obligations, etc.).

The PPC also provides for optional ineligibility criteria (Art. L. 2141–7 *et seq.*): the buyer may decide to apply it, or not (for instance, the operator has been condemned to pay damages for breach of its obligations during the performance of a previous public contract; suspicion of distortion of competition, or conflict of interest).

In any case, the buyer must require the give explanations as requested by the buyer on the matter, and assess its/their relevance, before rejecting the bid on that ground.

When a restricted call for tenders is carried out, or a competitive procedure with negotiation, or a competitive dialog, the buyer pre-qualifies the bidders which will be allowed to submit a bid, based on their professional, technical, economic and financial abilities.

Moreover, in order to be ranked, the bid must not be irregular (not comply with the tendering materials or national or EU law), unacceptable (over the buyer's budgetary allocations, as determined and issued before launching the procedure) or inappropriate (obviously not able, without any substantial modification, to meet the buyer's needs and requirements).

Abnormally low bids must be considered as irregular and are not regularisable. Buyers only require the bidder to explain the price/costs proposed and assess their relevance (an offer must be economically viable not to be rejected on that ground).

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

Buyers evaluate tenders according to the selection criteria announced in the tendering materials. These criteria shall be weighted, as well as sub-criteria if the buyer chooses to use them. The buyer shall not modify the selection criteria (and sub-criteria) and/or their weight during the tendering process.

Evaluation of tenders can be based, either on:

(a) a single criterion, which shall be the price/cost; or
(b) various criteria – in addition to the price/cost, it can be quality, sustainable development aspects, social inclusion etc., provided that they are non-discriminatory, objective, precise and linked enough to the subject-matter of the contract.

Buyers often choose to rely on various criteria for the evaluation of tenders, since the successful one is the most economically advantageous (not necessarily the one proposing the lowest price).

3.5 What are the rules on the evaluation of abnormally low tenders?

The fact that a tender is abnormally low can justify its exclusion, but the buyer has to ask the tenderer further explanations about the financial structure of the bid before being permitted to exclude it on that ground. If the tenderer's answer is insufficient or unconvincing, the buyer mut eliminate the bid without giving it a score (PPC, Art. R. 2152–4).

3.6 What are the rules on awarding the contract?

The buyer must award the contract to the first-ranked tenderer, in accordance with the selection criteria set out in the tendering materials, if such operator is able to provide the final administrative documents as requested by the buyer. If not, the contract shall be awarded to the second-ranked tenderer, and so on.

3.7 What are the rules on debriefing unsuccessful bidders?

The buyer must immediately inform unsuccessful bidders that their bid has been rejected (PPC, Art. L. 2181–1).

In a formalised procedure, such immediate information must also cover the reasons of this rejection, the successful tender's characteristics and advantages, and the successful tenderer's name.

In an appropriate procedure, unsuccessful bidders have a right to be given such additional information if they ask the buyer for it within 15 days of their rejection (PPC, Art. R. 2181–2).

Absence or insufficiencies of information are grounds to challenge the tendering procedure before the courts.

3.8 What methods are available for joint procurements?

The PPC defines several methods available methods for joint procurements:

- Central purchasing: the purchase it outsourced to a central purchasing body (ruled by the PPC), whose role is to buy in bulk for several awarding authorities who have the same needs (PPC, Art. L. 2113–2).
- Order grouping: awarding sharing the same need(s) pool to conclude a public contract with an operator. One of them is entrusted by the others to manage the procedure and/or control the contract execution. Order grouping may include private entities, but it will entail that these private entities must comply with the public procurement rules for the considered project.

Awarding authorities and private entities can also set up and institutionalised partnership which will often be subject to private law for the contract execution (for instance: semi-public company, local public company, etc.), but can, under some circumstances, be subject to the PPC for contract procurement.

3.9 What are the rules on alternative/variant bids?

In a formalised procedure conducted by a contracting authority, variants are in principle prohibited, unless expressly authorised in tendering materials (PPC, Art. R.2151–8 1° a) and Art. R.2351–8 1°).

In contrast, in a formalised procedure conducted by a contracting entity, or in an "appropriate" procedure, variants are in principle authorised, unless expressly prohibited in tendering materials (PPC, Art. R.2151–8 1° (a)/2° and R. 2351–8, 2°).

3.10 What are the rules on conflicts of interest?

Buyers must prevent conflicts of interest and exclude the bidders which fail to comply with legislation on that matter (PPC, Art. L. 2141–10).

Failure to do so may lead to the cancellation of the contract, and/or criminal prosecution.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

The PPC allows sourcing: before launching a tendering procedure, public buyers can set up a consultation of operators, to refine and target their needs, by seeking information, carryout market studies and exchanging about the project, its constraints and/or requirements (PPC, Art. R. 2111–1).

During this sourcing period, and then during the procurement process, buyers must take extra care not to distort competition by enabling one (or a few) operator(s) only to have access to privileged information. The core principles of open-access, transparency and equal treatment must always be respected (PPC, Art. R. 2111–2).

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

The principal exclusions are contracts which do not intend to fulfil a contracting authority's need, and/or contracts that are excluded because of their subject-matter (immovable property acquisition, arbitration, certain legal services, financial services, research and development, etc.), or when the contractor is merely an extension of the awarding authority (in-house).

The principal exemptions of prior publicity or competitive selection process are:

- imperative, external and unpredictable case of emergency (PPC, Art. R. 2122–1);
- the buyer did not receive any application, or any bid, or any regular and/or appropriate tender (PPC, Art. R. 2122–2); and
- only one identified operator can fulfil the contract (acquisition of a minor and inseparable piece of immovable property, work of art, exclusive right, etc.) (PPC, Art. R. 2122–3).

These exclusions and exemptions must be interpreted strictly. Restriction of competition to artificially fall within the scope of one of these exclusions and exemptions may lead to the cancellation of the contract, and/or criminal prosecution.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The "in-house" exception allows public buyers to award contracts without prior publicity and competition process when the operator is merely their extension.

Three conditions need to be met to benefit from this exception (PPC, Art. L. 2511–1):

- the buyer must exercise a control over the operator which is similar to that which it exercises over its own departments (administrative and/or financial);

- more than 80% of the operator's activities must be carried out in the performance of tasks entrusted to it by the buyer (or any other legal person controlled by the buyer); and
- there must be no direct private capital participation in the operator, apart from non-controlling and non-blocking forms of private capital participation required by French law, which do not exert a decisive influence on the operator (minimal participation in the capital and no representation in the management bodies).

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

Public procurement procedures can be disputed before an administrative court:

- Before the contract signature: the pre-contractual referral (Administrative Justice Code – AJC – Art. L. 551–1 *et seq.*) aims at preventing to award a contract whose procurement procedure would violate publicity and competitive selection rules.
  Such claim can be issued by any unsuccessful tenderer (or any other third party who has an interest to conclude the contract), but the applicant may only raise the breaches which (might) have prejudiced itself.
- After the contract signature, a pre-contractual referral cannot be initiated anymore. To sanction breaches towards prior publicity and/or competitive selection rules, the same categories of applicants can initiate a contractual referral (AJC, Art. L. 551–13 *et seq.*).
  However, the arguments that can be raised are more limited: absence of publicity, absence of publication in the official publication support for contract notices in the EU (if relevant), violation of the stand-still period, violation of the suspension period linked to a pre-contractual referral, violation of the reopening procurement rules for a framework agreement or a dynamic purchasing system.

This claim is also time-limited: 31 days starting from the publication of an award notice in the JOUE or six months from the contract award if no award notice has been published.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

In addition to the previously described proceedings where time is of the essence, the regular judicial proceedings also allow aggrieved bidders to challenge the validity of the contract after its signature ("*Recours en validité du contrat*", also called "*Tarn-et-Garonne*"). This remedy can lead to cancellation of the contract and/or to financial compensation.

The public procurement contract awarding process can also fall within the scope of criminal remedies, mainly in case of favouritism (granting an unjustified advantage), bribery (active corruption), trading in influence or passive corruption.

5.3 Before which body or bodies can remedies be sought?

Claims are generally brought before an administrative court. However, in some circumstances (buyer governed by private law), "regular" judicial (civil) courts are entitled to address public procurement awarding issues. But in such cases, it is not possible to challenge the validity of the contract after its signature by raising breaches of public procurement rules.

5.4 What are the limitation periods for applying for remedies?

The limitation periods are as follows:

- Pre-contractual referral: before the contract signature.
- Contractual referral: 31 days after the publication of an award notice in the JOUE or six months from the contract award if no award notice has been published.
- "*Recours en validité du contrat*"/"*Tarn-et-Garonne*": two months after the publication of the award notice.

5.5 What measures can be taken to shorten limitation periods?

Publishing an award notice reduces the time-limit to issue a contractual referral (31 days instead of six months).

Moreover, when procurement does not require prior publicity, if the buyer publishes an award notice and respects a period of 11 days between this publication and the contract signature, no contractual referral can be carried out (CJA, Art. L. 551–15).

Finally, the deadline to launch regular judicial proceedings to challenge the validity of the contract after its signature starts as soon as an award notice is published. Thus, public buyers should publish such a notice, to prevent the contract validity from being challenged for one year ("*délai raisonnable*") instead of two months.

5.6 What remedies are available after contract signature?

The contractual referral and the "*Recours en validité du contrat*"/"*Tarn-et-Garonne*".

5.7 What is the likely timescale if an application for remedies is made?

In pre-contractual (or contractual) referral proceedings, a judicial decision is generally issued within 20 to 30 days.

The timescale for regular proceedings before an administrative court is generally between two and three years.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

In 2023, leading examples of cases in which remedies measures have been obtained are:

- a buyer abandoned one of the criteria during the tendering procedure (*TA Poitiers, 13 November 2023, Anjou TP, n°2302780*);
- the construction of a pump track does not characterise a particular technical complexity allowing a buyer to conclude a design and built public procurement contract (*TA Grenoble, 25 October 2023, Wise Ride, n°2306384*);
- denaturing a bid (*TA Dijon, 5 October 2023, Ateliers Enache, n°2302521*); and
- illegal negotiation (*TA Strasbourg, 20 April 2023, GCM, n°2302128*).

5.9 What mitigation measures, if any, are available to contracting authorities?

To avoid contract cancellation (during or after the awarding process), public buyers can sometimes argue that such

cancellation would have disproportionate consequences on a public interest and/or public service continuity. The administrative judge may decide mitigation measures (termination of the contract with postponed effect).

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

As a rule, a public contract is awarded on the same terms as those set out in the tendering materials. Thus, only limited changes are allowed which do not substantially alter the initial conditions of the procurement (changes to contract specifications, to the timetable, etc.).

Special rules are provided for the change of contractor (or to the membership of bidding consortium): in principle, such changes are prohibited (too substantial), except in the event of a merger/restructuring, or if the operator is unable to perform the contract for reasons which are beyond its control (PPC, Art. R. 2142–26).

The tendering materials can also authorise the successful tenderer to be replaced by a company specifically set up for the performance of the contract (special purpose vehicle).

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

After the final bid submission, the buyer may request/accept limited changes to the bid, such as clarifications to improve understanding or corrections of material errors. These changes shall not substantially alter the initial conditions of the procurement, nor impact the tenderers' ranking. The underlying principles mentioned in question 1.2 above must always be respected at that stage as well.

6.3 To what extent are changes permitted post-contract signature?

To preserve the initial procurement conditions, the changes permitted post-contract signature are only limited ones (PPC, Art. L. 2194–1):

- changes specified in the contract, provided that such specifications are clear, precise and unequivocal (the transfer of the contract to another entity, price revision, etc.);
- additional works/supplies/services have become necessary (and a change of operator is impossible due to economic or technical reasons);
- the changes have become necessary due to unpredictable circumstances;
- change of contractor (see question 6.4 below);
- the changes are not substantial; and
- "Small price" changes (the overall price of all the changes on that ground is limited to 10 % of the initial contract price in case of services or supplies, 15 % for works).

For a change not to be considered a "*substantial*", the purpose of the contract shall not change, nor its economic balance to shift in favour of the contractor.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

The transfer of the contract to another entity is allowed only when it has been expressly provided for in the original contract, or because of a restructuring operation concerning the original contractor (PPC, Art. R. 2194–6). In the latter case, three additional conditions must be met:

- the new contractor provides similar guarantees (professional, technical, and financial);
- the transfer does not entail other substantial modification to the contract; and
- the transfer is not aimed at circumventing the publicity and competitive selection rules.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Privatisation does not fall within the scope of the PPC. It is subject to a specific legislation, in particular for the protection of essential interests of the French State as a shareholder in a public undertaking.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

One of the forms of public-private partnerships is now codified in the PPC as a specific form of public procurement contract, the "*marché de partenariat*" (Art. L. 1112–1).

The main issue is that the "*marché de partenariat*" is an exceptional form of contract that can only be used in very specific cases with regard to its global nature and its particular financing requirements.

This contract can be used only when two conditions are met (PPC, Art. R. 2211–1 *et seq.*):

- the amount is higher than one of the thresholds provided by the PPC, depending on the contract's subject matter (from €2 million to €10 million without tax); and
- the use of such contract is more efficient than another (public procurements or concessions), based on an objective assessment of its advantages and disadvantages.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

There has been a proposed law in 2023 to limit the number of sub-contractors to two or three, but it has been stopped in 2023, September. A law passed in July facilitated the reconstruction of public facilities damaged during the urban riots.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

See question 8.1 above. A proposed law also aims at reinforcing anti-corruption measures implemented by public authorities/bodies, especially by setting up a specific framework, and forcing

them to organise an annual debate on the anti-corruption measures effectively implemented. Its timescale is unknown at present.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

Law n°2023–973 on Green Industry of 23 October 2023 makes environment criteria be more taken into account in public procurement. Two new grounds of (optional) exclusion are created: if the operator fails at its obligation to make a review for greenhouse gas reductions, or to publish information report on sustainability.

Another ground of exclusion has been voted by Parliament but needs to be clarified by a decree before entering into force. It concerns bids providing from third-party countries which are suspected of competition distortion towards France.

From 2026 (even July 2024, for plants of renewable energy for instance), public buyers will not be permitted anymore to select tenders on the basis of the sole criterion of price/cost, without taking into account the environmental characteristics of tenders (PPC, Art. L. 2152–7).

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The antitrust procurement law applies to public procurement procedures exceeding the threshold for a European-wide tender. The relevant legislation includes the following:

- §§ 97–184 German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*). This law regulates the following:
  - the general principles of public procurement law;
  - the scope of application and types of award procedures;
  - the general requirements pertaining to suitability, the award decision and conditions of performance;
  - the reasons for exclusion from the procedure;
  - the requirements pertaining to "self-cleaning" mechanisms for companies; and
  - the legal protection procedure applying to the review bodies.
- German Regulation on the Award of Public Contracts (*Vergabeverordnung – VgV*). The VgV provides an in-depth regulation of the procedure for awarding public contracts in the area of public supplies and services. In the case of works contracts, only Chapters 1 and 2, subchapter 2 shall be applied. Freelance services are also covered by the VgV.
- Procurement Regulation for Public Works, Section 2 (*Vergabe- und Vertragsordnung für Bauleistungen – VOB/A-EU*): the VOB/A–EU is the core on which public procurement law in the field of construction work is based.
- German regulation on the award of public contracts by entities operating in the transport, water and energy sectors (*Sektorenverordnung – SektVO*): the SektVO deals with the award procedure in the water and energy supply as well as the transport sectors.
- German Public Ordinance for Contracts in the Fields of Defense and Security for the implementation of Directive 2009/18/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of specific works, supply and service contracts in the defence and security sectors in amendment of Directives 2004/16 EC and 2004/18/EC (*Vergabeverordnung Verteidigung und Sicherheit – VSVgV*): this ordinance applies to the award of contracts in the defence and security sectors.
- Supplementing the VSVgV, the Bundeswehr Procurement Acceleration Act, (Bundeswehrbeschaffungsbeschleunigungsgesetz – BwBBG), was passed. It allows the contracting authority to simplify procedures for the procurement of weapons and other defence-related material to strengthen the German (and European) armed forces.
- German regulation on the award of concession contracts (*Konzessionen (Konzessionsvergabeverordnung) – KonzVgV*): this regulation outlines more detailed provisions on the procedure for the award of a concession by a concession grantor.

Below the threshold for European-wide tenders, public procurement law runs under the umbrella of local budget law. Therefore, these rules are traditionally seen as only applying within a purely internal administrative context. However, despite this fact, the civil courts offer preventative legal protection in the case of a violation of the rules of procedure. The following regulations are considered the most important:

- German Regulation on the Award of Public Supply and Service Contracts below the EU Thresholds (*Unterschwellenvergabeordnung – UVgO*): the contents and structure of the UVgO are aligned to those of the VgV. It passed at the federal level in 2017 and applies in most of the German states except Saxony. Therefore, only in Saxony will the General Conditions for the Award of Public Supplies and Services (*Vergabe- und Vertragsordnung für Leistungen – VOL/A*) still apply.
- General conditions for the award of public works contracts, Section 1 (VOB/A): applies to the award of public works contracts below the thresholds for European-wide tenders.

Furthermore, contracting entities must also observe the German regulation pertaining to statistics resulting from the award of public contracts and concessions (*Vergabestatistikverordnung – VergStatVO*). This regulation governs which information public contracting entities are required to report to the Federal Ministry for Economic Affairs and Energy for statistical purposes.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic principles of public procurement law are competition, transparency, equal treatment, non-discrimination and proportionality. The detailed provisions of the GWB and the relevant ordinances implement these principles by means of procedural and substantive regulations, and concretise these principles. In cases of undefined legal terms or the like, these basic principles serve as an aid to interpretation. In addition to these principles, the contracting authority must above all take into account the interests of small and medium-sized enterprises (SMEs). Furthermore, quality and innovation, as well as social and ecological aspects, should be taken into account when awarding public contracts.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

As described in question 1.1 above, public procurement law already takes specific sectors, such as the defence and security sectors (VSVgV), the transport, water and energy supply sectors (SektVO) and the award of concession contracts (KonzVgV) into account. Alongside these, additional special regulations can also be found in individual cases. In special areas, competitive public procurement proceedings must be conducted based on these regulations; however, these do not directly fall under public procurement law. This applies, in particular, to the award of concession contracts in the electricity and gas sectors which are aligned to the German Energy Industry Act (*Energiewirtschaftsgesetz – EnWG*).

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

During the award procedure, contracting entities and bidders are required to observe the original public procurement law provisions as well as any other legal provisions that may be applicable beyond the scope of these provisions. Particularly important in this connection is legislation pertaining to public funding. Questions relating to the law of associations and competition law are also common. In individual cases, a course of action based on the German freedom of information act (*Informationsfreiheitsgesetz – IFG*) regarding federal state laws, may be considered in order to be able to review the procedural documentation outside the procurement review process in accordance with antitrust procurement law.

Companies must implement the Supply Chain Sourcing Obligations Act (*Lieferkettensorgfaltspflichtgesetz – LkSG*). If a violation of these obligations is legally established, the company in question may be excluded from procurement procedures for a period of up to three years.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Germany has implemented the provisions of European public procurement law within the scope of the antitrust procurement legislation. As European public procurement law also takes the requirements of the GPA into account, the antitrust procurement legislation can be considered as being GPA-compliant.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

Within the scope of applicability of antitrust procurement law, the definition of a public contracting entity that purchases goods and services includes the following institutions:

- Regional authorities, including their special funds.
- Legal entities governed by public law founded for the special purpose of fulfilling tasks of a non-commercial nature in the interests of the general public which are controlled by one or several public contracting entities.
- Associations whose members are included in the points listed above.

Furthermore, other legal entities governed by public law are also considered to be public contracting entities when these carry out specific construction work in cases where these projects are subsidised to over 50% (§ 99 (4) GWB).

It should be noted that below the threshold for a European-wide tender, the concept of the so-called institutional contracting entity applies. In this case, therefore, German procurement law only covers those public institutions to which respective budget regulations directly apply or which by virtue of other legal dictates (e.g. statutes) are under obligation to apply procurement law.

2.2 Which types of contracts are covered?

Public contracts are defined as contracts for pecuniary interest concluded between public contracting entities or contracting entities in the transport, water and energy sectors and undertakings for the procurement of services involving the supply of goods, the fulfilment of works contracts or the provision of services (§ 103 GWB). Within the scope of applicability of antitrust procurement law, German public procurement law also covers concession contracts. This concerns contracts for pecuniary interest whereby the so-called concessionaire is entrusted with the provision of construction services, which may also include the provision and management of services, whereby the service in return consists of the right to utilise the structure, or exploit the services, or consists of the respective right coupled with the payment of a fee. The decisive factor here is that the concessionaire carries the risk for his activities (§ 105 (2) GWB).

2.3 Are there financial thresholds for determining individual contract coverage?

The scope of applicability of antitrust procurement law is determined by whether the value of the contract needed for a European-wide tender exceeds or falls below that specified in the provisions of the European procurement regulations. Since 1 January 2024 the threshold for works contracts amounts to 5,538,000 euros. The thresholds are as follows: the threshold for supply and service contracts amounts to 221,000 euros; in the transport, drinking water and energy supply sectors it amounts to 443,000 euros; for contracts issued by top level federal authorities (outside the construction industry), the threshold amounts to 143,000 euros, and for the award of social and other special services, according to Annex XIV of Directive 2014/24/EU, the threshold lies at 750,000 euros.

For award procedures that are to be conducted at a solely national level, limits are also in place up until which orders may

be directly placed without a call for competition procedure – or where restricted tenders are also permitted. These thresholds are individually defined by the federal and state authorities.

2.4 Are there aggregation and/or anti-avoidance rules?

When implementing the provisions of European procurement law, the value of a contract may not be split in such a way as to avoid the applicability of German public procurement law (Section 3, para. 2 VgV). The expected total value of the intended services is to be used as a basis, whereby any options and contract extensions must also be taken into consideration. In the case of works contracts, the estimated total value of all the supplies and services required to fulfil the works contract that are provided by the public contracting entity must also be taken into account in addition to the actual value of the works contract (Section 3, para. 6 VgV).

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

The special regulations for awarding concessions are contained in the KonzVgV.

A concession is a contract for consideration by which a contracting authority assigns to an economic operator either the execution of works or the provision and management of services. The subject matter of the contract is either only the right to use the works or services in question or this right together with a fee.

The operating risk for the use of the works or services in question is generally borne by the concessionaire.

2.6 Are there special rules for the conclusion of framework agreements?

General framework agreements are to be awarded in the same manner as other contract forms in accordance with the provisions of German procurement law. However, individual orders may then be requested from the framework contract partner without the need to refer back to the procurement law provisions. In as far as a framework contract has been closed with several partners, it may be necessary to conduct so-called mini-competition proceedings (please refer to Section 21 VgV, Section 15 UVgO, Section 4 a VOB/A, Section 4 a VOB/A-EU, Section 19 SektVO, Section 14 VSVgV as well as Section 4 VOL/A).

2.7 Are there special rules on the division of contracts into lots?

The fundamental principle that applies to the award procedure is that services need to be divided according to quantity (partial lots) or according to fields of expertise (trade-specific lots). Partial and trade-specific lots may only be awarded collectively, if economic or technical reasons deem this necessary (§ 97 (4) GWB), Section 5 VOB/A, Section 22 UVgO, Section 24 SektVO, Section 10, para 1 VSVgV). According to case law, the common disadvantages associated with splitting a contract into lots are not a sufficient argument for justifying the award of the contract as one joint contract.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Suppliers located outside Germany are not restricted in any way from participating in public procurement procedures in Germany. They may invoke the principles of competition, transparency and equal treatment at any time. It is only possible to reject a tender if it falls under the rules of the SektVO and over 50% of the total value of the goods originates from countries which are not Contracting Parties of the Agreement on the European Economic Area, and with which no other agreements on mutual market access exist. Unaffected hereby, a contracting entity may specify certain implementation rules which are justified by the nature of the respective contractual object which then have to be observed by suppliers in third countries and which restrict them accordingly. These may include, for example "no spy requirements" in the IT area as a result of which, for example, databases may not be hosted outside the EU.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

For contracts exceeding the thresholds for a European-wide tender, the following types of award procedures are available:

- **Open procedure**
  The contracting entity publicly requests an unlimited number of undertakings to submit a tender based on a European-wide tender notice.
- **Restrictive procedure**
  Based on a European-wide tender notice, the first stage consists of a call for competition procedure (phase 1). Only suitable undertakings that may have been selected through the call for competition procedure are then actually requested to submit a tender (phase 2). A selection may be made from amongst those undertakings deemed suitable according to objective, transparent and non-discriminatory criteria.
  Both the open and restrictive procedures represent standard procedures between which the contracting entity may freely choose. Both procedures are characterised by the fact that negotiations on the content of the tenders are strictly prohibited.
- **Negotiated procedure**
  A negotiated procedure may be conducted with or without a preceding call for the competition phase. The contracting entity may negotiate all aspects of the tenders with the bidders.
- **Competitive dialog**
  Following the call for competition procedure, the contracting entity then enters a dialog with the selected undertakings in order to determine how their needs can best be met. The tenders are only submitted once the competitive dialog phase has been completed. These tenders are then only open to limited negotiation.
- **Innovation partnership**
  Following the call for competition procedure, the contracting entity conducts several phases of negotiations with the selected undertakings in cases where, and in as far as, innovative products and services that are not yet available on the market first need to be developed.

Below the thresholds, the following types of award procedure are available:

- Public tender procedure (the basic procedure corresponds to that of an open procedure).
- Restricted tender with or without a call for competition procedure (when a call for competition procedure is conducted, the basic process corresponds to that of a restrictive procedure).

- Negotiated award, or direct award without a call for competition procedure (the basic procedure corresponds to that of a negotiated procedure).

3.2 What are the minimum timescales?

For award proceedings according to antitrust procurement law, the following minimum timescales apply:

- In an open procedure, the minimum term for submitting a tender is 35 days (Section 15, para. 2 VSVgV). If electronic tenders are accepted, this minimum term may be shortened by five days. In cases where the grounds for an urgent decision have been duly substantiated, the minimum term may not be less than 15 days (Section 15, para. 3 VSVgV).
- In award proceedings that include a call for competition procedure, the minimum term for submitting applications for participation (participation deadline) is 30 days. In urgent cases, the minimum term may not be less than 15 days. The minimum term for submitting a tender in procedures that incorporate a call for competition is always 30 days. In cases where the grounds for an urgent decision have been duly substantiated, the minimum term may be set to 10 days. A deviating minimum term may be used if a consensus has been achieved between all the bidding parties – with the exception of top-level federal authorities. If no consensus has been achieved, the minimum term may not be less than 10 days.
- In the case of award procedures that are only to be conducted at national level, there are no fixed minimum terms. All minimum terms must be reasonable.

3.3 What are the rules on excluding/short-listing tenderers?

Above the threshold, a negotiated procedure without preceding a call for competition is only possible under extremely restricted conditions. In practice, this is most commonly applied in the following cases:

- A preceding open or restrictive open procedure has failed and there are no fundamental changes to the original conditions of contract.
- When viewed objectively, the contract can only be fulfilled or the services provided by one specific undertaking, for example, for technical reasons or where there is no competition due to the need to protect exclusive rights.
- In situations where there are extremely urgent, pressing reasons due to events which the contracting entity was unable to foresee, resulting in a situation where the minimum terms provided for within the scope of a standard procedure cannot be complied with. The reasons behind the urgency of the situation must not be attributable to the public contracting entity.

Below the thresholds applying to a European-wide tender procedure, it is possible to fall back on a restricted procedure without a call for competition procedure, if a preceding public tender procedure has failed to lead to an economic result, or where the costs to the applicant/bidder of an open procedure, or restricted procedure with a call for competition, would be out of proportion to the advantages thus achieved, or to the total value of the services. Furthermore, negotiated procedures and direct awards without a call for competition are also possible below the threshold, in conditions similar to those in negotiated procedures without a call for competition procedure above the threshold.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The contract for the most economically advantageous tender (Section 58, para. 1 VgV, Section 127, para. 1 GWB) may either be awarded solely on the basis of the lowest price or by also taking other non-price-related award criteria into account. Contracting entities are free to choose how they handle this, however, it is generally recognised that pricing may not simply be pushed to one side in the decision-making process. Alongside the price, particular consideration may also be given to qualitative, and even environmental and social, aspects. Within the scope of applicability of antitrust procurement law, it is compulsory to state the award criteria and their respective weighting either in the tender notice or in the respective tender documentation. No explicit rules exist to this effect for procedures below the threshold. However, procedural transparency allows no other alternatives.

3.5 What are the rules on the evaluation of abnormally low tenders?

The reasons behind an abnormally low tender must be examined by the contracting entity (Section 60, para. 1 VgV). The other bidders have a subjective legal right to this clarification process. The aim of the examination is to provide the contracting entity with a clear picture of whether or not they can expect the respective tender to result in the proper provision of services despite the strikingly low price. Therefore, this clarification process may examine, in particular, the technical solutions selected, and the conditions to be met by the undertaking concerned, with a view to providing its services; or may concern the bidder's sources of supply. Should any doubts remain as to whether the services can be properly provided, the contracting entity is permitted to refuse awarding the contract based on an abnormally low tender.

3.6 What are the rules on awarding the contract?

For the most part, no specific formal requirements apply to the actual award of a contract. However, notice of the award decision is generally made in textual form – for documentary purposes and the purpose of providing evidence. One exception to the freedom of form principle, however, exists for European-wide procurement procedures in the defence and security sectors (VSVgV). In such cases, the award decision must either be communicated in written form or electronically using an advanced electronic signature. In cases where services or supply contracts are awarded in accordance with VOL/A below the threshold, the respective award decision must likewise be communicated either in written form or electronically via telefax.

3.7 What are the rules on debriefing unsuccessful bidders?

Only in cases above the thresholds for conducting European-wide procurement proceedings must those bidders whose tenders are not to be given consideration be notified in textual form prior to the award of the contract of the name of the undertaking whose tender is to be accepted, the reasons for the planned rejection of the tender and the earliest date of the conclusion of the contract. A contract may only be concluded at the earliest 15 calendar days after this notification has been sent

out by post, but can be reduced to 10 days, if this information has been sent out electronically or by fax (§ 134 GWB).

In addition, applicants and bidders both above and below the thresholds are to be informed upon request of the reasons why their application with respect to tender was rejected, possibly including information on the features and advantages offered by the successful tender as well as the name of the bidder awarded the contract.

3.8 What methods are available for joint procurements?

The general rules apply to joint purchasing bodies. Here, one must consider that, in individual cases, joining a purchasing body that constitutes a demand cartel may be problematic from a competition law perspective. Apart from purchasing bodies, public contracting entities can also fall back on central procurement bodies that award public contracts or close framework agreements on their behalf (please refer to § 120 (4) GWB).

3.9 What are the rules on alternative/variant bids?

During award procedures, alternative/variant bids above the threshold for a European-wide tender may only be considered if these have been explicitly permitted by the contracting entity. In addition, the formal requirements, as well as the minimum requirements pertaining to the contents of the bid, must be stated by the contracting entity. Alternative/variant bids may also be permitted in cases where the price is the sole criterion for awarding the contract.

Below the threshold, alternative/variant bids are always permitted in the construction sector, if not explicitly excluded by the contracting entity (Section 8, para. 2 No. 3 VOB/A). In the case of supplies and services, alternative/variant bids below the threshold must also be explicitly permitted by the contracting entity in order to be evaluated.

3.10 What are the rules on conflicts of interest?

Individuals to whom a conflict of interest applies may not participate in the award procedure (Section 6, para. 1 VgV). A conflict of interest leading to a ban on participation is assumed to exist in the case of individuals who:

- are applicants or bidders;
- are consultants of an applicant or bidder or otherwise support them, act as their legal representative, or merely represent them during the award procedure; or
- are employed by or work for:
  - an applicant or bidder on a remuneration basis or who are engaged as a member of the applicant's or bidder's board, supervisory board or similar body; or
  - an undertaking engaged in the award procedures in cases where this undertaking simultaneously maintains a business relationship with the public contracting entity and the applicant or bidder.
- The presumption with regard to the aforementioned persons also applies to persons whose relatives fulfil these requirements. Relatives are the fiancé, spouse, life partner, relatives and in-laws in the direct line, siblings, children of siblings, spouses and life partners of siblings and siblings of spouses and life partners, siblings of parents as well as foster parents and foster children.

It should be noted that in the specific examples described above, an assumed conflict of interest may be refuted.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

If an undertaking or other company associated with this undertaking has already provided advice to the public contracting entity or otherwise been involved in the preparation of the award procedures, the public contracting entity must take suitable measures to ensure that competition is not distorted through the participation of this undertaking (Section 7 VgV). This includes, in particular, ensuring that the other undertakings participating in the award procedures have the same level of information as the previously involved undertaking. In addition, the deadlines for the submission of the tenders and applications to participate must be set so as to be reasonably achievable for all interested parties. Exclusion from the call for competition procedure due to prior involvement is only permitted as a last resort (§ 124 (1) No. 6 GWB).

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

The exceptions provided for by German procurement law, in which no procurement law provisions apply, are governed by Sections 107, 108, 109 GWB. The areas correspond to the regulations of the EU public procurement directives. On the one hand, general exceptions are regulated in various areas (arbitration and mediation services, rental and purchase of land and other real estate, employment contracts, civil protection and hazard prevention, and security-related contracts). In addition, exceptions apply pursuant to Section 108 GWB for public-public cooperations, as well as for contracts awarded in accordance with internationally regulated procedures to the contrary.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

Like the EU public procurement directives, the GWB also provides an exception to the rule on the application of public procurement law for in-house contracts. This exemption applies if a contracting authority awards a contract to a legal entity and exercises the same control over this entity as over its own departments, if at least 80% of the contractor's activity serves the tasks with which it has been entrusted by the contracting authority and if there is no direct private equity participation (Section 108 GWB). An in-house procurement exempted from public procurement law may also exist if the control over the contractor is exercised jointly with other contracting authorities. In other cases, an exemption may be justified by the fact that the contract is concluded between two contracting authorities if they thereby intend to achieve their common objectives.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

Public contracts that are above the threshold values and must be published throughout Europe are subject to the legal remedies regulated in the GWB. The merely nationally conducted award

procedures are subject to other legal remedies, which are determined differently by the federal states.

The bidders involved in the award procedure have a subjective right to have the decisions of the contracting authority reviewed (Section 155 GWB). This requires that the applicant claims that his own rights have been violated, which can be assumed if he has been disadvantaged as a competing bidder. The appeal procedure (*Nachprüfungsverfahren*) is initiated upon application. The public procurement chambers of the federal states set up for this purpose are responsible for this.

Moreover, the proceedings are only opened if the applicant has complained about the contracting authority's irregularity in advance within a certain time frame, thus assuring the contracting authority of a chance to remedy the irregularity. The Procurement Chamber finally decides on the existence of an irregularity in the award procedure and orders measures to remedy this irregularity.

The decision of the Public Procurement Tribunal can be challenged with an immediate appeal (Section 171 GWB). The appeal proceedings take place before the competent Higher Regional Court. All decisions made at first instance can be challenged in this way. The immediate appeal must be filed within a period of two weeks after the decision of the Procurement Chamber. All parties to the first instance proceedings are entitled to do so.

During the proceedings in both instances, the suspensive effect takes effect (Section 173 (1) GWB). This means that the award may not be made until the proceedings have ended. During the appeal proceedings, however, this suspensive effect must be applied for separately.

The proceedings are subject to the principle of acceleration and are to be concluded as quickly as possible in order not to delay the time until the award of the contract unnecessarily.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

Above the threshold values, primary legal protection can only be obtained through the review procedure. In addition, the aggrieved bidder can assert claims for damages against the contracting authority. These initially include the costs that the bidder had to expend for the unsuccessful preparation of the bid. If further conditions are met, the contracting authority is liable in the amount of the bidder's lost profit.

Below the threshold values, no primary legal protection is granted in most federal states through review procedures or similar. The award can only be effectively prevented by applying to the civil courts for an interim injunction prohibiting the contracting authority from awarding the contract. In addition, it is also possible here to assert claims for damages.

5.3 Before which body or bodies can remedies be sought?

The legal protection system in the procurement law sector consists of two instances.

The first is that, above the thresholds, the public procurement tribunals are solely responsible for the review of award procedures.

One or more of these tribunals are established in each federal state. In addition, there is a national procurement chamber. These are not courts in the true sense of the word and are integrated into the authorities of the federal states and the federal government. The public procurement chambers are organised similarly to courts and are staffed with permanent decision-making personnel.

In the second instance, the Higher Regional Courts are responsible for reviewing the decisions of the Public Procurement Tribunals.

In rare cases, the Federal Supreme Court is consulted on fundamental legal questions.

5.4 What are the limitation periods for applying for remedies?

An application for review can only be validly filed if the wrongful conduct of the contracting authority has been objected to in advance (Section 160 GWB). The objection must specify the conduct of the contracting authority which, in the opinion of the applicant, has led to an infringement of procurement law. In cases where the infringement was already apparent from the tender notice or the tender documents, this infringement must have been objected to before the expiry of the time limit for submission of tenders or participation. The complaint must always be submitted no later than 10 days after the infringement has become apparent to the complaining party.

After the contracting authority's notification that it does not intend to remedy the complaint, the application for review must be submitted within 15 days.

5.5 What measures can be taken to shorten limitation periods?

There are no possibilities to shorten limitation periods in direct connection with review procedures.

The contracting authority can only shorten the standstill period before the award is made by sending the information on the planned award electronically or by fax. The period is then reduced from 15 to 10 days. This leaves less time for the unsuccessful bidder to submit its application for review.

5.6 What remedies are available after contract signature?

An awarded contract cannot be annulled in the usual review procedure. Nevertheless, a public contract may be declared invalid from the outset if the contracting authority violates its standstill obligation after prior publication of the award, or awards the contract without EU-wide publication. In review proceedings, the Public Procurement Tribunal may find such a violation. The application for a declaratory judgment of invalidity must be filed within 30 days of the information on the award of the contract. The invalidity can no longer be established after six months after the conclusion of the contract.

In addition, it is possible to claim damages from the contracting authority.

National authorities and authorities at the level of the federal states also review the contract awards of the contracting authorities. These authorities are not able to annul the contracts concluded, but sanction the contracting authority in cases of hardship.

5.7 What is the likely timescale if an application for remedies is made?

The GWB stipulates that the Public Procurement Tribunal shall render its decision within five months after receipt of the request and must state the reasons for its decision in writing. This is an expression of the general principle of acceleration under public procurement law (Section 167 GWB). In exceptional cases, the

time limit may be extended, but the extension should not exceed two weeks. By waiving an oral hearing, which is possible in exceptional cases, an acceleration can be brought about here.

In the appeal proceedings (second instance) before the Higher Regional Courts, there is no such regulation on time limitation. Accordingly, the proceedings often take longer.

In practice, review proceedings often take up to six months.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

German and European public procurement law is strongly influenced by decisions of the public procurement tribunals and the courts, up to and including the European Court of Justice. Various examples serve as a guide for the prospects of success of review proceedings, which are also used by the public procurement tribunals and courts.

It is difficult to highlight subject areas in which review proceedings are particularly likely to be successful, as the complaints concern many different areas. Overall, it can be stated that, in percentage terms, only a few decisions are made in favour of the applicants. Only 100 of a total of 731 review proceedings before the public procurement tribunals that were concluded in 2022 ended with a decision by the public procurement tribunal in favour of the applicant. However, 214 cases in which the case was terminated without a decision – occasionally in favour of the applicant – must also be taken into account.

5.9 What mitigation measures, if any, are available to contracting authorities?

Apart from compliance with all procurement law requirements throughout the procurement procedure, there are no specific mitigation measures. It is not possible to completely exclude reprimands or the initiation of review proceedings. However, as the number of cases of rejection of applications for review reported by the public procurement tribunals shows, it is difficult for bidders to deal successfully with the procurement review procedure.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

The contracting authority may amend the tender documents in any respect during the ongoing award procedure. However, in procedures without negotiations, changes are in principle only permissible until before the expiry of the tender submission deadline, as the result of the competition may change due to the changes in the tender documents. Changes made to the tender documents may make it necessary to extend the tender submission period in order to give the bidders the opportunity to react to the changes.

In both open and restricted award procedures, changes to the tender documents made by the bidder, regardless of the specific reason, inevitably lead to the exclusion of the respective bidder from the award procedure. In the negotiated procedure or in the competitive dialogue, such changes on the part of the bidder are permissible to a certain extent. However, an exception exists insofar as the minimum requirements and award criteria stated in the tender documents may not be the subject of negotiations. Corresponding changes are not permitted.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

In as far as the award decision is made in an open or restrictive procedure, procurement law provides for a general ban on negotiations. The contracting entity is not permitted to negotiate the contents of the tender, in particular, changes to the goods and services offered, or the prices, with the bidder.

In a negotiated procedure or competitive dialogue, negotiations are also possible after a tender has been submitted. However, negotiations with only one preferred bidder in the final phase of a negotiated procedure are not permitted if several bidders are still in competition. The remaining bidders must always be invited to negotiate.

6.3 To what extent are changes permitted post-contract signature?

Following the conclusion of the award procedure, major changes to a contract during the contract period necessitate a new award procedure (§ 132 (1) GWB) as this would otherwise represent an unlawful *de-facto* award. A major change is considered when new conditions are introduced that would have permitted other applicants and bidders to be admitted to the original proceedings or another tender to be accepted, or when there is a shift in economic balance in favour of the contractor.

However, changes in accordance with § 132 (2) GWB are permissible without new proceedings, where:

- explicit, exact and unambiguously worded review clauses or options are provided for in the original tender documentation (No. 1);
- additional supplies, works or services have become necessary that were not provided for in the original tender documents and a change of contractor cannot be carried out for economic or technical reasons, and where this would entail considerable problems or substantial additional costs for the public contracting entity (No. 2);
- the change has become necessary due to circumstances which the public contracting entity was unable to foresee within the context of his duty to exercise care, and where the overall character of the contract is not altered as a result of the change (No. 3); or
- a new contractor replaces the previous one (No. 4) (please refer here to question 6.4).

In the cases described in § 132 (2) Nos. 2 and 3 GWB, the price may not be increased by more than 50% of the value of the original contract. Where there has been a succession of changes to the contract, this limitation applies to the value of each individual change, in as far as the changes are not carried out with the intention of circumventing the regulations.

Furthermore, as per § 132 (3) GWB, changes that do not require new award procedures are possible where the overall character of the contract remains unchanged, the value of the change does not exceed the respective threshold and does not amount to more than 10% of the original contract value in the case of supply and service contracts, respectively, 15% in the case of construction contracts, whereby the total value of all changes is decisive in the case of several successive changes.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

A change of contractor during the contract period constitutes a major change that requires new award procedures.

In accordance with § 132 (2) No. 4 GWB, there are exceptions to this rule when a new contractor replaces the previous one:

(a) based on a review clause in line with § 132 (2) No. 1 GWB;
(b) due to the fact that another undertaking, fulfilling the originally stipulated requirements pertaining to suitability, wholly or partially supersedes the original contractor in the course of a restructuring of the undertaking (for example through a takeover, merger, acquisition, or insolvency, in as far this does not result in any major changes as described in paragraph one above); or
(c) due to the fact that the public contracting entity itself takes on the commitments of the main contractor *vis-à-vis* the latter's subcontractors.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The sale of company shares during the privatisation process does not generally represent a procedure which is subject to procurement law. However, other rules apply in the case of a simultaneous award decision. This may turn the transaction, which has to be viewed as a whole, into a public contract which underlies procurement law.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The private partner must always be selected by the contracting authority in compliance with the relevant procedural requirements of public procurement law. In this context, it is important to take into account some special features that are inherent in the nature of PPP projects. For example, PPP models already have special requirements that must be taken into account when determining requirements. In addition to a PPP suitability test prior to the tender, a comparison of procurement options must be carried out once the result of the tender is available.

Public procurement law does not provide for special rules in relation to PPPs. Due to their complexity, it is normally possible to fall back on a negotiated procedure with a call for competition procedure, or a competitive dialogue.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

National procurement law is subject to constant change. It is to be expected that the federal state of Saxony, as the only remaining federal state that still applies the VOL/A, will replace it with the UVgO. However, it is not yet foreseeable exactly when this will happen.

In general, the EU thresholds increased from 1 January 2024. The new values will be as listed below:

- Supply and service contracts ("classic"): 221,000 euros (previously: 215,000 euros).
- Supply and service contracts (sector area, defence/security): 443.000 euros (previously: 431,000 euros).
- Supply and service contracts (upper and supreme federal authorities): 143,000 euros (previously: 140,000 euros).
- Construction contracts/concessions: 5,538,000 euros (previously: 5,382,000 euros).

The Commission calls on the Member States to contribute to the establishment of a common EU road map of joint procurement and coordination procedures for the establishment of a federated quantum infrastructure. Member States should also promote the availability of legal and technical support for the procurement and deployment of trustworthy and best-in-class artificial intelligence solutions. They should also support the development and deployment of trustworthy, effective, superior and advanced cloud computing services. The latter should include joint procurement efforts.

Finally, Member States should support the shared use of data in a secure and trustworthy way. This should be done, *inter alia*, by contributing to the recently created "common European data spaces" and by supporting the widespread use and procurement of big data solutions. The Commission announces that it will continue to monitor and report on Member States' progress in implementing the above recommendations in the coming years.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

The Federal Ministry for Economic Affairs and Climate Protection (BMWK) wants to transform public procurement law. Public procurement procedures are to be simplified, professionalised, digitalised and accelerated. The ministry has carried out an extensive public consultation on this. The following should be addressed in a more targeted manner:

- strengthening environmentally and climate-friendly procurement;
- strengthening socially sustainable procurement;
- digitalisation of the procurement process;
- simplifying and accelerating procurement procedures; and
- promoting medium-sized companies, start-ups and innovations.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

The Supply Chain Due Diligence Act (LkSG) came into force on 1 January 2023 and has since comprehensively set out corporate due diligence obligations for the respect of human rights and the protection of environmental concerns in law. Companies are obliged to establish effective risk management in order to identify, avoid or minimise risks of human rights violations and certain environmental damage. In the event of a breach of the LkSG, bidders – subject to the further requirements of Section 22 (2) LkSG – may be excluded from the award procedure for up to three years (see also Section 124 (2) GWB). It should be noted here that the Supply Chain Due Diligence Act will apply to companies with over 1,000 employees from 1 January 2024. Previously, it applied to companies with over 3,000 employees. Furthermore, the LkSG also provides for obligated companies to cooperate with suppliers to fulfil their due diligence obligations, even if they are not themselves obligated under the LkSG.

Since 12 October 2023, companies must report the receipt of subsidies from third countries in certain procurement procedures. The legal basis for this is the EU regulation on subsidies

from third countries (Foreign Subsidies Instrument – FSI). This means that the FSI, which came into force on 1 December 2023, is now fully in force.

The so-called "eForms", which have been available for voluntary use since November last year, must be used for EU-wide procurement procedures from 25 October 2023.

Implementing Regulation 2019/1780 of 23 September 2019 on the introduction of standard forms for the publication of notices for public contracts ("electronic forms – eForms") stipulates that from 25 October 2023, the new electronic standard forms ("eForms") must be used in Europe-wide procurement procedures instead of the previous forms under Regulation 2015/1986.

This is therefore an innovation of considerable practical relevance. In order to be able to map the new processes internally with sufficient lead time, contracting authorities should follow the introduction process particularly closely. A transitional period has not been granted, meaning that only eForms may be used from 25 October 2023.

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LEINEMANN PARTNER Rechtsanwälte was founded on 1 January 2000. The start of the new millennium marked the beginning of an innovative law firm, which set clear signs with its focus on Construction Law, Real Estate Law and Public Procurement Law. Since then, the five-person start-up has evolved into one of the market leaders in its areas of law. With more than 100 lawyers and six offices throughout Germany, LEINEMANN PARTNER has become a brand for highly qualified lawyers, for fast responses to clients as well as for economic and legal success.
In our core disciplines we are shaping current legal literature through textbooks, articles in professional journals and as publishers, editors and as publishers or regular contributors to relevant periodicals. Many attorneys in our firm have teaching positions at several universities and some are also non-executive members in advisory boards of various companies.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Public procurement in Greece is mainly regulated by Law 4412/2016 on the 'Public works, supplies and services contracts – Transposition of Directives 2014/24/EU and 2014/25/EU' (OJ 147/A/08.08.2016), and by Law 4413/2016 on the 'Award and execution of concessions – Transposition of Directive 2014/23/EU' (OJ 148/A/08.08.2016).

On 9 March 2021, Law 4782/2021 (OJ 36/A/09.03.2021) on the 'Modernisation, simplification and reformation of the public procurement framework' entered into force, introducing in-depth reforms. The basic aim was the achievement of higher speed and effectiveness during the award of public contracts and, at the same time, the mitigation of the excessive severity of certain provisions, that sometimes led to an inadequate result.

Furthermore, the Greek authorities have recently adopted the National Public Procurement Strategy (NPPS) for 2021–2025, with key initiatives including the digitalisation of public procurement processes, the introduction of modern tools and e-services, and improvements in the field of governance.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The award of public contracts must comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, the freedom of establishment, and the freedom to provide services; as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. The principle of formality and the obligation to state reasons for unfavourable administrative acts are also applicable.

These underpinning principles, which provide legal guidance upon issues that are not explicitly laid down in law, apply in all tendering procedures, notwithstanding the contract's estimated value.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

There are sector-specific regulations which supplement the general rules on public procurement and apply in certain cases, such as Law 3978/2011 (OJ 137/A/16.06.2011), which is applicable to the defence and security sector, Law 3433/2006 (OJ 20/A/07.02.2006) which regulates the procurement of equipment for military forces, and Ministerial Decision No 8028/1/34/2000 (OJ 1101/B/06.09.2000), which determines the procurement of goods of a confidential nature for the police forces.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Public authorities must comply with general administrative law and act in compliance with the principle of sound administration.

In addition, the Central Electronic Registry for Public Procurement (KIMDIS) is a transparency register. Since its operation, it has been compulsory for all contracting authorities to publicise on KIDMIS all acts or documents related to the life cycle of a public contract (i.e., requests for procurement, calls for tenders, contract award decisions, signed contracts and payment orders).

Furthermore, a central online hub, the National System of Electronic Public Procurement (ESIDIS) has been set up offering e-access, e-notification and e-submission services. In view of the latest amendments of Law 4782/2021, when the estimated value of a contract exceeds EUR 30,000, it is compulsory for such procurement procedure to be conducted electronically through ESIDIS.

Moreover, transparency is also served through prior judicial review by the Greek Court of Auditors. As far as the legality and regularity of public expenditure are concerned, public contracts exceeding a certain amount fall within the range of the judicial review of the Greek Court of Auditors, according to the provisions of Articles 324–337 of Law 4700/2020.

Contracts subsidised by EU funds fall within the range of additional reviews carried out by the governmental or regional Managing Authorities.

Furthermore, a digital platform will be launched by 2024 for the collection of statistical data held by judicial, supervisory and law enforcement authorities, which will also improve the Central Register of Beneficial Owners under Article 20 of Law 4557/2018 in order to facilitate the direct access of the competent authorities to this information and the interconnection with the respective registers of the EU Member States through the relevant EU platform.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Law 4412/2016 has transposed the EU public procurement directives covering tenders above EU thresholds, among others,

into national law. Furthermore, Law 4412/2016 governs the award procedures for contracts below the EU thresholds, as well as procedural and technical issues, which are in conformity with EU principles.

In the case of international agreements, the explicit provisions of Article 25 of Law 4412/2016 ensure that the EU's commitments arising from international agreements, such as the World Trade Organization Government Procurement Agreement (GPA), are fully respected.

In view of the above, the Greek procurement market does not impose any obstacles on financial entities originating from Member States of the European Economic Area (EEA) Agreement or from countries that are signatories to the GPA.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

Law 4412/2016 applies to both public and private entities, in their capacity as purchasers.

Regarding public entities, Law 4412/2016 applies to the Hellenic Republic, regional or local authorities, public authorities or associations formed by these authorities or, in general, entities governed by public law.

The private entities covered by Law 4412/2016, as purchasers, are those that fall within the definition of 'bodies governed by public law' which, in accordance with consistent case-law of the Court of Justice of the European Union, are: (a) established for the specific purpose of meeting needs in the general interest and not having an industrial or commercial character; (b) wholly or substantially financed by the State; and (c) subject to State management or supervision.

It should be noted that the Hellenic Corporation of Assets and Participations S.A. (HCAP) and its subsidiary companies (such as the Hellenic Republic Asset Development Fund S.A. (HRADF), and the Hellenic Public Properties Company S.A. (HPPC), which are entrusted with the privatisation and the management of valuable assets of the Greek State), as well as the Hellenic Financial Stability Fund, are permitted to substantially deviate from certain provisions of Law 4412/2016 by virtue of the relevant provisions of the latter, in conjunction with Law 4389/2016. However, they are still required to comply with Directives 2014/24/EU and 2014/25/EU.

Furthermore, the Hellenic Telecommunications Organisation S.A. (OTE), and several companies listed on the Athens Stock Exchange which do not constitute a contracting entity of the utilities sector, may under several conditions be considered not to fall within the scope of Law 4412/2016.

2.2 Which types of contracts are covered?

The following types of public contracts are covered by Law 4412/2016:

(a) Work contracts.
(b) Supply contracts.
(c) Provision of services contracts – according to domestic law, these are further classified into 'general services' having as their subject matter consultancy services in all sectors of the economy and 'contracts of designs, technical and other related scientific services'.
(d) Mixed contracts having as their subject matter different types of the abovementioned contracts.
(e) Social and other specific services – existing rules lay down a 'light regime' for health, social, educational and cultural services.
(f) Framework agreements.
(g) Contracts assigned by entities operating in the water, energy, transport, and postal service sectors.

The award and execution of concessions contracts is governed by Law 4413/2016.

2.3 Are there financial thresholds for determining individual contract coverage?

The EU thresholds laid down in Law 4412/2016, which are periodically subject to revision, are (according to the recently introduced Regulation (EU) 2023/2495 2023/2496 and 2923/2497) as follows (excluding value-added tax (VAT)):

- EUR 5,538,000 for public works and concession contracts.
- EUR 143,000 for supply and services contracts of 'central government authorities' (e.g., ministries or local government bodies).
- EUR 221,000 for supply and services contracts of 'non-central contracting authorities' (i.e., all of the remainder except for ministries and local government bodies).
- EUR 750,000 for social and other specific services (the 'light regime').

For contracts of a value below EU thresholds, the following financial ceilings apply:

- Up to EUR 2,500 the contract award is considered *de minimis*: no formalities e.g., call of interest, contract award or written agreement, are required and the supplier may be paid simply by issuing an invoice.
- Up to EUR 30,000 contracting authorities may proceed to a direct award.
- From EUR 30,001 to the estimated value set out by the relevant EU thresholds, a formal contract award procedure may apply, which is conducted via electronic means (see question 1.4).

Concerning public works, as well as social and other specific services, contracting authorities are exceptionally permitted to proceed to a direct award of contract with an estimated value of up to EUR 60,000.

2.4 Are there aggregation and/or anti-avoidance rules?

According to Law 4412/2016, as amended, the estimated value of a public contract is based on the total payable amount, excluding VAT, as estimated by the contracting authorities, and must include any form of option or renewal of the contract.

Special rules are provided regarding the methods for calculating the estimated value of contracts subdivided into lots, where account shall be taken of the total estimated value of all such lots, so as not to circumvent the proper application of public procurement rules.

Furthermore, it is prohibited to aggregate the procurement to award it as a whole to just one tender unless this is fully justified. Therefore, public contracts should be divided into lots in order to allow small and medium-sized entities to win some lots.

As far as framework agreements and dynamic purchasing systems are concerned, the value to be taken into consideration must be the maximum estimated value of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

Special rules for concession contracts are laid down in Law 4413/2016, which transposed Directive 2014/23/EU into Greek law, providing an adequate, balanced, and flexible legal framework for the award and execution of service concession contracts.

The distinguishing feature of a concession contract is the transfer to the concessionaire of the operating risk, entailing the possibility that it will not recoup the investments made and the costs incurred for the operation of the works or services awarded under normal operating conditions.

2.6 Are there special rules for the conclusion of framework agreements?

Special rules for the conclusion of framework agreements are laid down in Article 39 of Law 4412/2016.

A framework agreement is used when the purchaser does not exactly know whether he will have a specific need in the future or when such need will occur. This type of contract is most commonly used in Greece for big supply contracts and in the healthcare sector. More specifically, when the award of a framework agreement refers to pharmaceutical products or goods, Law 4412/2016 provides that the framework contract must be awarded to more than one bidder.

A framework agreement has a duration of four years except in extraordinary cases, which need to be duly justified. The call-off contracts, which are concluded based on a framework agreement, may not be subject to prior judicial review by the Greek Court of Auditors if their specific amount (consideration) does not exceed individually the threshold required by the law, irrespective of the amount of the framework agreement.

2.7 Are there special rules on the division of contracts into lots?

Special rules on the division of contracts into lots are set forth in Article 59 of Law 4412/2016. As a rule, contracting authorities shall divide a contract into lots in order to facilitate the access of SMEs to public contracts. If the tender is not divided into lots, the contracting authority shall duly justify such decision.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Suppliers established outside Greece are not restricted from participating in public procurement procedures in Greece and are treated in a non-discriminatory way.

Currently, according to Article 5 (k) of Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, it is prohibited to award or continue the execution of any public or concession contract falling within the scope of the public procurement Directives to or with:

(a) a Russian national, or a natural or legal person, entity or body established in Russia;
(b) a legal person, entity, or body whose proprietary rights are directly or indirectly owned for more than 50% by an entity referred to in point (a) above; or
(c) a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) above, including, where they account for more than 10% of the contract value, subcontractors, suppliers or entities whose capacities are being relied on within the meaning of the public procurement Directives.

Consequently, economic entities that fall under the above prohibition are not entitled to participate in the tender procedures.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

Law 4412/2016 sets out the rules for the application of the award procedures available, for contracts with an estimated value both above and below the relevant EU thresholds.

(a) For contracts that exceed EU thresholds, a contract may be awarded pursuant to the following procedures, between which the contracting authority can choose freely, without prejudice to the procedures which require prior written consent provided by the Hellenic Single Public Procurement Authority, as outlined below.

- **Regular procedures**:
  - *Open procedure.* In an open procedure, the contracting authority publishes a call for tenders and any interested economic operator may submit a bid according to the conditions and the framework set forth by the call for tenders. The stages of this procedure are as follows: (1) opening of the tenders – review of the letter of guarantee and the supporting documents for participation, evaluation of the adequacy of the tenders with regard to the technical specifications, and technical evaluation of the tenders (if applicable); (2) financial evaluation of the tenders and inspection of the supporting documents for the award of the contract; and (3) award of the contract. According to the latest modification introduced by Law 4782/2021, the stages of the financial evaluation of the tenders and the inspection of the supporting documents for the award of the contract have been consolidated. Where only one bid is submitted, or the award criterion is that of the lowest price, the contracting authority issues only one enforceable decision, encompassing the above-mentioned stages along with the stages of the examination of the exclusion grounds and the assessment of the technical part of the tenders, which can be challenged by filing a pre-judicial objection before the independent Single Authority for Public Contracts (H.S.P.P.A.), as analysed under question 5.1.
  - *Restricted procedure.* The Restricted Procedure is a two-stage process. The first stage is a selection process, where the bidders' capability, capacity and experience to perform the contract is assessed to shortlist bidders. This means the number of bidders can be reduced at the selection stage. The second stage is when the Invitation to Tender is issued and the bids are assessed to determine the most economically advantageous tender, on the basis of the award criteria.
- **Special procedures**:
  - *Competitive procedure with negotiation.* It should be stressed that the decision of a contracting authority to have recourse to the competitive procedure with negotiation due to submission of improper tenders is subject to prior written consent provided by the Hellenic Single Public Procurement Authority.

- *Negotiated procedure without prior publication*. It should be stressed that a decision of a contracting authority to have recourse to this exceptional procedure is subject to prior written consent provided by the Hellenic Single Public Procurement Authority.
- *Competitive dialogue*.
- *Innovation partnership*. The concept of 'Innovation partnership' was first introduced by Law 4412/2016, however its implementation remains *terra incognita* for the contracting authorities.

(b) For the award of contracts that fall below EU thresholds, Law 4412/2016 lays down the following award procedures:
- All procedures mentioned in point (a).
- Up to EUR 30,000 a direct award based upon negotiations with a single economic entity may apply.
- From EUR 60,001 to the estimated value set out by the relevant EU thresholds, a formal procedure may apply.

Concerning public works, as well as social and other specific services, contracting authorities are exceptionally permitted to proceed to a direct award of contracts valued at up to EUR 60,000.

3.2 What are the minimum timescales?

The minimum timescales for the submission of a request or tender are as follows:

(a) **For contracts above EU thresholds**:
- *Open procedure*: 35 days between the dispatch of the contract notification of tender. This time limit can be reduced to 30 days in the event that the tenders are submitted by electronic means. When a prior information notice has been published, the time limit may be shortened to 15 days.
- *Restricted procedure and competitive procedure with negotiation*:
- 30 days between the dispatch of the contract notice and the submission of a request (first stage). This time limit can be further reduced to 20 days if the tenders are submitted by electronic means.
- 30 days between the dispatch of the invitation to submit a tender and the submission of a bid (second stage).
  Under extraordinary conditions, the timescales of the restricted procedure may be further shortened as follows: 15 days for the receipt of requests; and 10 days for the receipt of tenders.
- *Competitive dialogue and innovation partnership*: 30 days between the dispatch of the contract notice and the submission of a request.
- *Negotiated procedure without prior publication*: The timescale shall be specified in the Request to Participate.

(b) **For contracts below EU thresholds**:
Deadlines start to run from the date of the publication of the call for tenders on KIMDIS (see question 1.2); these deadlines, according to Article 121 of Law 4412/2016, are as listed below:
- *Formal tendering*: 15 days from the date on which the call for tenders was published.
- *Direct award*: within a period of five days after the call for tenders is published on KIMDIS.

(c) **For concession contracts falling under the scope of Law 4413/2016**:
As far as the timescales for concession contracts are concerned, Article 43 of Law 4413/2016 provides that the minimum time limit for the receipt of applications, whether they include tenders or not, is 30 days from the date on which the concession notice was sent. Where the procedure takes place in successive stages, the minimum time limit for the receipt of tenders is 22 days from the date on which the invitation to tender was sent, which may be reduced by a further five days where the tenders were submitted via electronic means.

3.3 What are the rules on excluding/short-listing tenderers?

To be eligible, bidders must prove that they are qualified and efficient according to the selection criteria of each contract. Law 4412/2016 includes:

(a) **Exclusion grounds** (Articles 73–74) related to the status of the economic operators, leading to compulsory or potential exclusion from the contract award procedure, are laid out as follows:
- *Compulsory exclusion grounds*:
  - The economic operators' legal representative(s) has (have) been the subject of a conviction by final judgment for certain criminal offences.
  - The economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.
  - The economic operator has been sanctioned for specific labour law infringements of major importance.
    For contracts of a value above EUR 1 million, economic operators should pay particular attention to Law 3310/2005, according to which the status of an owner, partner, substantial shareholder or director of a media company is deemed to be incompatible with the status of the owner, partner, substantial shareholder or director of a contractor of a public contract.
- *Potential exclusion grounds*:
  These grounds are specifically laid down in Article 73 paragraph 4 of Law 4412/2016, and may include: non-compliance with environmental, social and labour law rules; cases of bankruptcy, insolvency or similar situations; demonstration of guilt of grave professional misconduct; distortion of competition; and serious deficiencies in performance under a prior public contract, etc.

(b) **Selection criteria**
There are three sets of requirements that bidders must meet in order for them to participate in a public procurement procedure, namely: (a) suitability to pursue a professional activity; (b) economic and financial capacity; and (c) technical and professional skills.
Requirements under (b) and (c) must be specified by the contracting authorities in line with the principle of proportionality. Especially for the requirement listed under (a), as far as works, designs and technical services contracts are concerned, participation in tendering procedures is allowed for companies registered in the 'Register of Contractors' Enterprises' kept by the Ministry of Infrastructure, Transport and Networks of Greece, or in any equivalent register kept in the country where the economic operator has its seat.

(c) **Short-listed tenderers**
In open procedures, bids can directly be submitted further to the publication of a call for tenders without any pre-qualification stage. However, this is not the case under the restricted procedure, competitive procedure with negotiation, competitive dialogue procedure and innovation partnership, where the contracting authorities

may limit the number of candidates in respect of the criteria or the rules defined in the contract notice.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

Public contracts may be awarded on the basis of the Most Economically Advantageous Tender (MEAT) criterion. The most economically advantageous tender may be identified on the basis of the price or cost or on the basis of the best price-quality ratio. In this context, the following novelties of Law 4412/2016 as amended by Law 4782/2021 should be highlighted:

- On the basis of the price or cost: in addition to the cases where a contract is awarded solely on the basis of price or cost, especially for supply contracts, according to Article 95 of Law 4412/2016, the most economically advantageous tender may result as a percentage of a discount offered upon a reference price, which is determined by the contracting authority.
- On the basis of the best price-quality ratio: the contracting authorities take into consideration both the economical and the technical aspects of the tenders submitted, including qualitative, environmental and/or social aspects, linked to the subject matter of the public contract in question. However, contracting authorities, according to Article 86 par. 7 of Law 4412/2016, may decide to award a contract by solely evaluating the technical aspects of a tender, based on a fixed price.

  Additionally, contracting authorities may define criteria related to environmental, social or innovative aspects. In particular, the social characteristics could be related to:
  (a) the employment of workers who belong to vulnerable groups of the population;
  (b) facilitating the social and/or work integration of people from vulnerable groups of the population;
  (c) combating discrimination; and/or
  (d) the promotion of gender equality.

3.5 What are the rules on the evaluation of abnormally low tenders?

In the event that a tender appears to be abnormally low, the contracting authority must seek clarifications from the tenderer. If the clarifications seem to be inadequate, the contracting authority may refuse to award the contract to the economic operator concerned.

Concerning public works contracts, each offer that encompasses a discount that deviates by more than 10% from the average offered discount is deemed to be abnormally low, and thus needs to be justified. The average offered discount is calculated by taking into account all submitted offers.

3.6 What are the rules on awarding the contract?

Contracting authorities are obliged to award the contract in accordance with the chosen award criteria to an eligible tenderer who is not subject to exclusion grounds.

The awarding procedures include the following main phases:

(a) Assessment of the so-called eligibility and qualitative criteria: at the time of submission of tenders, contracting authorities accept the European Single Procurement Document (ESPD), which consists of an updated self-declaration as preliminary evidence in the place of certificates issued by public authorities or third parties.
(b) Evaluation of the so-called award criteria, namely the appraisal of (i) the technical offer (if any), and (ii) the financial offer.
(c) Examination of the supporting evidence that the preferred tenderer is asked to submit concerning the fulfilment of the eligibility and qualitative criteria.

Certificates, statements and other means of proof required by a contracting authority which cannot be issued in another jurisdiction, outside Greece, may be replaced by an affidavit or a solemn declaration. It should be stressed that all documents that form part of a tender, with the exception of technical manuals and brochures, must be submitted in the Greek language or, otherwise, must be duly translated into Greek.

3.7 What are the rules on debriefing unsuccessful bidders?

The relevant decision and its justification must be communicated to the parties concerned. Contracting authorities must state the reasons in a precise and unequivocal manner when debriefing unsuccessful bidders. The rules on debriefing and the rules on remedies are interrelated; the latter is analysed in section 5.

3.8 What methods are available for joint procurements?

As far as joint procurements are concerned, Law 4412/2016 provides the following:

- Occasional joint procurement: two or more contracting authorities may agree to perform certain procurements jointly.
- Centralised purchasing activities and central purchasing bodies: public purchasers may also acquire works, supplies and/or services from a central purchasing body.

3.9 What are the rules on alternative/variant bids?

Contracting authorities may allow tenderers to submit variant bids. In this case, a special provision for variants is required in the tender notice and the contracting authority will indicate the minimum requirements to be met by the variants, otherwise alternative offers are rejected as inadmissible.

3.10 What are the rules on conflicts of interest?

Conflicts of interest should be avoided at every stage of the procurement procedure.

In a case where there is a conflict of interest, persons involved in the conduct of a procurement procedure, or those capable of influencing the outcome of a procedure, must notify the contracting authority of their situation. The contracting authority must then advise the H.S.P.P.A., and take any possible measures in order to avoid any potential distortion of the competition. If a conflict of interest remains, as an *ultimum refugium*, the candidate or tenderer associated with it can be excluded from the procedure.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Market engagement and the involvement of potential bidders in the preparation of a procurement procedure constitute potential

exclusion grounds, as provided for in the Article 73 of Law 4412/2016 and, therefore, may be laid down in the relevant call for tenders. In view of the above, the participants can be required to declare any similar situation in the respective fields of the ESPD.

In this event, the contracting authority provides the tenderers concerned with the opportunity to demonstrate that their participation in the preparation of the contract award procedure cannot cause a distortion of competition. If the latter is not proven, and in the absence of any other mitigating measures, this involvement may lead to the exclusion of the economic operator concerned from the procedure.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Exclusions from the award and monitoring procedures of Law 4412/2016 are listed in Articles 1 and 7–17 of said Law, and cover the following cases:

- Specific exclusions in the field of electronic communications.
- Award procedures organised pursuant to international rules.
- Specific exclusions for service contracts (e.g., acquisition or rental of real estate, legal services, financial services, etc.).
- Service contracts awarded on the basis of an exclusive right.
- Public contracts between entities within the public sector ('in-house' arrangements).
- Public-private partnerships (PPPs) which are excluded from the scope of specific articles of Law 4412/2016 and are mainly regulated by Law 3389/2005.
- Contracts subsidised by contracting authorities.
- Research and development services.
- Defence and security contracts.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

'In-house' arrangements are explicitly excluded by the application of Law 4412/2016, according to Article 12 of the latter. These arrangements allow a contracting authority to award a public contract to a separate legal entity without advertising or calling for competition.

'In-house' arrangements may take the following forms:

- **Vertical agreements**
  A public contract awarded by a contracting authority to a legal person governed by private or public law where: (a) the contracting authority exercises, over the legal person concerned, control which is similar to that which it exercises over its own departments; (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to them by the controlling contracting authority; and (c) there is no direct private capital participation.
- **Horizontal agreements**
  A contract concluded exclusively between two or more contracting authorities falls outside the scope of Law 4412/2016 when: (a) the contract establishes a cooperation between the participating contracting authorities with the aim of ensuring public services and achieving objectives they have in common; (b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and (c) the participating contracting authorities perform on the open market less than 20% of the activities involved in the cooperation.
- **Programme Agreements**
  Similar to in-house agreements, specifically for public works and studies contracts, Article 44 of Law 4412/2016 introduces the tool of 'Programme Agreements', intended to be used by contracting authorities who do not possess a certain standard of technical adequacy to carry out the award procedure under their responsibility. These contracting authorities are entitled to sign a Programme Agreement with a supervising public authority or, in the absence of the latter, with any public authority within the spectrum of 'General Government' (which includes ministries, local government bodies and other entities governed by public or private law), which assumes the responsibility for carrying out the award procedure and the supervision of the awarded contract.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

Law 4412/2016 provides for a set of detailed provisions regarding the review of procurement procedures, which has considerably extended the scope of the Remedies Directive 2007/66/EC.

The dispute mechanism set out in Book IV of Law 4412/2016 applies not only to contracts falling within the scope of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, but also to any public contract (in principle) with an estimated value over EUR 60,000 for works and EUR 30,000 for services and supplies.

Specifically, under Book IV of Law 4412/2016, as amended by Law 4782/2021 with a view to speeding up the award procedures, the review process is the following:

(a) **Administrative remedies** (Articles 360–367): Any act or omission of a contracting authority, which is enforceable and is deemed to infringe EU or Greek legislation can be challenged by filing a **pre-judicial objection** (appeal) before H.S.P.P.A. For the admissibility of the pre-judicial objection, complainants have to pay an administrative fee that amounts to 0.5% of the estimated value (excluding VAT) of the contract.

(b) **Judicial remedies** (Article 372): Acts of H.S.P.P.A. may be challenged before the competent Administrative Courts by both contracting authorities and interested economic operators. More specifically, any interested party may file a **single application** for both the suspension and the annulment of the act concerned. The latter represents a remarkable novelty of Law 4782/2021, since, before its entry into force, interested parties were required to file two separate applications, one for the suspension and one for the annulment of the act concerned. For the admissibility of the application for suspension and annulment, applicants must pay an administrative fee that amounts to 0.1% of the estimated value (including VAT) of the contract.

For contracts of an estimated value below EUR 60,000 for works and EUR 30,000 for services and supplies, Law 4412/2016, as amended by Law 4782/2021, no longer foresees an administrative remedy. However, any enforceable act relating to an award procedure may be challenged directly before the competent Administrative Courts, by filing an application for suspension and an application for annulment. For the admissibility of

both applications, the economic operator concerned is required to pay an administrative fee amounting to 5% of the estimated value (excluding VAT) of the contract.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

In a case where national contracting authorities violate their obligations deriving from EU public procurement law, an economic operator may lodge a complaint before the European Commission.

Moreover, at national level, public procurement procedures may be subject to audits carried out by various national authorities responsible for budgetary surveillance or public administration transparency. On this basis, a relevant complaint may be filed before the National Transparency Authority or, in the case of public contracts co-financed by EU funds, before the competent regional or sectoral Managing Authority.

5.3 Before which body or bodies can remedies be sought?

By virtue of the recently enacted Law 4912/2022, two independent bodies have been merged, in order to strengthen the optimal use of their experience and know-how, establishing one single independent authority, the so-called Hellenic Single Public Procurement Authority (H.S.P.P.A.).

The H.S.P.P.A. is the competent authority for all public contracts and the effective monitoring of the correct application of the national and EU public procurement law by the contracting authorities. Moreover, H.S.P.P.A. is the competent authority for the examination of pre-judicial objections submitted prior to the award of public contracts.

Having said that, the competent bodies for the remedies provided for in Law 4412/2016 are as follows:

(a) For contracts of an estimated value over EUR 60,000 for works and over EUR 30,000 for services and supplies:
- Pre-judicial objections may be brought before H.S.P.P.A.
- Applications for both suspension and annulment of H.S.P.P.A's acts may be brought before the competent Administrative Court of Appeal. For contracts of an estimated value over EUR 15,000,000, the jurisdiction lies with the Council of State. Similarly, disputes arising from the award of concession contracts falling within the scope of Directive 2014/23/EU or PPPs falling within the scope of Law 3389/2005 are brought before the Council of State.

(b) For contracts of an estimated value below EUR 60,000 for works and EUR 30,000 for services and supplies, applications for the annulment and the suspension of the contracting authorities' enforceable decisions are lodged before the Administrative Court of Appeal.

5.4 What are the limitation periods for applying for remedies?

The limitation periods for applying for remedies provided for in Law 4412/2016 are relatively short and, as a consequence, require the complainant to be prompt. Specifically:

(a) For contracts of an estimated value over EUR 60,000 for works and EUR 30,000 for services and supplies:
- The time limit for lodging a pre-judicial objection before the H.S.P.P.A is 10 days from the notification of the contested act, in case of notification sent by electronic means, or 15 days if other means of communication have been used or in case that the objection concerns an omission.

  The time limit for lodging an application for both the suspension and annulment is 10 days after the issuance of the H.S.P.P.A's act. During the abovementioned period, the award procedure shall be suspended.

(b) For contracts of an estimated value below EUR 60,000 for works and EUR 30,000 for services and supplies:
- The time limit for lodging an application for the annulment of the contracting authorities' enforceable decisions is 60 days of their issuance.
- There is no time limit for lodging an application for the suspension of the contracting authorities' enforceable decision, however it should be carried out with no delay, otherwise the contract may be irrevocably concluded.

5.5 What measures can be taken to shorten limitation periods?

Apart from the possibility of shortening the limitation period for lodging a pre-judicial objection due to the use of electronic communication (as stated in question 5.4), no further relevant measures are foreseen in Law 4412/2016.

5.6 What remedies are available after contract signature?

Following the conclusion of a public contract, Law 4412/2016 provides for a dispute resolution system which is applicable to disputes arising from the **award procedure** as follows:

(a) Administrative remedies for the annulment of the signed contract (Article 368) are provided for the following reasons:
- the contracting authority has awarded the contract without prior publication of the notice;
- the obligation to suspend the conclusion of the contract has not been complied with; or
- the relevant (specialised) award procedures for a framework agreement or for a dynamic purchasing system have been violated.

  The relevant remedies may be lodged before H.S.P.P.A , in principle, no longer than 30 days after the publication of the signed contract. The procedure is subject to the relevant rules laid down above, and H.S.P.P.A's acts may be challenged before the competent Administrative Court.

(b) Claims for damages (Article 372 par. 9): In the case that no interim relief measures have been awarded, following an application for suspension and annulment (as stated in question 5.1), and the relevant actions of the contracting authority have been annulled after the conclusion of the contract, no remedies are provided for the annulment of the signed contract. However, the party in question may still protect its legal interests by filing a claim for damages.

In addition, Law 4412/2016 provides for a dispute resolution system applicable to disputes arising from the **execution of the contract**, as follows:

(a) Administrative remedies against any decision or omission regarding the contract execution period may be submitted before the contracting authority, for services and supplies, or before the Minister of Infrastructure and Transport for works contracts.

(b) Regardless of the estimated value of the contract and irrespective of the contracting authority's legal nature, decisions of the contracting authority or of the Minister of

Infrastructure and Transport may be contested before the competent Administrative Courts.

(c) Accordingly, the claim for damages during the contract execution period may be brought exclusively before the competent Administrative Courts.

5.7 What is the likely timescale if an application for remedies is made?

The timescale of the review procedure applicable to contract award procedures governed by Law 4412/2016 is defined, as follows:

(a) Before the H.S.P.P.A.:
- The case must be heard within 40 days after the filing of the objection.
- The time limit for the issuance of the ruling is 20 days after the hearing.

(b) Before the competent Administrative Court of Appeal:
- For a period of 15 days after the filing of the application, the awarding procedure shall not proceed.
- Within the same period, interim relief measures may be awarded by the Administrative Court.
- The application for annulment must be heard no later than 60 days after its filing.
- The court decision is issued within 15 days after the hearing.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

Here are some examples of recent cases worth noting:

(a) **Council of State – Ruling no. 136/2023**
This decision is of paramount importance not only because it concerns a major project involving the operation and maintenance of the Thessaloniki Metro, but also because it addresses a highly complex legal issue. The question that arose in this case is whether the contracting authority may not accept the support offered to an economic operator by a third party for a specific task of the contract – although there is no such provision in the relevant legislation – considering that subcontracting is explicitly and lawfully excluded by the call of tender for the relevant task.
The Court, held that contracting authorities possess wide discretion in establishing tender requirements, even having the power to prohibit subcontracting for specific parts of the contract. In such case, the contracting authority may also provide that bidders cannot rely on third parties' previous experience related to these specific parts of the contract, since the third party is obliged to execute the specific tasks, according to the relevant legislation. Consequently, allowing reliance on third party would breach the prohibition that these particular tasks shall not be executed by other economic operator besides the contractor, a rule designed to safeguard public interest.

(b) **Athens Administrative Court of Appeal – Ruling no. 436/2023**
On the basis of Article 78 of Law 4412/2016 a contracting authority may ask bidders to replace a third party that they rely on, when the third party does not meet the relevant selection criterion or fall within the scope of the exclusion grounds provided for in Articles 73 and 74. In this case, the question arose as to whether the substitute of the initial third party must prove the fulfillment of the participation requirements at the time of submitting the bid, or if it suffices to prove them at the stage of entering the tender procedure.
The Court ruled that the substitute third party must prove that it meets the relevant requirements at the point the bidder submits its bid, notwithstanding the fact the substitute joins later. This means that the substitute third party has to meet participation requirements at the stage of the bid submission, ensuring that the principle of equal treatment will not be violated.

(c) **Athens Administrative Court of Appeal – Ruling no. 1208/2023**
According to Article 78 of Law 4412/2016, when a bidder relies on a third party in order to meet the previous experience criterion for specific part of the contract, the third party shall execute the relevant part as a subcontractor. In this case, according to Article 131 of Law 4412/2016, the bidder shall declare the percentage of participation of the third party in the performance of the contract.
The issue at hand is whether the declared percentage of participation of the third party shall correspond to the actual proportion of the specific tasks that will be carried out by the third party to the total subject of the contract. Taking into consideration that the subcontracting percentage of the third party declared by the bidder relates to their business agreement, the Court held the opinion that it is not obligatory that the contractual remuneration of the third party corresponds to the value of the services to be provided in order to carry out the factual contractual subject.
Additionally, the Court ruled that the percentage declared by the bidder as subcontracting services provided by the third party does not have legal consequences on the legality or acceptability of the submitted bid, especially considering the absence of an explicit provision restricting such subcontracting in the relevant call for tenders.

(d) **Plenary Session of the Council of State – Ruling no. 2325/2023**
This case, owing to its significant importance, was referred to the plenary session of the Council of State. According to the provisions of Law 4412/2016, as amended by Law 4782/2021, economic operators are no longer required to provide at the very last stage of the award process evidence related to the participation requirements covering the time of submission of the tender. Instead, at the time of the submission of the tender, participation requirements can be proved only by the European Single Procurement Document (ESPD).
By this ruling, the Plenary Session of the Court confirmed that the ESPD, as a preliminary means of evidence cannot be considered as efficient proof for the conclusion of the award procedure. As a result, regardless of the new provisions of Law 4412/2016, the successful tenderer is still required to provide at the very last stage of the award procedure full evidence covering participation requirements, not only at the time of the final stage, but also at the time of the tender submission.

5.9 What mitigation measures, if any, are available to contracting authorities?

The mitigation measures that a contracting authority may take are as follows:
- The contracting authority can request H.S.P.P.A not to impose the suspension of the tender procedure or, if the contract has already been signed, not to declare it void on grounds of public interest.

- The contracting authority can lodge an appeal against acts of H.S.P.P.A.
- The contracting authority can request the competent Administrative Court not to impose the suspension of the tender procedure or, in the case that a suspension has already been awarded, to revoke it.
- The contracting authority can proceed to the partial annulment of the tender procedure, continuing from the point where an irregularity occurred, or even to cancel the tender procedure and re-launch it (Article 106 paras 2 and 3 of Law 4412/2016).

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

In view of the principles of equal treatment and transparency, the most important cases of pre-contract award modifications and amendments to contract specifications etc., as provided for in Law 4412/2016, are the following:

(a) Article 57 enables contracting authorities to authorise or require tenderers to submit variants. It also sets out certain procedural requirements for the submission of variants, such as the obligation of contracting authorities to clearly state in the contract notice whether they authorise or require variants, as well as the rules governing the evaluation of tenders.

(b) Article 68 foresees that contracting authorities may, under certain conditions, conduct market consultations following the launching of a procurement procedure. Only minor changes to the tender documents arising from the consultations may be confirmed by the contracting authority. In any other case, the contracting authority is obliged to cancel the tender procedure and re-launch it.

(c) Article 104 foresees that the award of a public supply or service contract may, under certain conditions, vary in terms of quantity, in comparison with the quantity initially referred to in the contract notice. Specifically, the definitively awarded quantity may exceed the initially estimated value of the contract by up to 120% or constitute less than 80% thereof.

(d) Article 121 provides that when a provision in the contract notice is amended, the time limit for the submission of tenders should be extended.

(e) Article 53 foresees that when it comes to supply contracts for a delivery period of goods exceeding 12 months, the contract documents must include a clause for the price adjustment, subject to the conditions of Article 132 on the modification of contracts during their term. In this case, the form, method and conditions of the price adjustment must be specified in the contract documents. In service contracts, a clause on price adjustment or the conditions and method of adjustment of the price is not compulsory but may be set out in the contract documents. These provisions have been enacted in order to tackle the results of high inflation rates and the consequences of the Ukrainian conflict.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

As mentioned in question 3.1, negotiations may exceptionally take place only when the negotiated award procedures are applied. Under the regular award procedures, negotiations after tender submission are prohibited.

However, it should be mentioned that, according to established case law, changes to contract specifications are in certain cases permitted after the final evaluation of the offers, but only if the proposed changes are not in favour of the preferred bidder.

6.3 To what extent are changes permitted post-contract signature?

In general terms, post-contract signature modifications may occur provided that they are not substantial. By virtue of Article 132 of Law 4412/2016, the amendment of a concluded contract without the launching of a new procurement procedure is permitted in the following exceptional cases:

- where modifications, irrespective of their monetary value, have been provided for in the initial procurement documents, in clear, precise and unequivocal review clauses;
- for additional works, services or supplies that have become necessary where a change of the contractor cannot be made for economic or technical reasons;
- where the modifications have become necessary as a result of extraordinary circumstances which a diligent contracting authority could not foresee, the modification does not alter the overall nature of the contract, and any increase in price is not higher than 50% of the value of the original contract;
- where a new contractor replaces the one to which the contracting authority had initially awarded the contract under certain conditions; and
- where the modifications, irrespective of their value, are not substantial. Furthermore, a contract amendment may be permitted if the total value of the modification does not exceed both (a) the EU thresholds, and (b) 10% of the value of the initial contract for services and supplies and 15% of the value of the initial contract for works.

The amendment of a contract may, under certain conditions stipulated in Article 132, be subject to prior judicial review by the Greek Court of Auditors, if the initial contract is subject to this judicial review.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

Under the provisions of Article 132 of Law 4412/2016, the replacement of the initial contractor with a new one is considered acceptable only as a consequence of:

- an unequivocal review clause or option;
- universal or partial succession into the position of the initial contractor, following corporate restructuring; and
- in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors.

In addition, Law 4412/2016, as amended by Law 4782/2021, foresees that public work contracts may be executed by a consortium, in which the initially preferred bidder must hold more than 50%, provided that all joint members of the consortium meet the selection criteria set by the call for tenders.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The Hellenic Republic Asset Development Fund (HRADF) was established in 2011 (by Law 3986/2011) and aims to restrict governmental intervention in the privatisation process and further develop said process within a fully professional and private context.

Furthermore, the Hellenic Corporation of Assets and Participations S.A. (HCAP), a 'super fund', was established in 2016 (by virtue of Law 4389/2016) with the objective of owning and managing a large number of assets belonging to the Greek State. The HCAP also operates as the holding company of four subsidiaries, namely: (a) the Hellenic Financial Stability Fund, entrusted with the stabilisation of the Greek banking sector; (b) the HRADF, the entity which has so far managed the privatisation programme; (c) the Hellenic Public Properties Company S.A. (HPPC), which owns and manages all real estate assets of the Greek State; and (d) the Public Participations Company, which holds the participations of the Greek State in a number of public companies.

The HCAP is aimed at exploiting and optimising the value of all assets owned by its subsidiaries, operating under a private company legal structure and, thus, overcoming the bureaucratic obstacles inherent in the operation of public or quasi-public entities. The above framework sets out a very ambitious and challenging privatisation package, the implementation of which could create a 'flood' of investment opportunities.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

PPPs appear to be an appealing vehicle for large-scale projects especially in the fields of environment, waste management, energy, urban development, transport and digital convergence.

Law 3389/2005 relating to 'Public-Private Partnerships' (OJ 232/A/22.09.2005) offers a solid and coherent framework for the implementation and development of PPPs, which has been well 'tested' before the competent courts during its application, thus providing legal certainty.

The 'General Secretariat for Private Investments and PPPs' of the Ministry for Development and Competitiveness is entrusted with the coordination and safeguarding of the interests of all parties by providing clarity, continuity and security at all stages of a PPP project's life cycle.

The principal issues that arise in relation to a PPP project can be summarised as follows:

- The award procedure is excluded from the scope of specific articles of Law 4412/2016 and is based on the provisions of Law 3389/2005. The selected private entities conclude contracts through special purpose vehicles (SPVs) that are established exclusively for the purposes of the project.
- The private entities assume the risks associated with the financing, the availability and the construction of the necessary infrastructure, or the provision of the services against a consideration paid in a lump sum or in instalments by the public entities (availability payments) or the end users of the services (e.g. tolls).

Approval for the inclusion of a PPP project within the framework of Law 3389/2005 is subject to a decision issued by an Inter-Ministerial Committee.

PPP schemes under Law 3389/2005 are a significant means of achieving the strategic priorities of public entities, complementary to other forms of partnership between the public and private sectors, such as concession agreements, which are governed by Law 4413/2016 (see question 2.5).

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

As analysed above, Law 4782/2021 and a series of amendments recently enacted through several laws have introduced extensive changes to the provisions of Law 4412/2016. This major reform of the public procurement rules is aimed at making award procedures more effective and efficient, while neutralising the unreasonable rigour of certain provisions.

Due to the recent introduction of the amendments to Law 4412/2016 it remains to be seen to what extent such amendments satisfy the *ratio* of their introduction and if further reforms are needed to be made towards this direction on the public procurement rules.

The facilitation and timely implementation of investments, that are being realised through public procurement, was mainly addressed by the adoption of Law 4782/2021. Additionally, the critical secondary legislation of the Law 4782/2021 has already been issued, as a component of the NPPS 2021–2025, therefore the legal framework is already functional. Further amendments may take place in the future.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

The completion of the implementation of all four pillars of the National Strategy on Public Procurement 2021–2025, as amended in agreement with the European Commission, is crucial. It encompasses several changes and improvements in the domain of public procurement:

(a) the reform of the regulatory framework for public procurement, including adoption of secondary legislation to fully operationalise the new public procurement legal framework, actions to further simplify and improve the regulatory framework, and to ensure the effective implementation and resilience of public procurement system;
(b) the digital transformation of the public procurement domain and end-to-end eProcurement including evaluation and redesign of information systems, data analytics, and public/private sector synergies;
(c) the governance framework for public procurement (supervision, implementation monitoring, audit, and professionalisation of staff involved in public procurement); and
(d) the wider strategic goals and policy initiatives such as green procurement, procure2innovate, infrastructure modernisation, SME access to procurement, procurement as a leverage tool, efficient use of resources and social procurement.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

Following the enactment of Law 4782/2021, several regulatory developments are anticipated to influence the legal landscape.

Many of the newly introduced provisions within this law are slated for implementation through Ministerial Decisions. Furthermore, it remains crucial to assess the utilisation of existing tools provided by Law 4412/2016, particularly concerning electronic procurement methods like dynamic purchasing systems, electronic catalogues, and auctions. However, contracting authorities appear to maintain a cautious approach towards embracing these electronic procurement mechanisms. The timeline for the implementation of these developments and their potential impact remain subjects of ongoing scrutiny.

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Michailopoulos & Associates Law Firm is a boutique law firm, distinguished for its public finance and business law practice. In this context, Public Procurement Law lies at the core of our practice.
We provide comprehensive legal services across the whole spectrum of public procurement issues by consulting and litigating on behalf of bidders as well as contracting authorities.
We have handled a great number of cases related to contentious proceedings both at an administrative and at a judicial level, provided legal guidance on strategic matters related to the participation of bidders throughout the entire public procurement process, drafted numerous legal opinions on delicate issues related to the participation in tender procedures, and have been involved in significant PPP's projects and concession agreements.
At the same time, our client portfolio contains a variety of public authorities and entities, such as ministries, local government bodies and State-owned companies. Therefore, our profound understanding of the contracting authorities' *modus operandi*, in addition to our extensive experience in advising bidders, render us a key provider of best practice and know-how in this field.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

There is no singular legislation that encompasses all aspects of public procurement in India. Instead, the Department of Expenditure ("**DoE**"), Ministry of Finance, Government of India has issued the General Financial Rules ("**GFR**"), which comprise rules and orders that are treated as executive instructions, to be observed by all entities to whom the GFR is applicable ("**procuring entities**" as detailed in question 2.1), while dealing with matters involving public finances. While the GFR serves as a regulatory framework, it is not covered under any statute. Notably, Chapter 6 of the GFR deals with procurement of goods and services and extends to procurement of works.

In addition to the GFR, the Manual for Procurement of Goods, 2017 ("**MPG**"), Manual for Procurement of Services, 2017 ("**MPS**") and Manual for Procurement of Works, 2019 ("**MPW**") (collectively referred to as "**manuals for procurement**") serve as broad guidelines.

In case of any conflict between the manuals for procurement, the General Instructions on Procurement and Project Management, 2021 ("**Instructions**") issued by the Ministry of Finance shall prevail.

Additionally, the following legislations are applicable:

i. Any contract between the government and the selected bidder is governed by the domestic law on contracts, i.e., the Indian Contract Act, 1872 ("**Contract Act**"), and in case of procurement of goods, such contracts are governed by the Sale of Goods Act, 1930.
ii. Any dispute resolution clause requiring parties to refer disputes to arbitration, in the tender document or in the contract, would be subject to the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").
iii. In case of unfair competition in the procurement process, the Competition Act, 2002 is applicable. Under this Act, any agreement between enterprises engaged in similar or identical trade of goods or provision of services which directly or indirectly results in bid rigging or collusive bidding is presumed to have an appreciable adverse effect on competition.

Some States also have their own legislations on public procurement such as: the Rajasthan Transparency in Public Procurement Act, 2013; the Punjab Transparency in Public Procurement Act, 2019; the Karnataka Transparency in Public Procurement Act, 1999; and the Tamil Nadu Transparency in Tenders Act, 1998.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The core principles enshrined in the GFR are:

i. Every authority delegated with the financial powers of procuring goods in public interest has the responsibility and accountability to bring efficiency, economy, and transparency in matters relating to public procurement and for fair and equitable treatment of suppliers and promotion of competition, for which yardsticks are enlisted in Rule 144;
ii. Rule 173 contains measures for ensuring that purchases are made in a transparent, competitive and fair manner, to secure the best value for money; and
iii. Public procurement procedure should ensure efficiency, economy and accountability in the system for which Rule 174 specifies the issues to be addressed.

Further to the above core principles, the manuals for procurement contain five fundamental principles:

i. **Transparency principle**: procuring entities should do only that which they had professed to do as pre-declared in the relevant published documents.
ii. **Professionalism principle**: procuring entities have a responsibility and accountability to ensure professionalism, economy, efficiency, effectiveness and integrity in the process.
iii. **Broader obligations principle**: procuring entities have the responsibility to conduct public procurement in a manner to facilitate achievement of the broader objectives of the Government.
iv. **Extended legal responsibilities principle**: the Constitution of India guarantees certain fundamental rights including equality before law, obligating "the State" to not encroach upon them. In this context, courts exercise judicial review over public procurements conducted by procuring entities falling within the ambit of "State" in relation to the manner of decision making in respect of fundamental rights, fair play and legality.
v. **Public accountability principle**: procuring entities are accountable for all the above principles to several statutory and official bodies in India such as, the Legislature and its Committees, Central Vigilance Commission ("**CVC**"), Comptroller and Auditor General of India, Central Bureau of Investigations.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

The GFR empowers procuring entities to issue detailed instructions relating to procurement of goods, broadly in conformity with the general rules contained in Chapter 6. Further, for procurement of services, procuring entities should ensure that their detailed instructions do not contravene the basic rules contained in this chapter. However, the Central Government may permit some of the procuring entities, considering unique conditions under which they operate, for all or certain categories of procurements, to adopt detailed approved guidelines for procurement, which may deviate in some aspects.

Consequently, several departments have published manuals/policies to supplement the GFR. For instance:

i. The Ministry of Defence has promulgated the Defence Acquisition Procedure, 2020, the Defence Procurement Manual, 2009 and the Defence Works Procedure, 2020;
ii. The Ministry of Railways has issued the Indian Railway Financial Code, 1998, Indian Railway Code for the Accounts Department, 1997 and the Indian Railway Code for the Stores Department, 1990;
iii. The Ministry of Petroleum and Natural Gas has issued the New Exploration Licensing Policy, 1997 under the Petroleum and Natural Gas Regulatory Act, 2006;
iv. The Ministry of Chemicals and Fertilisers has issued Pharmaceutical Purchase Policy 2013; and
v. The Department of Telecommunications, Ministry of Communications and the Ministry of Electronics and Information Technology have notified mechanisms for procurement of telecom and electronic products from local manufacturers, respectively, pursuant to the Public Procurement (Preference to Make in India) Order, 2017 ("**Make in India Order, 2017**").

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Other areas of national law which are relevant to public procurement are as follows:

i. Under the Right to Information Act, 2005 ("**RTI Act**"), every public authority is obligated to publish crucial information and any person may request for obtaining information from any public authority.
ii. The Integrity Pact ("**IP**") serves as a contract between the procuring entity and the bidders, containing a commitment to the effect that neither side will pay, offer, demand or accept bribes, or collude with competitors to obtain the contract, or while carrying the contract out. The CVC has mandated inclusion of the IP as an annexure to the procurement documents. An Independent External Monitor ("**IEM**") is appointed to oversee the IP's implementation.
iii. The Prevention of Corruption Act, 1988 is the primary anti-corruption statute in India which criminalises receipt of any "undue advantage" by "public servants".
iv. Government officials are also bound to conduct themselves in accordance with the Central Civil Services (Conduct) Rules 1964 and the All-India Services (Conduct) Rules 1968 which prohibit them from receiving gifts or any other pecuniary advantage.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The main international agreement relating to public procurement is the World Trade Organization's plurilateral Agreement on Government Procurement ("**WTO GPA**"). In 2010, India attained an observer status in the WTO GPA but has not acceded to the agreement.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The GFR applies to procurements by:

i. all Central Government Ministries and Departments, units thereof and attached or subordinate offices/units;
ii. any Central Public Sector Enterprise ("**CPSE**") or undertaking which is an incorporeal entity established under any Act in which the Central Government or a Central enterprise owns more than 50 per cent of the issued shared capital; and
iii. any other body (including autonomous bodies) which is substantially owned, controlled by, or receives substantial financial assistance from the Central Government.

For entities with investment from Central Government or any of the aforesaid procuring entities, "substantial ownership and control" must be subjectively examined on a case-by-case basis. While there are several references on what may constitute "substantial ownership" or "control", including regulations applicable to foreign direct investment and public securities, neither the GFR nor the manuals for procurement provide express thresholds for such determination.

In case of procurements by States, the State legislations referred to in question 1.1 contain varying definitions of "procuring entities". For example, "procurement entity" under the Karnataka Transparency in Public Procurements Act, 1999 is defined as "any Government Department, a State Government Undertaking, Local Authority or Board, Body or Corporation established by or under any law and owned or controlled by the Government, and any other body or authority owned or controlled by the Government and as may be specified by it".

2.2 Which types of contracts are covered?

As a rule of thumb, all contracts are sought to be covered by the procurement framework, unless expressly excluded. Illustrations of specific contracts covered by the MPG, MPS and MPW are:

i. turnkey contracts, annual maintenance contracts, and rate contracts;
ii. contracts depending on a different basis for linking payments to the performance of services such as lump sum (firm fixed price) contracts, time-based (retainership) contracts, percentage (success fee) contract, retainership *cum* success fee-based contracts, and indefinite delivery contracts; and
iii. lump sum (firm fixed-price) contracts, item rate (unit rate) contracts, percentage rate contracts, piece work contracts, engineering, procurement and construction contracts, and Public Private Partnerships ("**PPP**").

2.3 Are there financial thresholds for determining individual contract coverage?

Yes, financial thresholds exist for the mode of procurement as well as contract coverage.

i. The purchase of goods and other services up to INR 25,000 can be made without inviting quotations or bids, based on a certificate issued by the competent authority.
ii. The purchase of goods and other services from INR 25,000 up to INR 2,50,000 may be made on the recommendations of a Local Purchase Committee.
iii. Procuring entities may make purchases up to INR 2,50,000 by issuing purchase orders containing basic terms and conditions.
iv. The purchase of goods less than INR 25,00,000 can be made through a limited tender enquiry (inviting select participants as opposed to a public tender).
v. The Government e-Marketplace ("**GeM**") portal can be utilised for direct online purchases of goods and services:
    a. up to INR 50,000 from any of the eligible available suppliers on GeM;
    b. from INR 50,000 up to INR 30,00,000 from the seller having the lowest price amongst at least three eligible sellers of different manufacturers; and
    c. above INR 30,00,000 from the eligible supplier having the lowest price after obtaining bids using online bidding or reverse auction tools.

2.4 Are there aggregation and/or anti-avoidance rules?

Rules on aggregation and anti-avoidance are usually included within tender documents.

The MPS states that in case joint ventures ("**JVs**") are permitted to bid, it should be clarified which qualifications are to be collectively met by the JV partners and which of them each partner must individually meet.

In the MPG, the annexure on sample pre-qualification criteria ("**PQC**") contains a clause stating that while credentials of the partners cannot be clubbed for the purpose of compliance of PQC, for the purpose of qualifying the financial standing criteria, the financial standing credentials of a holding company can be clubbed with only one of the fully owned subsidiary bidding companies, with appropriate legal documents proving such ownership.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

The GFR neither defines nor contains any rule specifically governing concession contracts. However, the term PPP has been defined in the manuals for procurement as follows:

> *"PPP means an arrangement between the central, a statutory entity or any other Government-owned entity, on one side, and a private sector entity, on the other, for the provision of public assets or public services or both, or a combination thereof, through investments being made or management being undertaken by the private sector entity, for a specified period of time, where there is predefined allocation of risk between the private sector and the public entity and the private entity receives performance-linked payments that conform (or are benchmarked) to specified and predetermined performance standards, deliverables or Service Level agreements measurable by the public entity or its representative."*

Further, various Ministries have published their Model Concession Agreements ("**MCAs**") to standardise terms under which licences are granted to private entities. MCAs have been formulated across sectors such as highways, ports, airports, railway stations, metros, in the development of eco-tourism. According to the Department of Economic Affairs ("**DEA**"), Ministry of Finance, in sectors where there are no MCAs available, the MCA for development of national highways may be used for preparation of concession agreements.

The infrastructure development laws of some states including Punjab, Bihar, Andhra Pradesh, Gujarat, Himachal Pradesh and Tamil Nadu also define and govern concessions and concession agreements.

2.6 Are there special rules for the conclusion of framework agreements?

The GFR and MPG have provisions governing rate contracts, also referred to as framework agreements in some contexts:

i. The MPG defines a rate contract as an agreement between the purchaser and the supplier for the supply of specified goods at a specified price, containing terms and conditions during the contract period, without specifying the quantity of goods. Such rate contracts are standing offers which become binding contracts after the order is placed for supply of a definite quantity of goods. The method for the conclusion of rate contracts is identical to *ad hoc* contracts, subject to the inclusion of special terms and conditions applicable to rate contracts. If necessary, parallel rate contracts can be awarded.
ii. As per the GFR, the Directorate General of Supplies and Disposals ("**DGS&D**") should conclude rate contracts with registered suppliers for goods which are common-use items, and are not available on GeM.

2.7 Are there special rules on the division of contracts into lots?

The GFR prohibits dividing a demand for goods into smaller quantities to avoid procurement through lowest bidder ("**L1**") buying, bidding or reverse auction requirements on GeM or the necessity of obtaining the requisite sanction of higher authorities.

Nevertheless, under the MPG, when there is no prior declaration in the bidding documents to split the quantities but it is discovered that the quantity to be ordered is far more than what the L1 is capable of supplying, then the quantity ordered may be distributed among the other bidders in an equitable manner.

The MPG also recommends that it may be advantageous to include a parallel contract clause in the bidding document in cases of critical, vital, safety or security items, large quantities, urgent delivery requirements and inadequate vendor capacity. Such clause should specify that the procuring entity reserves the right to split the contract quantity between suppliers, the minimum number of suppliers, and the manner of the relative share amongst the bidders.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

In case of advertised tender enquiry, where the purchaser contemplates obtaining bids from abroad, the GFR obligates the purchaser to give a minimum time of four weeks for submission of bids for both domestic and foreign bidders.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The item sought to be procured and the financial threshold of the contract primarily determine which award procedure would be applicable. While there is a choice to deviate from these thresholds, it is exercised sparingly owing to the various tiers of approval required for major deviations. The types of award procedures for procurement of goods, the circumstances (based on urgency, number of suppliers, value, and nature of procurement) in which each procedure may be adopted, and the process to be followed for each procedure, under the GFR is as follows:

i. **Purchase of goods without inviting quotations or bids**: please see question 2.3.
ii. **Purchase of goods by Purchase Committee**: please see question 2.3.
iii. **Advertised tender enquiry**: this method is used for procurement of goods equal to or above INR 25,00,000. The advertisement and complete bidding document must be published on the Central Public Procurement Portal ("**CPPP**"), GeM and the procuring entity's website. If the procuring entity is of the opinion that the goods required may not be available domestically, copies of the tender notice may be circulated to foreign embassies.
iv. **Limited tender enquiry**: please see question 2.3. The bidding document should be sent directly to more than three registered suppliers and the limited tender enquiry should be published. If the procurement is more than INR 25,00,000, this method can be adopted where the demand is urgent, an advertised tender enquiry will not be in the public interest, the source of supply is definite, or the possibility of a new supply source is remote.
v. **Two-bid system**: this method is used for obtaining high-value plant machinery of a complex nature. Bids comprise technical and financial bids. After the technical bid is to be opened and evaluated, the financial bids of the technically acceptable offers should be opened.
Notably, for procurement of consulting services, technical bids should be evaluated by a Consultancy Evaluation Committee constituted by the procuring entity, which should record the reasons for acceptance or rejection. Financial bids of only those bidders that have been declared technically qualified should be evaluated.
vi. **Two stage bidding**: in this method, the financial bid is submitted after receipt and evaluation of the technical bids. This method is adopted where detailed specifications cannot be formulated without technical inputs from bidders, the procurement is subject to rapid technological advances or relates to research and development, or the bidder is expected to carry out a detailed survey or investigation. Such bids are invited through advertised tender without a bid price.
vii. **Single tender enquiry**: this method is used where a particular firm is the manufacturer of the required goods, for emergencies and for obtaining machinery or spare parts which should be compatible with the existing equipment.
viii. **Electronic reverse auction**: this is an online real-time purchasing technique, requiring presentations by bidders and automatic evaluation of bids. This method can be adopted where it is feasible for the procuring entity to formulate a detailed description of the procurement, there is a competitive market of bidders or the criteria for determining the successful bid can be quantifiable.

3.2 What are the minimum timescales?

To reduce delay, the GFR obligates the procuring entity to prescribe an appropriate time frame for each stage of procurement.

For advertised tender enquiry, the minimum time to be allowed for submission of bids should be three weeks from the date of publication of the tender notice or availability of the bidding document for sale, whichever is later. In case bids are to be obtained from abroad, a minimum of four weeks will be given to both domestic and foreign bidders. For limited tender enquiry, sufficient time should be allowed for the submission of bids.

The manuals for procurement obligate that the time for finalising the tender process, from the date of issuance of tender to date of issuance of contract, must be published in the bid documents. They must also provide suggested timelines for opening of tenders and finalising contracts.

3.3 What are the rules on excluding/short-listing tenderers?

Registered suppliers are approved after verification of their credentials, manufacturing capabilities, quality control systems, past performance, after-sales service, and financial background. A supplier can be de-registered if such supplier fails to abide by the terms and conditions of the registration, fails to supply the goods on time, supplies substandard goods, makes any false declaration or for any ground which is not in public interest.

A bidder shall be debarred from bidding for a period of:

i. up to three years if he has been convicted of an offence of corruption or under a criminal statute for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract; and
ii. up to two years for breach of the code of integrity.

The MPG requires the advertisement inviting expression of interest to clearly state the eligibility criteria which should be applied for shortlisting of bidders.

The manuals for procurement require bids to be evaluated for shortlisting based on their similar experience, financial strength, manpower strength, and technical capabilities, among other things.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

As per the GFR, bids should be evaluated in terms of the conditions already incorporated in the bidding documents rather than any extrinsic evidence. The rules for evaluation of tenders as per GFR are:

i. For procurement of goods, the contract should ordinarily be awarded to the lowest evaluated bidder whose bid is responsive and who is eligible and qualified to perform the contract as per the bidding document.
ii. For procurement of consulting services, the methods for evaluation are:
    a. **Quality and cost-based selection** ("**QCBS**") – the proposal with the highest weighted combined score (quality and cost) is selected, which is calculated based on predefined relative weightages for the score of the quality of the technical proposal and the score of the financial proposal;
    b. **Least Cost System** – the responsive technically qualified proposal with the lowest evaluated cost is selected; and

c. **Single Source Selection** – this method for evaluation is to be used for specified circumstances such as emergencies or continuation of previous work.

iii. For procurement of non-consulting services, the procuring entity is required to rank responsive bids or conduct the procurement by nomination in specified circumstances.

As per the Instructions, the procuring entity is permitted to use the QCBS method for procurement of:

i. non-consulting services and works where the procurement has been classified as a quality-oriented procurement; and

ii. non-consulting services, where the estimated value of the procurement is not more than INR 100,000,000.

3.5 What are the rules on the evaluation of abnormally low tenders?

While there is no rule in the GFR dealing with abnormally low bids, the MPG lays down the procedure for assessment of abnormally low tender. According to this procedure, a bid is considered abnormally low when the bid price, along with other elements of the bid, appear so low that it raises concerns regarding the capability of the bidder to perform the contract at the offered price. In such an event, the procuring entity can seek written clarifications from the bidder including detailed price analyses of its bid price concerning scope, schedule, allocation of risks and responsibilities, and any other requirements of the bid document. After evaluating the price analyses, if the procuring entity believes that the bidder has substantially failed to demonstrate its capability to deliver the contract at the offered price, the bid may be rejected.

3.6 What are the rules on awarding the contract?

According to the MPG and MPW, before the expiry of the period of bid validity, the successful bidder should be notified of the acceptance of the bid in writing. In certain contracts, depending on their value, the letter of acceptance will result in a binding contract. For instance, in procurement of works up to INR 1,000,000, the letter of acceptance will result in a binding contract where the tender document includes general and special conditions of contract and the scope of work. Whereas, for procurement of works above INR 1,000,000, a self-contained contract must be executed.

According to the MPS, work is to be awarded to the successful bidder through written communication after negotiations.

3.7 What are the rules on debriefing unsuccessful bidders?

Under the GFR, the name of the successful bidder who has been awarded the contract must be mentioned in the CPPP, the website/notice board/bulletin of the procuring entity.

Subsequently, upon the successful bidder furnishing the signed agreement and performance security, each unsuccessful bidder must be promptly notified in compliance with the manuals for procurement. The GFR requires the bid security of the unsuccessful bidders to be returned at the earliest after the expiry of the final bid validity and within 30 days from the date of the notice of award of the contract.

3.8 What methods are available for joint procurements?

The GFR does not contain any specific rule on joint procurements. In general, when the subject of a case concerns more than one Department, no order can be issued until all such Departments have concurred, or a decision has been taken by, or under the authority of, the Cabinet.

In the case of projects jointly executed by several governments, where the expenditure will be shared by the participating Governments in agreed proportions, but the expenditure is initially incurred by one government, and the shares of the other participating governments are to be recovered subsequently, such recoveries from the other governments are to be exhibited as abatement of charges under the relevant expenditure head of accounts in the books of the government incurring the expenditure initially.

3.9 What are the rules on alternative/variant bids?

The MPG requires the tender document to clearly state whether alternative offers/makes/models would be considered or not, and, in the absence of an express statement to the effect, these should not be permitted.

3.10 What are the rules on conflicts of interest?

The GFR disallows any official of a procuring entity or a bidder to act in contravention of the code of integrity which includes a disclosure of conflict of interest.

The manuals for procurement define conflict of interest as situations where:

i. there is participation by a bidding firm or any of its affiliates that are either involved in the consultancy contract to which the procurement is linked;

ii. if they are part of more than one bid in procurement;

iii. if the bidding firm or their personnel have relationships or financial or transactions with any official of the procuring entity who are directly or indirectly related to the tender or execution process of the contract; or

iv. there has been improper use of information that has been obtained by the bidder from the procuring entity with an intent to gain unfair advantage.

As per the MPG, amongst the important clauses to be included in the information to bidders is the clause on conflict of interest among bidders or agents, stating that a bidder shall not have a conflict of interest with other bidders and if a conflict of interest is found, such bidder shall be disqualified.

However, to encourage voluntary disclosures, the MPS specifies that a declared conflict of interest may be evaluated and mitigation steps, if possible, may be taken by the procuring entity.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

As per the GFR, when two-stage bidding is permissible (kindly refer to question 3.1) and, it is not feasible to formulate detailed specifications or identify specific characteristics for the subject-matter of procurement without receiving inputs on the technical aspects from bidders, the appropriate committee constituted by the procuring entity for evaluating bids may hold discussions with the bidders in the first stage of evaluation of technical bids. Based on the discussions, the committee may revise the terms and conditions of procurement namely, any specification of the subject matter of procurement or criteria for evaluation, without altering its fundamental nature.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

The specific exemptions permitted by the GFR are the following:

i. The conditions of prior turnover and prior experience may be relaxed for startups (as defined by Department of Industrial Policy and Promotion) and Micro and Small Enterprises (under the Micro, Small and Medium Enterprises Development Act, 2006) subject to meeting quality & technical specifications and making suitable provisions in the bidding document.
ii. Registered suppliers are normally exempted from furnishing bid security along with their bids.
iii. Individual cases may be exempted from the e-publication and e-procurement requirements where national security and strategic considerations demand confidentiality.
iv. Tenders floated by Indian missions abroad may be exempted from e-procurement by the competent authority.

By way of an order issued by the DoE, startups are exempted from the obligation of submitting earnest money deposit as bid security.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The GFR does not contain any specific rule governing "in-house" arrangements. The manuals for procurement do not apply to procurements by procuring entities for their own use (but not for purpose of trading/sale) from their subsidiary companies including JVs in which they have controlling share. While mandatory purchase preference, allowing Public Sector Undertakings ("**PSUs**") within a defined price margin from the highest ranked private bidder to match their bid, has been discontinued *per se*, it is open for procuring agencies to provide for purchase preference for PSUs in their own manuals with the necessary approvals.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

Rule 173 of the GFR stipulates that the bidding document must make suitable provision for settlement of disputes, if any, arising from the resulting contract.

The MPG empowers the procuring entity to terminate the contract on the grounds of breach of contract by the supplier, insolvency of the supplier and on account of convenience to the procuring entity in case of an unforeseen situation.

In case of non-performance of obligations, the procuring entity may also blacklist the selected bidder and the performance security submitted by the selected bidder may be forfeited.

The manuals for procurement recommend that the mode of settlement of disputes be through arbitration (as per the Arbitration Act), for which a standard arbitration clause must be included in the contract with the domestic supplier.

In the MPW, as a first step, it is suggested that disputes be resolved amicably through conciliation for which a Dispute Resolution Board may be created by express consent of the procuring entity and the contractor. In case of failure to resolve disputes amicably, recourse may be taken to the settlement of disputes through arbitration.

Complaints regarding the compromise of transparency and corrupt practices are handled by the IEM appointed under the IP (for contracts above INR 500,000,000) who give their recommendations to the Chief Vigilance Officer of the procuring entity.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

The right to terminate the contract under the MPG (kindly refer to question 5.1) is without prejudice to any other remedy for breach of contract. Therefore, parties may also approach civil courts having the appropriate jurisdiction for obtaining the relief of specific performance of contract or to claim damages.

Disputes are resolved through arbitration (as provided in the bidding document and the contract).

The High Courts (in States) and the Supreme Court of India may also be approached under writ jurisdiction for conducting a judicial review of the bidding process. These courts can exercise the power of judicial review on the grounds of arbitrariness, unreasonableness, or biased procedures or decisions taken by public tendering authorities while administering or awarding tenders, since these authorities are instrumentality of "the state". The Supreme Court in *Tata Cellular vs. Union of India (1994) 6 SCC 651* had observed that in such judicial reviews, the court should confine itself to the question of legality which includes whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal would have reached, or abused its powers.

5.3 Before which body or bodies can remedies be sought?

The High Courts and the Supreme Court may be approached under writ jurisdiction. Civil courts having the appropriate jurisdiction may be approached for obtaining relief (as specified in question 5.2).

A right to information application may also be filed to seek information (as specified in question 1.4).

The Competition Commission of India may be approached in case of unfair competition in the procurement process (as specified in question 1.1).

5.4 What are the limitation periods for applying for remedies?

In terms of the civil jurisdiction of courts, under the Limitation Act, 1963 the limitation period for filing an application for specific performance of a contract and compensation for breach of a contract is three years from the date of the occurrence of the cause of action. In such cases, if the Government is filing the suit, the limitation period is 30 years. The same limitation period would be applicable in case of disputes being settled by way of arbitration by virtue of Section 43(1) of the Arbitration Act.

5.5 What measures can be taken to shorten limitation periods?

Section 28 of the Contract Act specifies that an agreement curtailing the period of limitation prescribed by law is void to the extent that it restricts the parties from enforcing their rights after the expiration of the stipulated period.

5.6 What remedies are available after contract signature?

If a dispute arises after the award of a contract, the successful bidder will be bound by the dispute resolution process (arbitration or civil suit) as mentioned in the contract. Additionally, the bidder may also seek other remedies (as specified in questions 5.1 and 5.2).

5.7 What is the likely timescale if an application for remedies is made?

Resolution of a dispute by a civil court in India could take a significant time depending on the nature and complexity of the cause of action.

In case of arbitration, the proceedings are to be completed in a time-bound manner. As per the Arbitration Act, the award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of 12 months from the date of completion of pleadings, which may be extended by a further period of six months by consent of the parties. Beyond this time, permission from the court is required to extend the period further.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

In *Centre for Public Interest Litigation v. Union of India (2012) 3 SCC 1*, the Supreme Court cancelled 122 2G spectrum licences issued to various telecom companies by the government on a "first come, first serve" policy at archaic rates. The court observed that there is a fundamental flaw in this approach as it involves an "element of pure chance or accident", and held that an auction held fairly and impartially is the best method for the state to allocate public or natural resources.

It has also been held in a case that the High Courts or Supreme Court under writ jurisdiction cannot direct award of a contract under a tendering process in favour of any individual.

5.9 What mitigation measures, if any, are available to contracting authorities?

To mitigate the risk of non-performance of contracts, Rule 171 of the GFR requires performance security to obtained from the successful bidder.

Various mitigation measures are recommended in the manuals for procurement, such as the following:

i. Advance payments should be mobilised only in limited circumstances and such payments should be interest bearing (MPG).
ii. Contract modifications and renegotiations should not substantially alter the nature of the contract and should not result in undue benefits to the contractor (MPG).
iii. In case of lump sum contracts, a provision should be included for evaluation of quality and scope of deliverables and recording of certificate for acceptability, such that payments are made only against such certificates (MPS).
iv. Owing to the nature and complexity of procurement of works, clauses of works contract should be structured to ensure that risks are optimally shared between the procuring entity and the bidder (MPW).
v. A price variation clause may be added to the tender document to account for escalation and reduction in prices (MPW).

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Rule 173(iii) of the GFR allows modifications to be made to a bidding document pre-award of the contract. If any modification or clarification is issued that materially affects the terms of the bidding document, then the procuring entity is required to publish the same in the manner in which the bidding document was published. The procuring entity may extend the last date for submission of bids if more time is required by bidders to consider the clarification or modification while submitting their bids. Any bidder who has submitted a bid according to older requirements should be allowed to modify, re-submit, or withdraw such bid if the modification materially affects the essential terms of the procurement.

Similarly, the manuals for procurement allow the procuring entity, on its own or in response to a clarification, to amend bid documents by issuing corrigendum(s) prior to the date of submission of bids.

As per the GFR, bidders should not be permitted to alter or modify their bids after the expiration of the deadline for the receipt of bids.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

The GFR strongly discourages negotiation with bidders after bid opening. However, in exceptional circumstances where price negotiations against an *ad hoc* procurement is necessary due to unavoidable circumstances, the same may be resorted to with the L1 bidder.

The manuals for procurement enlist different circumstances in which negotiations may be considered.

Separately, in rate contracts where several firms are simultaneously brought on rate contract for the same item, negotiation as well as counter-offering of rates is permissible.

6.3 To what extent are changes permitted post-contract signature?

As per the GFR, the terms of contract, once the contract is entered into, should not be varied. If any material variation in any of the terms or conditions in the contract becomes unavoidable, any financial or other commitments should be examined, and specific approval of the competent authority should be sought. All such changes must be recorded in as amendment(s) to the contract and signed by both the parties.

Normally, extensions cannot be granted for scheduled delivery or completion dates, except in *force majeure* events provided in the contract.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

The GFR does not contain any explicit rule on assignment or transfer of contract. As a general rule, transfer of contract to

another entity post signature is not permitted unless specifically approved by the procuring authority. This position is maintained even within the general terms of contract on GeM.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The Department of Investment and Public Asset Management ("**DIPAM**") deals with all matters relating to disinvestment of government equity in CPSEs. Currently, the process requires an in-principle consent of the administrative Ministry of the concerned CPSE and an approval by Cabinet Committee on Economic Affairs ("**CCEA**").

DIPAM has detailed guidelines and instructions to be followed during the entire bidding and selection process. The mode and consequent obligations to give effect to the disinvestment would vary according to the nature of the concerned CPSE and the sector it operates in.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The DEA, Ministry of Finance has issued the Guidelines for Formulation, Appraisal and Approval of Central Sector PPP Projects which deal with institutional structure for the project identification, inter-ministerial consultations, and approval mechanisms for PPP projects. The CCEA constituted the PPP Approval Committee which is responsible for approving PPP proposals which are to be implemented at the national level.

For matters falling within the domain of States, most States have enacted legislations containing administrative mechanisms governing PPPs. For instance, the state of Andhra Pradesh has enacted the Andhra Pradesh Infrastructure Development Enabling Act, 2001.

PPP projects based on revenue sharing models have led to litigation or arbitration for recovery of payments arising due to lack of budgetary allocation by the relevant government authority. Consequently, most PPP projects in India are structured in such a way that they are not dependent on regular payments from the government and are reliant on receipt of user fees.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

There are currently no proposals to change the law.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

There are currently no proposals to change the law.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

GFR and the manuals for procurement are regularly updated, the GFR was last updated in January, 2023 and the manuals for procurement were last updated in June, 2022.

Rule 6(1) of the GFR states that the systems and procedures established by the GFR are subject to general or special instructions or orders which may be issued by the Ministry of Finance. In this context, the Ministry of Finance issued the Instructions in 2021 which prevail in case of conflict between the provisions of the manuals for procurement. The Instructions introduce clauses such as pre-tender activities, tender documents, additional methods of procurement, and delay in payment to contractors. The Instructions seek to overhaul the manner in which projects are awarded and implemented by procuring entities and public authorities.

The Make in India Order, 2017 mandates purchase preference to local suppliers. "Local supplier" is defined in the said Order as a supplier or service provider whose product or service offered for procurement meets the minimum local content as prescribed under this Order or by the competent Ministries/Departments. The said Order gives the flexibility to procuring entities to prescribe the minimum local content for any product or service offered for procurement. Accordingly, Ministries and Departments routinely undertake a review of the domestic manufacturing capabilities and adjust the local content percentage as well as the kind of activities (assembling, packaging, marketing, after-sales support) that may count as local content (in value). For example, the Ministry of Electronics and Information Technology has notified the mechanism for calculation of local content for electronic and cyber security products and the Department of Telecommunications has notified the local content determination criteria for telecom goods, services and works.

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Ada Esposito

1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Public procurement is governed by Legislative Decree No. 36/2023 and its Annexes (the "**Code**"). The Code and its Annexes entered into force on 1 April 2023, as it is linked to the fulfilment of the PNRR objectives, however, its provisions came into effect on 1 July 2023.

On the basis of transitional regime, the Code repealed and replaced the old set of rules contained in Legislative Decree No. 50/2016 (the previous public contract code), indeed, as of 1 July 2023 the Code applies to the tender procedures initiated after such date while all the procedures already in progress as of 1 July 2023 and imitated before such date will remain regulated by the previous public procurement code. Moreover, some provisions of the new Code will apply as of 1 January 2024 (thus further extending the effectiveness of the provisions of the old set of rules), in particular those regarding the digitalisation of procedures and therefore relating to the national ANAC database.

Public procurement procedures and contracts concerning public investments wholly or partially financed with funds provided by the National Recovery and Resilience Plan (the "**NRRP**") or by the National Plan for Complementary Investments (the "**NPC**"), as well as by the EU structural funds, are subject, even after 1 July 2023, to easing rules provided for by Legislative Decree No. 77/2021 and by Law Decree No. 13/2023 as well as to all the specific legislative provisions aimed at simplifying and facilitating the achievement of the NRRP, the NPC and the national energy and climate plan targets.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic underlying principles of the regime according to which the Code regulations are to be interpreted and applied are the following (see Articles 1–12):

(a) The principle of results: contracting authorities shall endeavor to award and execute contracts in the shortest possible time and at the best possible price/quality ratio, in compliance with the principles of legality, transparency and competition.

(b) The principle of trust: the allocation and exercise of powers in public procurement is based on the principle of mutual trust in the lawful, transparent and correct action of the public administration, its officials and economic operators, recognising the decision-making autonomy of the public officials, in particular with regard to evaluations and choices for the acquisition and execution of services according to the principle of results.

(c) The market access principle: contracting authorities shall promote access to the market for economic operators in accordance with the principles of competition, impartiality, non-discrimination, publicity and transparency and proportionality.

Other principles applicable to the procurement phase and to the contracts execution are also set out in the Code, such as principles of: good faith and protection of legitimate expectations; solidarity and horizontal subsidiarity; administrative autonomy; contractual autonomy; preserving the contractual balance; mandatory exclusion; and maximum participation.

Said principles are also in line with the basic principles underlying the EU Treaty and EU Directives; in particular, the principles of freedom of movement of goods, freedom of establishment and freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality, transparency, environmental protection and energy efficiency.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

The special sectors within the Code are: (i) gas and heat; (ii) electricity; (iii) water; (iv) transport services; (v) ports and airports; (vi) postal services; and (vii) extraction of oil and gas and exploration for or extraction of coal or other solid fuels (the "**Utilities**"). With regard to Utilities, the Code identifies the activities subject to public procurement rules and which regulations of the ordinary regime apply to relevant tenders and contracts. Also, special rules are set forth with regard to the procedures for the selection of the contractors as well as the contents of the tender notices and their publicity modalities.

Also, the Code provides for special regulation – mainly setting out publicity and procedural rules – regarding: (i) social services, catering services and alternative canteen services; (ii) contracts concerning cultural heritage; and (iii) research and development services (Articles 127–135). Special rules are also provided for the defence and public security sectors, for which Legislative Decree No. 208/2011 provides for certain restrictions on market access for economic operators and for shorter award procedures (see Articles 136–139).

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Law No. 136/2010 outlines certain measures concerning traceability of financial flows, aimed at preventing criminal infiltration in the public procurement sector. All parties involved in public procurement procedures, such as purchasers, contractors, subcontractors and suppliers must use "dedicated" bank accounts (though not exclusively) for all financial transactions relating to public procurement. Specifically, all financial transactions should be made by bank transfer or other traceable payment methods and should indicate a specific tender identification code.

In addition, also depending on the subject matter of public contracts, other areas of national law may be relevant, such as:

(i) public companies regulation (Legislative Decree No. 175/2016) which is relevant with regard to tender procedures for selection of the private shareholder of private-public companies;
(ii) transparency regulation (Legislative Decree No. 33/2013);
(iii) occupational health and safety regulation (see Legislative Decree No. 81/2008) which shall be considered with regard to the tender requirements; and
(iv) Italian Civil Code which is applicable to public contracts to the extent that it is not derogated by the Code.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

At national level the Code implements the EU public procurement Directives (i.e. Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU; the "**EU Directives**"). The scope of the Code is broader than that of the EU Directives, as it also covers contracts below the EU thresholds and provides for more procedural and contractual rules than the EU Directives.

As a general remark, EU Directives are closely aligned with the GPA and, therefore, the Code ensures *de facto* compliance with the GPA by Italy.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The Code applies to the following categories/types of entities as purchasers:

(a) the State and its central administrations; all territorial, regional or local administrations; other non-economic public entities; any associations, unions, consortia (however denominated) formed by said bodies;
(b) the bodies governed by public law having all of the following characteristics: (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) they have legal personality; and (c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law, or are subject to management supervision by those authorities or bodies, or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;
(c) public or private entities as defined in Article 7 of Directive 2014/23/EU, which operate within the Utilities sector and award concessions for the pursuit of the Utilities activities; and
(d) other contracting entities, as specific private entities that are subject to the Code (e.g., private subjects executing public urbanisation works such as roads or car parks as compensation for urbanisation fees due to building permits/town-planning agreements).

2.2 Which types of contracts are covered?

The Code covers works, services and supplies contracts where the contracting authorities act as purchasers as well as public-private partnership contracts such as public works and public services concessions, availability contracts and financial lease contracts, general contractor partnership (see Articles 174–208).

Save for general principles mentioned under question 1.2 above, the Code does not apply to awarding procedures of excluded contracts as well as gratuitous contracts and active contracts even if they offer the counterparty, including indirectly, the possibility of economic gain (see Article 13).

2.3 Are there financial thresholds for determining individual contract coverage?

Article 14 of the Code lays down the EU thresholds within the ordinary sectors:

(i) EUR 5,538,000 for public work contracts and concessions;
(ii) EUR 143,000 for supply and service contracts, and public design contests awarded by central government authorities;
(iii) EUR 221,000 for supply and service contracts and public design contests awarded by sub-central contracting authorities; and
(iv) EUR 750,000 for social service contracts and other specific services listed under Annex IX of Directive 2014/24/EU.

The relevant thresholds in the Utilities sector are the following:

(i) EUR 5,538,000 for public work contracts;
(ii) EUR 443,00 for supply and service contracts and public design; or
(iii) EUR 1,000,000 for social service contracts and other specific services listed under Annex IX, of Directive 2014/24/EU.

Moreover, the Code also provides for a set of simplified procedural rules applicable to below-threshold procurement and in particular (see Article 50):

(i) for works below EUR 150,000 and for services and supplies below EUR 140,000, contracts are awarded directly to economic operators; and
(ii) for contracts exceeding the threshold mentioned in point (i) above, and within the EU thresholds, it is required to carry out a negotiated procedure (without publication of tender notice) inviting:
    (a) at least five economic operators, in the case of work contracts with a value between EUR 150,000 and EUR 1,000,000 and in any case of supply and service contracts below the EU thresholds; and
    (b) at least 10 economic operators in the case of work contracts with a value between EUR 1,000,000 and the relevant EU thresholds.

2.4 Are there aggregation and/or anti-avoidance rules?

The estimated value of a public contract is based on the total amount payable, net of VAT, as estimated by the contracting

authority, and must take into account any form of option/renewal of the contract as well as eventual prizes or payments to candidates or tenderers, where provided by the procedure.

The Code sets out specific methods for calculating the estimated value of certain types of contracts, and thus identifies the appropriate procedure. The choice between several possible methods cannot be made for the purpose of avoiding the application of the Code. In addition, contracts may not be split up in order to remove them from the scope of the Code, unless this is justified on objective grounds.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

The Code provides for special rules for concession contracts in Part II, Section IV dedicated to the private-public partnership.

Concession contracts are defined as agreements concluded in writing by means of which one or more contracting authorities entrust to an economic operator the construction of works or the supply and operation of services against the economic exploitation of the work or service, even accompanied by a public contribution (see Annex I.1).

Concession contracts involve the transfer to the concessionaire of an operating risk related to the execution of the works and/or to the management of the services, including demand and/or supply risks. The concessionaire is considered to assume the operating risk whenever, under normal operating conditions, there is no guarantee that the investments made or costs incurred in operating the works or services will be recovered. The public contribution may take the form of a financial contribution, guarantees or transfer of real estate ownership and is permitted whenever the business operation cannot achieve economic and financial balance on its own, to the extent that the concessionaire is not completely relieved of the operating risk (see Article 177).

Specific rules are set forth by the Code with regard to the awarding procedures, as well as duration, conditions for the revision of the financial and economic plan, cases of early termination, subcontracts, changes to the contract and procedures for the awarding of works and services to third parties by the concessionaires, etc.

2.6 Are there special rules for the conclusion of framework agreements?

Pursuant to Article 59, framework agreements must have a maximum duration of four years, save for exceptional cases depending on the subject matter of the contract. Where the framework agreement is awarded to a single economic operator, individual contracts shall be awarded directly to that economic operator in accordance with the conditions laid down in the framework agreement. In the case of more than one economic operator taking part to the framework agreement, the contracting authority can award the single contract either directly or after a new competitive bidding phase, depending on whether or not the framework agreement provides for the full regulation of the works, services or supplies to be performed under the individual contracts as well as for the conditions and terms for the selection of the contractor to be awarded the individual contract.

The parties cannot substantially modify the conditions set forth by the framework agreement and, in any case, the purchasers cannot use the framework agreement in violation of fair competition rules.

Specific rules are also provided by Article 154 of the Code in relation to the framework agreement awarded in the special sectors.

2.7 Are there special rules on the division of contracts into lots?

As a general rule, contracts shall be subdivided into functional, service or quantity lots in order to ensure the effective participation of micro, small and medium-sized enterprises. Artificial bundling of lots is prohibited.

Contracting authorities must provide adequate justification for not subdividing the contract into lots. Under duly motivated circumstances, contracting authorities may limit the maximum number of lots that may be awarded to the same tenderer within the same procedure or the possibility for the same tenderer to bid for multiple lots (see Article 58).

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Pursuant to Article 65 of the Code, Italian contracting authorities must guarantee the participation of economic operators established in EU Member States in tender procedures.

As regards the GPA, economic operators from third countries party to the GPA are guaranteed treatment no less favourable than that granted by the Code.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The Code provides for the following award procedures:

(a) open procedures, where contracting authorities publish the call for tender and any interested economic operator may submit a bid according to the conditions and timescales set forth by tender documents (see Article 71);

(b) restricted procedures, where contracting authorities solicit economic operators to submit a request to participate to the tender and, subsequently, only the invited operators may submit a bid (see Article 72);

(c) competitive procedure with negotiation, where contracting authorities publish a tender notice open to all the economic operators, describing their needs, explaining the required characteristics of the supplies, works or services to be procured and specifying the criteria for awarding the contract; interested economic operators can submit their request to participate and then, if invited, their tenders; the contracting authorities negotiate the bids received in order to improve their content and then award the contract to the best final bid (see Article 73);

(d) competitive dialogue procedure, where the procedure is similar to the competitive procedure with negotiation above, with the difference being that the dialogue is aimed at covering all aspects of the contract and identifying the most suitable means to meet the needs of the contracting authority, on the basis of which the candidates are invited to tender (see Article 74);

(e) innovation partnership, where contracting authorities identify a need for innovative products, services or works that cannot be satisfied by those available on the market and require research and development activities; any interested

economic operator may submit a request to participate to the call for competition, providing the information therein requested by the contracting authorities (see Article 75); and

(f) negotiated procedure without previous publication of the call for tender: in practice, such procedure is similar to a private negotiation, except for the fact that the awarding authority will be required to apply the general principles mentioned under question 1.2 above, and takes into account the outcome of market consultations possibly launched to assess EU and extra-EU markets. Moreover, such procedure can be applied only upon the occurrence of the specific and strict circumstances provided by Articles 76 and 158 (e.g., urgency reasons that are not imputable to the contracting authorities, previous unsuccessful tenders, existence of a sole operator on the market that is capable to perform the contract for technical reasons, repetition of similar services or works under certain conditions, etc.).

With the exception of the procedure referred to in (f) above, the contracting authorities are free to choose any of the above procedures. The procedures referred to in (c) e (d) above are to be applied in the specific cases provided for by Article 70.3 (e.g., whenever the needs of the contracting authority pursued by the tender cannot be met by ordinary procedures or require innovative solutions/projects or prior negotiations are needed due to special circumstances in connection with the nature, complexity or financial and legal set-up of the subject matter of the contract or due to the risks associated with it).

3.2 What are the minimum timescales?

According to the type of tender procedure, the Code provides for minimum terms to bid and/or request to participate to the tender procedure:

(a) Open procedure: 30 days from the call for tenders to bid.
(b) Restricted procedure: 30 days to request to participate from the tender notice and 30 days to bid, from the invitation to the procedure.
(c) Competitive procedure with negotiation: 10 days to request to participate from the tender notice and 25 days to bid, from the invitation to the procedure.
(d) Competitive dialogue procedure and innovation partnership: 30 days to request to participate from the tender notice.

For duly substantiated reasons of urgency, contracting authorities may reduce such minimum terms by up to half. Moreover, apart from such minimum terms, the contracting authorities may provide for longer terms in consideration of the complexity of the contract and the time needed by the participants to prepare all the documentation.

3.3 What are the rules on excluding/short-listing tenderers?

There are three sets of requirements which must be met by the bidders in order to participate in a public procurement procedure, namely:

(a) general morality requirements;
(b) economic and financial capacity; and
(c) technical and professional skills.

Requirements under letters (b) and (c) must be specifically drawn up by the contracting authorities within the tender documents, and must be proportionate to the subject matter of the contract to be awarded.

In the case of public works above EUR 150,000, economic operators are required to have a qualification certificate issued by certain bodies (so-called SOA). Such certificates of qualification are issued following the procedure set out in Annex II.12 and qualify the economic operators for specific categories and classes of works. The Code also provides for a similar qualification mechanism to be implemented for service and supply contracts, but no implementing regulations have yet been issued.

The aim of the requirements under (a) is to exclude entities from the procedure which, for various reasons, are not eligible to conclude contracts with public administrations. In this regard, the Code provides for both:

(i) automatic ineligibility criteria under the circumstances provided by Article 94, such as criminal conviction of the entity of certain types of crimes with an unappealable judgment (participation in a criminal organisation, corruption, bribery, fraud, terrorism, etc.), bankruptcy (or entering into a proceeding for the declaration of bankruptcy), and sanctions disqualifying the economic operator from exercising certain activities, pursuant to Legislative Decree No. 231/2001; and
(ii) non-automatic ineligibility criteria, where the contracting authority is called to assess whether the factual circumstances provided by Article 95 are met to exclude the interested economic operator (professional misconduct; participation of multiple entities belonging to a single decision-making centre etc.).

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The Code provides for the "most economically advantageous offer" as the main rule on the evaluation of tenders, which are identified on the basis of either the cost, or the best value for money. Certain contracts, such as contracts related to social services, hospitals, welfare and school catering as well as supply, work and services contracts having a high technological and innovative content, must be awarded on the basis of the best value for money criteria (see Article 108). Otherwise, contracts related to standardised goods and services, or whose conditions are defined by the market, may be awarded on the basis of the lowest price criterion.

Contracting authorities assess the most economically advantageous tender on the basis of best value for money, pursuant to objective criteria, such as qualitative, environmental or social aspects. Such criteria can be chosen freely by the contracting authority taking into account the subject matter of the contract. Amongst the main innovations worth mentioning, the Code enhanced specific qualitative criteria (e.g., in the contracts for computer goods and services, the contracting authority shall always take into account the cybersecurity elements and the economic score is capped at 10%) and introduced premium criteria to promote small and medium-sized enterprises as well as sustainability and gender equality.

3.5 What are the rules on the evaluation of abnormally low tenders?

Pursuant to Article 110, upon request by the contracting authority, economic operators must provide explanations as to the prices or costs proposed if they appear to be abnormally low.

Economic operators may justify the abnormality of their tender only on the following grounds: (a) the economic efficiency of the production process, of the services to be provided or of the construction method; (b) the technical solutions chosen by the tenderer or any exceptional conditions available to the tenderer; and/or (c) the originality of the works,

supplies or services offered by the tenderer. No explanation will be accepted with regard to the health and safety costs and personnel costs quoted by the tenderer.

The contracting authorities exclude the abnormally low tenders whenever the proposed prices and costs are not duly justified on the basis of the above grounds or if the tender is abnormally low because it does not comply with: (i) the environmental, social and employment obligations set forth at national and European level; (ii) the obligations related to the subcontracts; and (iii) minimum wages fixed by the national regulation.

By way of derogation from Article 110, for contracts below the EU thresholds to be awarded on the basis of the lowest price, the Code provides for the automatic exclusion of tenders that are abnormally low. In such cases, the methods to identify the abnormally law tenders are indicated in the tender documents among those set out in Annex II.2.

3.6 What are the rules on awarding the contract?

The contract is awarded to the highest ranked non-abnormal bid as determined in accordance with the awarding criteria set out in the tender documents. The award of the contract may be made subject to prior verification of compliance of the awardee with the conditions and requirements set out in the tender documents, where said verification has not been carried out previously during the procedure. In the case such verification fails, the contract is awarded to the second highest ranked bid, and so on.

Contracting authorities may also decide not to award the contract if no tender is found to be suitable or worthwhile in relation to the subject matter of the contract.

Within five days from the adoption of the relevant measure, the Contracting Authorities must communicate: (i) the exclusion from the tender to entities which have been excluded; (ii) the awarding of the contract to the awardee and to the other tenderers, including those that have been excluded and have already challenged (or are still entitled to challenge) the exclusion; (iii) any decision not to award the contract to all the tenderers; and (iv) the signing date of the contract with the awardee relative to the subjects under point (ii) above.

3.7 What are the rules on debriefing unsuccessful bidders?

Unsuccessful bidders must be informed of the award in favour of the successful tenderer. Please also see question 3.6 above.

3.8 What methods are available for joint procurements?

Two or more contracting authorities may carry out a procurement procedure jointly through an administrative institutionalised partnership pursuant to Article 15 of Law No. 241/1990. The contracting authorities involved appoint a single project manager (so-called "RUP") jointly and are jointly and severally liable for the procedure, unless the procedure is carried out jointly only in part (e.g., only for the award phase).

Moreover, contracting authorities must be qualified in order to launch a tender procedure for works exceeding EUR 500,000 and for services and supplies exceeding EUR 140,000 (see Articles 62–63). The qualification procedure is carried out by the national public procurement authority ("ANAC") in accordance with the regulation set out in Annex II.4, which provides for different levels of qualification depending on the amount and type of contract. Unqualified contracting authorities must use central or regional qualified purchasing bodies or other qualified contracting authorities to launch tenders for which they are not qualified.

3.9 What are the rules on alternative/variant bids?

Tenderers are entitled to submit one single bid (see Article 17.4). According to the relevant case-law, tenderers may submit alternative or variant tenders only if this is expressly provided for in the tender documents.

With respect to work contracts to be awarded on the basis of the best value for money, contracting stations may not award points for offering additional work to that included in tender specifications (see Article 108.11).

3.10 What are the rules on conflicts of interest?

Contracting authorities must take appropriate measures to identify, prevent and effectively resolve any conflict of interest in the course of the procedures concerning the award and performance of contracts and concessions. Conflicts of interest exist whenever the contracting authority's staff or consultants taking part to the procedure and who may, directly or indirectly, determine its outcome have other financial, economic or personal interests which may jeopardise their impartiality and independence (see Article 16).

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

In general terms, potential bidders must not be directly involved in the preparation of a procurement procedure. Only under certain procedures, the Code does allow prior involvement of the bidders, such as in the case of competitive dialogue (see question 3.1) or project financing procedures. In the latter case, economic operators and institutional investors submit project financing proposals to contracting authorities which, if deemed to be of public interest, will then put out to tender among interested economic operators.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Public contracts excluded from the scope of the Code are listed by Article 56 of the Code with regard to the ordinary sector and Articles 143–146 in the special sectors. Among these, the Code does not apply to:

(a) services awarded by a contracting authorities to other contracting authorities on the basis of exclusive rights assigned by law or regulatory provisions;
(b) contracts aimed at allowing contracting authorities to make available or operate communication networks as well as to supply communication services;
(c) acquisition or rental of real estate properties;
(d) arbitration and conciliation services, as well as certain legal services as listed in the EU Directives;
(e) financial services regarding issuance, sale, purchase or transfer of certain financial instruments as well as contracts concerning loans;
(f) acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters, and contracts for broadcasting time;

(g) employment contracts;
(h) certain civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, except patient-transport ambulance services;
(i) public passenger transport services by rail or underground;
(j) contracts in the special sectors whose activity have been found by the European Commission to have been directly exposed to competition on markets to which access is not restricted; and
(k) contracts awarded pursuant to international rules.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

As a general remark, the Code implements the EU Directives regulations regarding the in-house arrangements (see Annex I.1). Therefore, the Code does not apply to public contracts awarded by contracting authorities to related entities fulfilling the following requirements:
(i) the contracting authority controls the related entity as it was one of its own departments (administrative and financial control);
(ii) more than 80% of the turnover of the entity derives from activities carried out for the dominant contracting authority or authorities, or companies controlled by the latter; and
(iii) there is no private participation in the entity, save for mandatory participation by national law.

In the case of such in-house arrangements, the contracting authorities are required to assess the benefits for the community and the cost-effectiveness of the performance offered by the in-house entity (see Article 7).

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

According to Legislative Decree No. 104/2010 (the "**Code of the Administrative Trial**"), any dispute relating to awarding procedures, including claims for damages, falls within the jurisdiction of the Administrative Courts.

Any resolution adopted during the awarding procedures may be challenged by any interested party before the Regional Administrative Court (the "**Administrative Appeal**").

The Administrative Appeal is aimed at the annulment of the challenged administrative resolutions (e.g., call for tender, exclusion of candidates, awarding decision, etc.) in order to allow the claimant to participate in the tender or to be awarded the contract, depending on the relevant stage of the procedure. Whenever such a result cannot be obtained (e.g., because the contract has already been executed), the claimant is entitled to claim for damages (including loss of chance). The claimant can also ask for interim measures.

In case of annulment of the awarding decision and only under specific circumstances, the administrative judge is entitled to declare the contract null and void (see Articles 121 and 122 of the Code of the Administrative Trial).

Decisions of Regional Administrative Courts may be appealed to the Council of State (court of second instance); the final decision of the Council of State may be appealed only with exceptional remedies.

The Code of the Administrative Trial also provides for a reduction of the duration of judicial proceedings regarding public procurement and concessions sector, in order to guarantee the ruling in reasonable time.

In general, Civil Courts have jurisdiction over disputes arising after the conclusion of public contracts and relating to their performance.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

With regard to the award phases, there are no further judicial remedies other than the Administrative Appeal.

With regard to the execution of the contract, the following remedies are provided as alternative means to judicial solutions before the Civil Court: (i) amicable agreement; (ii) arbitration; (iii) settlements; and (iv) (see Articles 210-213).

The Code also provides for the mandatory appointment of a technical advisory board (so-called "*Collegio Consultivo Tecnico*") for works above the EU thresholds and for services and supplies above EUR 1,000,000 (see Article 215) to advise the parties on the execution of the contract.

5.3 Before which body or bodies can remedies be sought?

Please refer to questions 5.1 and 5.2 above.

5.4 What are the limitation periods for applying for remedies?

The Administrative Appeal must be filed before the Administrative Regional Court within 30 days from the relevant notification or publication or, at the latest, from the acknowledgment of the challenged deeds. Should the calls for tender not be published, the abovementioned period starts from the date on which the contracting authority publishes the awarding notice and the reasons for such choice. If such information is not included in the notice, the contract may be challenged within six months from the date of signature of the contract communicated pursuant to Article 90 of the Code.

The appeal before the Council of State must be filed no later than 30 days from the notification of the challenged decision. Should the challenged decision not be notified, the appeal must be filed within three months from the publication of the decision.

5.5 What measures can be taken to shorten limitation periods?

The terms described under question 5.4 above are mandatory and cannot be shortened under any circumstance. The lack of challenges in such cases prevents any competitors from claiming any further illegitimacies in the deeds following the awarding procedures (e.g., awarding measures).

5.6 What remedies are available after contract signature?

In the event of a breach of contract, the parties are entitled to bring a civil action before the Civil Court. Please refer to question 5.1 above.

5.7 What is the likely timescale if an application for remedies is made?

The timeframe depends on a number of factors, such as the nature of the claim, the legal issues involved in the case and the workload of the courts. However, the Code of Administrative Procedure provides for a special procedure aimed at speeding up proceedings relating to public procurement disputes. All the ordinary time limits for notifying or submitting acts to the Administrative Courts are halved. The time normally required to obtain an interim measure is between 15 and 30 days, while the final decision is generally obtained within one year.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

Under the Italian legal system, the Courts' decisions do not constitute binding precedents. The principles set out in well-established case law are usually implemented in the Code, while case law may be shifting on certain issues.

5.9 What mitigation measures, if any, are available to contracting authorities?

The contracting authorities may carry out self-defence procedures (known as "*autotutela*"), which allow them to review, cancel and amend any act of the award procedure if infringements of the law are detected.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Generally, the rules outlined in the tender procedure and the contents of contracts are binding on the tenderers to respect the principle of equal treatment. Should contracting authorities change the tender regulation, they are required to give all bidders a reasonable time to evaluate the changes and prepare their bids accordingly (see Article 92.2).

Changes to the membership of bidding consortia pre-contract award are allowed in the following cases (see Article 68.17):

(a) withdrawal of one or more members, provided that the remaining members possess the qualifications required for the works, services or supplies to be provided; and
(b) where a member of the consortium is ineligible to participate in the tender and the consortium notifies the contracting authority and provides evidence that the ineligible member has been excluded or replaced.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

As a general rule, there is no scope for negotiation after the submission of tenders. A small margin of flexibility is only allowed in negotiated procedures and PPP contracts, depending on the tender rules.

6.3 To what extent are changes permitted post-contract signature?

Contracts may be amended in the following cases (see Article 120):

(a) the changes are expressly provided by the tender documents;
(b) whenever additional works, services or supplies not included in the original contract are required and a new contract is not technically or economically feasible and would cause inconvenience to the contracting authority;
(c) for variants in progress, to be understood as changes made necessary during the execution of the contract due to unforeseeable circumstances; and
(d) replacement of the awardee in the cases described in question 6.4 below.

In the cases described under (b) and (c), the price may not be increased by more than 50% of the value of the original contract.

Changes are also permitted if the overall structure of the contract is not altered and the value of the amendments (i) does not exceed the relevant EU threshold, and (ii) does not exceed 10% or 15% of the original contract value for supply and service contracts and for works contracts respectively.

Non-material changes are always permitted, regardless of their value. It is worth noting that special rules have also been provided in recent years in order to compensate the economic operators for the exceptional increase in raw material prices.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

Public contracts may be transferred to another entity only as a result of a restructuring operation (merger, demerger, transfer of a going concern) of the original economic operator, provided that:

(i) the new entity fulfils the requirements initially established in the tender procedure for the performance of the contract;
(ii) the transfer of the contract does not entail any other material changes to it (e.g., terms and conditions, prices, subject-matter); and
(iii) the entire transaction is not entered into for the purpose of avoiding the application of the Code.

Assignment of the contract to another legal entity is also allowed when it has been expressly provided in the original contract or where the contracting authority assumes the obligations of the main contractor *vis-à-vis* its subcontractors.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Privatisations do not fall within the scope of the Code. According to Article 10 of Legislative Decree No. 175/2016, public administrations are required to dispose of their shareholdings in companies through open procedures based on the principles of publicity, transparency and non-discrimination. Only in duly justified exceptional cases may the sale be carried out through direct negotiations with an individual buyer. The approval process of the disposal of shareholdings provides for the involvement of the political bodies of the public administration concerned (see Article 7 of Legislative Decree No. 175/2016).

Special consideration is given to disposals of shareholdings (or other significant corporate transactions) in companies operating in the defence and national security sectors, as well as in activities of strategic importance in the energy, transport and communications sectors which are subject to the Foreign Direct Investment regulations provided by Law Decree No. 21/2012 and to a special approval procedure subject to the Italian Government, regardless of whether public shareholdings are involved (so-called Golden Power).

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The Code includes an entire section for the regulation of PPP procurement procedures and contracts.

PPPs are defined as economic transactions having the following characteristics:

(a) a long-term contractual relationship between a public authority and one or more private operators in order to achieve a result in the public interest;
(b) the financial coverage of the project is guaranteed to a significant extent by resources raised by the economic operator itself;
(c) the private party is responsible for the implementation and management of the project, while the public party is responsible for defining the objectives and verifying their fulfilment; and
(d) the operational risk associated with the performance of the works or the management of the services is borne by the private party.

The Code provides for two types of PPP:

(i) institutional PPPs, which are carried out through the creation of an entity jointly owned by the private and public parties and governed by Legislative Decree No. 175/2016 on the regulation of public-private undertakings; and
(ii) contractual PPPs, which include concession, leasing and availability contracts, as well as any other contracts executed by the public administration with private operators with the above characteristics and aimed at public interests.

PPP contracts can only be awarded by qualified contracting authorities (please refer to question 3.8 above).

The main issue concerns the structuring of the financial business plan, which needs to be assessed and approved by the contracting authority. Financial business plans should be based on a fair sharing of risks between the public and private parties and must be able to guarantee the economic and financial balance of the contract. In a balance perspective, the Code allows a public contribution by the public party to be included in the financial business plan to the extent that it does not relieve the private party of the operational risk.

It is also a key point the fact that the public contribution does not impact the classification of the PPP as an off-balance transaction even if it is exceed the percentages set forth by Eurostat decisions.

One of the most common procedures used to award concessions and PPPs is project financing where a private operator may submit to the public administration proposals for the awarding of works and services.

Only the private-initiative project financing procedure is now envisaged by the Code, while public-initiative projects are no longer permitted. Moreover, qualifications of the private proposers as well as bonds are no longer required at the proposal stage. Also, the Code allows institutional investors and financial entities lacking the requisites to participate in a tender to submit proposals directly to the public administration, provided that they then partner with qualified economic operators in the phase of the tender and for the execution of the PPPs. Additionally, in the tender procedures for the awarding of PPPs, institutional investors and financial entities may satisfy the technical, financial and professional requirements relying on the capacity of third parties and, if awardees, may subcontract, in whole, the works and services of the PPP contract to qualified operators provided that the selected subcontractor is communicated to the grantor within the expiration date of the offer.

It is worth noting that the Code also includes some remedies to safeguard the balance of PPP contracts, such as the revision of the financial business plan in the event of major deviations altering the economic balance and the right of institutional investors to replace the "manager" of the project in the event of the latter's defaulting (so-called step-in right).

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Given the very recent entrance into force of the Code, no particular changes with a significant impact are envisaged at this stage. As is usual in these cases, some corrective measures may be adopted in the future to rectify minor inaccuracies that may arise during the first application of the Code.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

Please refer to question 8.1 above.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

The implementing rules of the Code are already comprehensively set out in its annexes. The Code itself envisages that they may be replaced by additional regulatory acts (such as ministerial decrees) in the future, but it does not set a deadline for their adoption.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The procurement procedures of the national government of Japan are generally regulated by the Accounts Act (Act No.35 of 1947, as amended, "Accounts Act"), the Cabinet Order concerning the Budget, Auditing and Accounting (Imperial Ordinance No.165 of 1947), the National Property Act (Act No.73 of 1948) and the Contract Management Regulations (Ministry of Finance Ministerial Ordinance No.52 of 1962). Procurement procedures of local governments are generally regulated by the Local Autonomy Act (Act No.67 of 1947) and the Local Autonomy Act Enforcement Ordinance (Government Ordinance No.16 of 1947).

As for public-private partnerships ("PPPs") or privatisation, the Act on Promotion of Private Finance Initiative (Act No.117 of July 30, 1999, as amended, "PFI Act") constitutes a part of the regulation on public procurement. In addition, the Act on Reform of Public Services by Introduction of Competitive Bidding (Act No.51 of 2006) provides procedures and regulation for market testing of public services.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The key underlying principles of the regimes are ensuring "economic efficiency" (including competitiveness) and "fairness" (i.e., equal treatment) between both (a) the public and suppliers (tenderer), and (b) tenderers. In addition, in order to ensure "fairness", ensuring "transparency" is essential. These underlying principles are the lens through which any interpretation of the legislation must be made, and legislative politics are determined in accordance with such principles.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

With respect to: (i) the introduction of supercomputers; (ii) procurement of non-research and development satellites; (iii) public procurement of computer products and services; (iv) public procurement of telecommunications products and services; and (v) public procurement of medical technology products and services, the Japanese national government sets self-imposed regulations in an effort to improve accessibility for foreign companies to the Japanese market, which includes detailed contents of market research, specification documents, and public procurement procedures. These self-imposed regulations are required by "common consent among related ministries" as of March 31, 2014 (https://www.cas.go.jp/jp/seisaku/chotatsu/pdf/r2_hontai.pdf (available only in Japanese)).

Except for those described above, no special rules are provided relating to defence procurement; however, many contracts for defence procurement are awarded at the discretion of the relevant governmental body ("Contracts at Discretion") and not on a competitive basis, because the number of suppliers for defence goods is limited and goods for defence procurement require advanced technology and security. Due to the particular character of contracts for defence procurement, consideration for goods is determined by a cost calculation system. The definition of the proper "cost" often becomes a topic of discussion and is sometimes referred to a judicial court.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Other acts relevant to public procurement include: the Promoting Proper Tendering and Contracting for Public Works Act (Act No.127 of 2000); the Act on Promoting Quality Assurance in Public Works (Act No.18 of 2005); the Criminal Act (Act No.45 of 1907) which, alongside the Antimonopoly Act (Act No.54 of 1947, as amended, "Antimonopoly Act"), sets regulations on fraud (such as on bribery); the Act on Prevention of Delay in Payment under Government Contracts, etc. (Act No.256 of 1949), which regulates the timing (and delay) of payments by the government; and the Act on Promotion of Procurement of Eco-Friendly Goods and Services by the State and Other Entities (Act No.100 of 2000), which promotes environmentally friendly procurement. In addition, information relating to public contracts may be disclosed in accordance with the Act on Access to Information Held by Administrative Organs (Act No.42 of 1999).

With respect to IT governance and management for public procurement, there exists a special guideline for maintenance and management of information systems, named "IT Governance and Management Guideline for Government Information Systems", which provides common rules for public procurement of information systems and project management thereof.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Japan is a signatory to the WTO Agreement on Government Procurement ("GPA") (including the Protocol Amending the Agreement on Government Procurement, as of March 30, 2012 – the "Protocol"). To implement the provisions of the GPA, special provisions are stipulated in the Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services (Government Ordinance No.300 of 1980), the Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services in Local Government Entities (Government Ordinance No.375 of 1995), and other ministerial ordinances for government procurement subject to the GPA. The amendment protocol was accepted by Switzerland on December 2, 2020, and the Protocol has been applied between all parties since January 1, 2021.

In addition to the GPA, Japan has executed economic partnership agreements ("EPAs") with some countries. Between Japan and a country which is not a signatory to the GPA but which is a signatory to an EPA (such as India, the Republic of the Philippines or Thailand), governmental procurement rules in the EPA (if any) apply.

Other than the GPA and EPAs, the Trans-Pacific Partnership Agreement ("TPP") also provides governmental procurement rules in Chapter 15.

Please see question 8.2 for details of the latest status of EPAs and the TPP.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The regulation of public procurement applies mainly to national and local governments. Government-affiliated organisations stipulated in the Annexes of the GPA, such as incorporated administrative agencies, usually have internal rules similar to the legislative regulations for public procurement.

Apart from domestic regulation, the GPA is applicable not only to national and certain local governments but also to certain incorporated administrative agencies, public research institutes, government financial corporations, public corporations and similar bodies.

The GPA does not apply directly to third-sector companies, but the national government recommends that such companies adapt regulation of public procurement in consideration of the GPA.

As a general rule, public-interest corporations or stock corporations which are established by local governments pursuant to the Civil Code (Act No.89 of 1896) or Corporation Act (Act No.86 of 2005) are not covered. However, those corporations sometimes have internal rules similar to the legislative regulation for public procurement. The GPA sets out a list of private entities wholly or partly owned by the national government to which the GPA is applicable.

The Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. (Act No.101 of 2002) stipulates criminal penalties on certain collusive acts; covering acts in relation to bidding by not only the national and local governments, but also (ii) corporations in which the government or local governments (or the government and local governments jointly) have equity of 50 per cent or over, and business corporations which have been established by a special act and of which shares representing at least one-third of the total outstanding shares or one-third of the total voting rights owned by all shareholders are required by such special act to be owned by the government or a local government at all times.

2.2 Which types of contracts are covered?

The contracts covered by the regulation of public procurement are contracts which (i) result in the transfer of any economic value (generally money) of public entities, and (ii) are entered into by public entities and private entities. The typical contracts covered are construction contracts, contracts which stipulate supplies of services (including completion of works) or transfers of properties rendered by a private entity.

Certain types of contracts, such as a build-operate-transfer contract and a public works concession contract, are not clearly stated by law as contracts covered by public procurement rules, but in practice they are treated as such.

2.3 Are there financial thresholds for determining individual contract coverage?

At the domestic level, no specific financial thresholds for determining individual contract coverage exist, except that expenditure under each contract must be within the amount permitted in a budget resolved by the council.

Special regulations are provided for goods and services with a value of the threshold amount stipulated in the Annexes of the GPA. The threshold amounts and the current values in yen (which is adjusted every two years) are as follows (effective until March 31, 2024):

I. National government entities:
   i. Supplies: 100,000 Special Drawing Rights ("SDR") (15,000,000 yen).
   ii. Construction services: 4,500,000 SDR (680,000,000 yen).
   iii. Architectural, engineering and other technical services: 450,000 SDR (68,000,000 yen).
   iv. Other services: 100,000 SDR (15,000,000 yen).

II. Local government entities:
   i. Supplies: 200,000 SDR (30,000,000 yen).
   ii. Construction services: 15,000,000 SDR (2,280,000,000 yen).
   iii. Architectural, engineering and other technical services: 1,500,000 SDR (220,000,000 yen).
   iv. Other services: 200,000 SDR (30,000,000 yen).

III. Government-affiliated organisations:
   i. Supplies: 130,000 SDR (19,000,000 yen).
   ii. Construction services by certain government-affiliated organisations categorised as Group A: 15,000,000 SDR (2,280,000,000 yen).
   iii. Construction services by certain government-affiliated organisations categorised as Group B: 4,500,000 SDR (680,000,000 yen).
   iv. Architectural, engineering and other technical services: 450,000 SDR (68,000,000 yen).
   v. Other services: 130,000 SDR (19,000,000 yen).

Notwithstanding the foregoing, the Japanese national government sets self-imposed regulations in an effort to improve accessibility for foreign companies to the Japanese market, and thereby the above standard for the threshold amounts and the current values in yen are adjusted as follows (parts that differ from the GPA standard are in **bold**):

I. National government entities:
   i. Supplies: **100,000 SDR (15,000,000 yen)**.

ii. Construction services: No change from the GPA.
iii. Architectural, engineering and other technical services: No change from the GPA.
iv. Other services: **100,000 SDR (15,000,000 yen)**.

II. Government-affiliated organisations:
i. Supplies: **100,000 SDR (15,000,000 yen)**.
ii. Construction services by certain government-affiliated organisations categorised as Group A: No change from the GPA.
iii. Construction services by certain government-affiliated organisations categorised as Group B: No change from the GPA.
iv. Architectural, engineering and other technical services: No change from the GPA.
v. Other services: **100,000 SDR (15,000,000 yen)**.

2.4 Are there aggregation and/or anti-avoidance rules?

Although there is no specific provision explicitly prohibiting disaggregation, the intentional disaggregation of a contract for the purpose of avoiding the application of the public procurement regulation is regarded as illegal. The GPA explicitly prohibits intentional disaggregation.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

As stated in question 2.2, public procurement rules are, in practice, applied to concession contracts as well. In the PFI Act, there are rules on the "Right to Operate Public Facility, etc.", which is regarded as a type of right based on a concession contract.

The term "Right to Operate Public Facility, etc." means the right to implement "Public Facility, etc. Operation Project". The term, "Public Facility, etc. Operation Project" means a qualified project under the PFI Act in which a private company is given a right to operate a public facility (such as an airport), the ownership of which is held by a public entity, and receives usage fees as its own income.

See question 7.1 concerning the "Right to Operate Public Facility, etc." and the relevant contract award procedure for privatisations and PPPs.

2.6 Are there special rules for the conclusion of framework agreements?

There is no concept of framework agreements in public procurement regulation in Japan.

2.7 Are there special rules on the division of contracts into lots?

There are no such special rules on the division of contracts into lots.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

In general, under applicable laws and regulations on public procurement, purchasers (public entities) do not owe particular obligations to suppliers (bidders) established outside Japan, which are different from those of suppliers established in Japan. Note that, as mentioned in question 3.3 below, additional conditions for excluding/shortlisting tenderers may be set by public entities. Such additional conditions sometimes contain qualification criteria which are relatively difficult for a foreign company to fulfil, such as the existence of an office or certain work experience in Japan.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

There are two main types of award procedures: (i) general competitive bidding; and (ii) designated competitive bidding. General competitive bidding is used as a general procedure, and designated competitive bidding is exceptional and permitted only when relevant ordinances, etc. specify as such under certain circumstances.

The main stages of general competitive bidding are as follows:

a. Public notice for invitation.
b. Responses to inquiries and/or on-site debriefing by a public entity.
c. Confirmation of qualification for submission and notice thereof.
d. Submission of proposals and bidding by tenders.
e. Evaluation of proposals and bidding, and notice of appointee.
f. Conclusion of agreement between appointee and public entity.

In cases of designated competitive bidding, (a) and (c) are omitted because tenderers qualified for submission will have already been appointed by a public entity and the public entity shall prepare and disclose the list for such qualified tenderers.

In addition to the two types of award procedures, Contracts at Discretion are available when strict conditions set by regulation are satisfied.

3.2 What are the minimum timescales?

For procurements subject to the GPA, generally there must be a period of at least 40 days between the date of public notice for invitation to tender and the deadline for submission of tenders. This period will be extended to 50 days in most cases. For procurements to which the GPA is not applicable, this period is 10 days.

3.3 What are the rules on excluding/short-listing tenderers?

There is an explicit provision of law which sets a list of conditions that tenderers must satisfy. Additional conditions for excluding/shortlisting tenderers may be set by public entities and such additional conditions shall be established and disclosed to the public. In the case of procurement of construction, as a part of the qualification criteria, public entities usually require tenderers to obtain a certain grade of their capability from relevant public entities in accordance with their performance record, size of the company, number of employees, etc.

As for procurement by local governments to which the GPA is not applicable, local governments may, as a part of the qualification criteria, require tenderers to have their offices located in a specific city if such an additional requirement is regarded as

appropriate and reasonable in light of the type and nature of the relevant contract.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

There is a principle that the tenderer who offers the best (from the perspective of the tenderee) price for a proposal and bid shall generally be appointed; that is, price has in the past been the sole relevant factor. However, nowadays, a tenderer who offers the most benefit to the relevant public entity shall generally be appointed; i.e., that public entity shall consider various factors including not only price but other conditions (such evaluation method is called the "Comprehensive Evaluation Method"). Both methods for evaluation are provided in relevant national and local laws, and the Local Autonomy Act Enforcement Ordinance contains provisions to establish and disclose criteria for such evaluation, as there are no more specific rules in the relevant national laws.

Especially for the tendering of construction work by the national government, almost all tenders are implemented through the Comprehensive Evaluation Method. In the Comprehensive Evaluation Method, factors other than price are set as evaluation criteria, such as the execution plan, experience in similar work, and the ability of technical personnel. For more detailed and complicated projects (especially PFI projects), more detailed and segmented criteria are set, and the evaluation process is often conducted by an independent committee consisting of various experts, such as academic experts, lawyers, and accountants, although such committee is not mandatory.

3.5 What are the rules on the evaluation of abnormally low tenders?

Under the Accounts Act and the Local Autonomy Act, if it is found likely that the person who should be the counterparty to the contract will not satisfactorily perform the terms of the contract for the price that the person has offered, or if it is found to be extremely inappropriate to conclude the contract with the person who should be the counterparty for the price that the person has offered, because of the likelihood that doing so will disrupt the establishment of a fair transaction; national and local governments may select the person who offered the lowest price among the other persons who made offers, within the range determined by the target price as the counterparty to the contract.

In addition, the Local Autonomy Act allows local governments to set a minimum contract price in their procurement process when necessary.

3.6 What are the rules on awarding the contract?

The contracting authority may establish its own criteria for each tendering process, and may request in the notice for invitation of bids that the bidders submit necessary materials to prove that they satisfy such criteria before submission of a bid. The contracting authority may deem any bid submitted by those who do not meet such criteria invalid.

3.7 What are the rules on debriefing unsuccessful bidders?

Although there is no specific statutory rule concerning debriefing, the Ministry of Land, Infrastructure, Transport and Tourism ("MLIT") has issued a notice which internally requires its regional development bureaux to establish a Bidding Monitoring Committee which, when a request for explanation is filed by an unsuccessful bidder, gives an explanation, conducts an investigation and issues its non-binding recommendation. The Ministry of Defence also has a similar committee, called the Fair Bidding Investigation Committee. Local governments generally establish the same kind of organisation through their internal rules.

3.8 What methods are available for joint procurements?

There is no explicit rule on joint procurements, which are rarely implemented in practice. However, in several PFI projects, plural public entities have executed agreements on the procedure of joint procurement and allocation of disbursement of the costs of the procurement procedure and the project, and subsequently implemented procurement procedures jointly.

3.9 What are the rules on alternative/variant bids?

The Act on Promotion of Securing Quality of Public Works (Act No.18 of 2005) sets out the rules on promoting a technical proposal from tenderers. The Act provides that when public entities require tenderers to submit technical proposals, such public entities must publish the criteria by which they will evaluate such proposals. The Act further provides that if any proposal submitted by tenderers relies on novel techniques or innovation, public entities may change the target price.

3.10 What are the rules on conflicts of interest?

There is no explicit rule on conflicts of interest in public procurement regulation in Japan. However, it is often provided in the public notice of invitation or request for qualification that a conflict of interest with a member of the evaluation team or unfair advantages are some of the reasons for disqualification.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Each of the national and local governments adopts its calculation standard of the target price of contract. In the application of their standards, public entities conduct market engagement or request potential bidders to provide their quotations as referential information.

Any unfair conduct, such as leakage of a target price which is not disclosed in the procurement process, could constitute an offence under the Penal Code (Act No.45 of 1907) and the Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. (Act No.101 of 2002).

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Laws relating to public procurement apply to the public entities and contracts specified in questions 3.1 and 3.3, and there is no other specific rule regarding the principal exclusions/exemptions.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

There is no explicit rule concerning "in-house" arrangements. Any contract between national or local governments is classified as an "administrative contract" and is considered conceptually different from the contract by which a procurement regulation would be applicable.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

As a general rule, if a bidder suffers loss due to an intentional act or negligence of the public officer in charge of the bidding procedures, the bidder can file a lawsuit against the government to seek compensation for the loss based on the State Redress Act (Act No.125 of 1947).

In addition to the filing of a lawsuit against the government in the courts, as regards public procurement to which the GPA is applied, Japan has established a system to provide non-discriminatory, timely, transparent and effective procedures to file complaints. The national system will handle complaints regarding procurements by the national government and related entities. Complaints about procurements by local governments and related entities to which the GPA is applied are handled by each local government. The rules of challenge procedures of the national system have been established under the authority of the Cabinet. This challenge system is called the "Government Procurement Challenge System" ("CHANS").

Under those rules, any supplier who believes that a specific case of government procurement has breached the provisions of the GPA or other prescribed stipulations may file a complaint with the Government Procurement Challenge Review Board (the "Board"). If the Board finds that the procurement was made in breach of the GPA, etc., it will prepare its recommendation for remedial actions such as starting a new procurement procedure, redoing the same procurement, re-evaluating the tenders, and awarding a contract to another supplier or terminating the contract.

For further details on CHANS, please see the website of the Cabinet Office of the Japanese government (https://www5.cao.go.jp/access/english/chans_main_e.html).

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

The procedure of explanation, investigation and non-binding recommendation by the Bidding Monitoring Committee or similar organisation established by local governments, as described in question 3.7, constitute possible remedies.

5.3 Before which body or bodies can remedies be sought?

As stated in question 5.1, under the complaint system, a complaint can be filed with the Board.

5.4 What are the limitation periods for applying for remedies?

The complaint filed with the Board must be filed (if at all) within 10 days from the date the supplier knew or should have known the basis of the complaint.

5.5 What measures can be taken to shorten limitation periods?

No measures are available to shorten limitation periods.

5.6 What remedies are available after contract signature?

As stated in question 5.1, the State Redress Act (Act No.125 of 1947) provides monetary compensation for loss. Under the State Redress Act, the plaintiff is required to prove: (a) that the public officer intentionally or negligently violated the provisions of the law; (b) that the plaintiff has suffered loss; and (c) the causation between the intentional act or negligence and the loss.

Concerning the remedies (though non-binding) available under the system of the Board, see question 5.1.

5.7 What is the likely timescale if an application for remedies is made?

The Board will review the complaint within 10 working days and may dismiss the complaint if: (a) the complaint was not filed within the prescribed period; (b) the complaint is not related to the GPA; (c) the complaint is meaningless or the violation is *de minimis*; (d) the complaint is not filed by a supplier; or (e) the complaint is not appropriate for review by the Board. If the Board accepts the complaint for review, the Board will notify the complaining party and the procurement entity thereof, and publicly announce the filing of the complaint. The procurement entity is required to participate in the proceeding. Any supplier interested in the government procurement subject to the complaint can participate in the proceeding by notifying the Board thereof within five days after the public announcement.

If a complaint is filed before signing a contract for the procurement, the Board will, as a rule, make a request to the governmental entity to suspend the contract procedure promptly, within 10 days after the filing of the complaint. If a complaint is filed within 12 working days after the making of a contract for the procurement, the Board will, as a rule, make a request to suspend the performance of the contract promptly. Within 14 days after the date of receipt of a copy of the complaint, the government entity is required to file a report containing tender documents, an explanation in response to the complaint, and additional information necessary for the resolution of the complaint. The Board will ask the complaining party and the government entity to submit assertions, an explanation and evidence, and review the complaint. The Board may call a witness or expert, or conduct a public hearing on the contents of the complaint. The Board will prepare a report on its findings within 90 days (50 days in case of a complaint involving public construction work). The Board may expedite the proceeding on application by the complaining party or the procurement entity.

In the report, the Board will decide whether all or part of the complaint is upheld and whether the procurement was made in breach of the GPA, an EPA or other equivalent treaty. If the Board finds that the procurement was made in breach of the GPA, an EPA or any other equivalent treaty, the Board will prepare its recommendation for remedial actions, taking into account such circumstances as the degree of defect in the procurement procedures, the degree of disadvantage caused to the suppliers, the degree of breach of the GPA, an EPA or other equivalent treaty, the extent of the performance of the contract already made, the degree of the burden on the government, the urgency of the procurement and the effect on the business of the procurement entity. The procurement entity, as a rule, is required to follow the Board's recommendation, although such recommendation is not regarded as legally binding. If the procurement entity does not follow the recommendation, it must notify the Board thereof, with a reason, within 10 days (60 days in the case of public construction work) after the receipt of the recommendation.

As to a lawsuit against the government to seek compensation for the loss based on the State Redress Act, the length of the time period until a court order is obtained depends on the complexity of the case – it usually takes more than a year.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

In the case filed by IBM Co. Ltd. (Japan) with the Board in relation to MLIT's procurement information processing system in 2008, the Board issued a report dated December 25, 2008 in which it found that the evaluation criteria were not appropriate in light of the relevant rules set in relation to the GPA; the Board further issued its recommendation requiring the MLIT to re-evaluate the proposal made by the tenderers.

5.9 What mitigation measures, if any, are available to contracting authorities?

If the procurement entity has been required by the Board to suspend execution or performance of a contract because a complaint has been filed, they may override such requirement if they determine that they cannot adhere to it because of urgent and compelling circumstances.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

There is no explicit rule on changes during the procurement procedure.

However, the general understanding is that changes to specifications or contract conditions, etc. are basically not permitted during and after a procurement procedure, as such factors are deemed a prior condition, so that if changes to contract specification, timetable and contract conditions are regarded as material, then public entities are required to restart that procurement procedure, reflecting those changes. In the case of Contracts at Discretion, such changes are generally more easily permitted.

Concerning changes to the membership of bidding consortia, although there is no explicit rule, the general understanding is that changes to the membership are not permitted without prior approval of the government, which is only given when there is a compelling reason.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

After the submission of a final tender, changes to the final tenders and the terms of the contract are basically not permitted during a procurement procedure and after a contract award, unless such a change is *de minimis*.

6.3 To what extent are changes permitted post-contract signature?

There is no explicit rule concerning the changes after contract signature. In practice, the general understanding is that changes are permitted if such changes are mutually agreed, have justifiable reason and are not material.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

There is no explicit rule concerning the transfer of a contract.

The contract used in public procurement in Japan generally contains a provision which prohibits a contracting party from transferring its rights and obligations under the contract without prior approval of the contracting authority.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The PFI Act provides a very general idea of procedures for privatisations and PPP, but there is no provision which specifically provides details of the procurement procedure applicable to privatisations and PPP. There exist documents known as "guidelines" published by the Cabinet Office, which holds jurisdiction over the PFI Act: (I) its guideline on the "Right to Operate Public Facility, etc." ("Concession Guideline"), which is regarded as a type of right based on a concession contract; (II) the model contract for privatisations and PPPs; and (III) its guideline on the model procedure.

The principal issues and changes described in the guidelines above are as follows:

I. Principal issues in the new guideline of the "Right to Operate Public Facility, etc.":
   i. How to establish the "Right to Operate Public Facility, etc." and the contents of such a right.
   ii. How to conduct a public facilities operation project by the holder of the "Right to Operate Public Facility, etc.".
II. Principal changes in the guideline of a model contract:
   i. How to allocate various risks in a concession contract of the public facilities operation project implemented by the holder of the "Right to Operate Public Facility, etc.".
III. Principal changes in the guideline on the model procedure:
   i. How to evaluate properly any proposal of a tenderer which proposed a privatisation project before the

procurement procedure started and the public entity adopted such a proposal.

ii. Whether negotiation of a contract is acceptable under the current system of procedure.

Although they are not major amendments, the PFI Act was amended as follows:

i. The scope of "Public Facility, etc.", i.e., facilities that would be subject to the specified projects including the "Public Facility, etc. Operation Project" under the PFI Act, was expanded to include sports facilities and convention facilities in June 2022 (see question 2.5 concerning the "Public Facility, etc. Operation Project"), and has been enforced since then.

ii. Previously, it was not possible to change the size and layout of the facilities set forth in the initial policy of the "Public Facility, etc. Operation Project", however, it became possible to renovate and expand the facilities more flexibly in June 2023, and has been enforced since then.

Other than the PFI Act, there is no explicit general rule applicable to the privatisation of public enterprises. In Japan, when a certain public enterprise is to be privatised, the government usually establishes a special act applicable to the privatisation.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

In Japan, privatisations and PPPs are not singled out for special treatment. Within the general rules and regulations of public procurement, the guidelines of the PFI Act discuss how to apply those rules and regulations appropriately to PFI/PPP projects, as stated in question 7.1.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

No substantial changes to the law are expected at present, but there have been some changes to existing practices that are expected to affect public procurement procedures in Japan (*cf.* question 8.2).

With respect to bids for the procurement of goods and public works that are to be executed after April 2022, in the case of the Comprehensive Evaluation Method, companies that have announced wage increases for their employees will be given preferential treatment.

In addition, as a support measure for startup companies, there are plans to allow startup companies to participate in bidding and Contracts at Discretion as an exception in government procurement projects covering the period from the research and development phase to the contracts phase.

In the Cabinet Decision of June 2022, it was decided that government procurement for information systems should be reviewed in FY 2022 with the aim of ensuring fairness and promptness in entry procedures, adapting to methods such as agile development, and developing services using the cloud, and that the necessary measures should be implemented, including by updating the existing legal framework. The Digital Marketplace ("DMP") is a procurement method which is expected to be introduced, in which a business that has previously concluded a basic contract with the Digital Agency, the Japanese ministry in charge of IT, establishes a catalogue site for registering digital services, from which each administrative agency selects the most appropriate services and makes individual contracts. It is scheduled to be officially launched and fully operational in 2024 after a demonstration project began in 2023. This is expected to expand opportunities for startups as well as local and large companies to enter IT procurement including government procurement for information systems.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

There are no proposals to make any significant change to the law.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

Although it may not be accompanied with the amendment of law, in order to encourage environmentally conscious business management, the government will launch an initiative in FY 2023 only to publicly procure products that indicate the amount of carbon dioxide (carbon footprint, "CFP") emitted from raw material procurement to disposal. Similar efforts are being made by the Ministry of the Environment, which gives preferential treatment to companies that are certified as environmental conservation companies under the Eco-First Program.

Moreover, as with the initiative and efforts above, even though it may not be accompanied with the amendment of law, in order to encourage socially conscious business management, the Ministry of Economy, Trade and Industry ("METI") has launched a support programme called "J-startup Impact" as a mechanism to foster public and private sector startups that seek solutions to social problems, in 2023. METI will allow selected companies to bid on all government procurement projects if certain conditions are met, and will hold matching events with local governments.

In the Cabinet Decision of April 2023, in response to the global interest in the United Nations Sustainable Development Goals, the government decided to strive to ensure that respect for human rights is upheld and adhered to by all bidding companies in public procurement. It is necessary for bidding companies to make efforts to respect human rights based on the guidelines for respecting human rights in responsible supply chains published by the government.

After the United States' withdrawal from intercompany negotiations for the (old) TPP, the remaining 11 countries (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam) agreed on the revised version of the TPP, the Comprehensive and Progressive Agreement for New Trans-Pacific Partnership (the so-called "TPP11"). The TPP11 is a free trade agreement between the above 11 countries which includes provisions relating to less restrictive access to markets, equal treatment of nationals and foreigners, and freedom of investment into signatory countries. It became effective among eight countries on September 19, 2021.

In relation to public procurement, the TPP11 provides (i) non-discriminatory treatment of overseas companies, (ii) the introduction of fair and transparent procurement procedures, and (iii) efforts to use English upon announcement of the procurement plan. The Japanese government has announced that no amendments/additions need to be made to the existing laws, orders and ordinances relating to public procurement, as the TPP11 is almost equivalent to the GPA, which already applies to public procurement in Japan. Further attention, however, will still be required as to whether previous practices

(in particular, lower and internal rules in each governmental organisation and each local government) for public procurement will change or not, since there are some differences between the TPP11 and GPA.

In November 2020, the 10 Member States of the Association of Southeast Asian Nations ("ASEAN") plus Australia, China, Japan, the Republic of Korea and New Zealand signed the Regional Comprehensive Economic Partnership Agreement ("RCEP"), which came into effect on January 1, 2022. Like the TPP, the RCEP has a chapter on government procurement. Unlike the TPP, the RCEP also applies to countries which are not members of the TPP (for example, China). On the other hand, unlike the government procurement rules in the TPP, the RCEP has looser regulations, i.e., local governments are not covered by the RCEP, and there are differences in target government agencies, transparency obligations, and procurement liberalisation. No corresponding legislative changes are planned at present, but as described in question 8.1, the policies under the RCEP have been gradually incorporated into practice.

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Anderson Mōri & Tomotsune has approximately 560 Japanese lawyers (*bengoshi*), 60 lawyers qualified in foreign jurisdictions, approximately 20 other professional staff including patent lawyers, immigration lawyers, judicial scriveners, and approximately 700 translators, paralegals, and other general staff members at the time of writing.

Anderson Mōri & Tomotsune has a wide-ranging public sector transaction practice which includes privatisation, PPP and PFI. We have acted for national and local governments in relation to many PFI/PPP projects in various sectors, including airports, satellites, prisons, hospitals, water, sewage, waste disposal, renewable energy, among others. We provide extensive legal services covering not only the implementation of various projects through public procurement procedure, but also disputes in public procurement.

Our attorneys have experience working in many public entities, including ministries and quasi-governmental organisations, and include the former Deputy Secretary of the Ministry of Economy, Trade and Industry and the former Director-General of the Cabinet Legislative Bureau.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The Constitution of Kenya, 2010
The Constitution in Article 227 requires that public procurement be carried out in a system that is fair, equitable, transparent, competitive and cost-effective. Supplementary Constitutional provisions which ought to be adhered to in public procurement include:

- the national values (Article 10);
- equality and freedom from discrimination (Article 27);
- affirmative action programmes (Article 55);
- principles of Public Finance (Article 201);
- the values and principles of public service (Article 232); and
- Chapter 6 of the Constitution on Leadership and Integrity.

The Public Procurement and Asset Disposal Act (Revised Edition 2022) (PPADA) and the Public Procurement and Asset Disposal Regulations, 2020 (PPADR)
The PPADA and PPADR serve as the guide in all matters of procurement and asset disposal in Kenya. They bring to life the provisions of Article 227(1) of the Constitution. The PPADA establishes the Public Procurement Regulatory Authority (PPRA) and the Public Procurement Administrative Review Board (PPARB), which serve as the watchdogs for public procurement in Kenya.

The PPADA and PPADR detail roles and responsibilities of county governments in public procurement; the powers of regulatory bodies to ensure compliance with the procurement laws; internal organisation of procuring entities in procurement; general procurement principles and procurement planning; various modes of procurement and applicable procedures; administrative review of decisions of procuring entities; and offences and sanctions applicable in public procurement.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic underlying principles are provided under Article 227(1) of the Constitution (see question 1.1 above).

Section 3 of the PPADA provides the national values and principles and affirmative action programmes provided for under Articles 10, 27, 55, 56, 201 and 232 of the Constitution, principles of integrity, value for money and promotion of local industry and citizen contractors.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

Procurements for all public entities, including national security organs must comply with the provisions of the PPADA and use the procurement methods provided therein. The PPADA provides for Classified Procurement Methods and procedures for procurements carried out by the national security organs. The PPADA also allows a procuring entity to use Specially Permitted Procurement Procedures in specific cases such as when use of other procurement methods is impractical or uneconomical, if permitted by the National Treasury.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The Public Finance Management Act, 2012 (PFMA)
The object of the PFMA is to ensure public finances are managed in accordance with the principles in the Constitution and to ensure accountability, transparency, and efficiency in the management of public finances. The PFMA outlines the role of accounting officers of public entities to ensure the keeping of accurate and legally compliant accounting records, among other duties.

The Public Officers Ethics Act, 2003
This Act advances the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers. It details how public officers should carry out their duties, with efficiency, honesty, professionalism, and integrity, avoiding conflicts of interest, and with political neutrality.

The Public Audit Act, 2015
This Act empowers the Auditor General to undertake audit activities in state organs and public entities to confirm whether

public money has been applied lawfully. This includes auditing public procurements in public entities.

The Leadership and Integrity Act, 2012
The primary purpose of this Act is to ensure that State officers respect the values, principles and requirements of the Constitution, these being the values and principles provided for in Articles 10, 73, 75, 99(1)(b) and 193(1)(b), 132, 174 and the fundamental rights and freedoms in Chapter Four of the Constitution.

The Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003
This Act contains provisions on the protection of public property and revenue including in tendering. Failure to comply with procurement laws and guidelines is an offence under the Act.

The Public Service (Values and Principles) Act, 2015
- Values and Principles of Services including honesty, high standards of integrity, transparency, accountability for one's actions, being respectful, objective, patriotic, observes the rule of law.
- Compliance with provisions of relevant professional association.
- Efficient, effective and economic use of resources.
- Responsive, prompt, effective, impartial and equitable provision of services.
- Provision to the public of timely accurate information.
- Facilitate public participation and involvement in the promotion of values and principles of public service.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

According to Section 4 of the PPADA, public procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government or multilateral agency are not procurements or asset disposals to which the PPADA applies, unless the Regulations or the International Agreement or rules prescribe otherwise. This allows for implementation of such Agreements without conflict with the applicable municipal legislation.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The PPADA gives effect to Article 227 of the Constitution and provides procedures for efficient public procurement and for assets disposal by public entities.

Section 2 of the PPADA defines public entities and includes a comprehensive list of such entities at both the national and county governments levels including the Judiciary, Legislature and offices established under the Constitution. These are entities that use public money for purposes of procurement and any entity declared to become a public entity under PFMA.

2.2 Which types of contracts are covered?

Contracts for procurement of goods, works or services, including asset disposal. Section 4 (2) of the PPADA provides for contracts which are excluded from the Act, such as employment contracts or contracts for services offered between government departments or procurements under other laws such as the Public Private Partnerships Act.

2.3 Are there financial thresholds for determining individual contract coverage?

Yes. Section 45 of the PPADA provides that all procurement processes shall be undertaken within the approved budget and as per the prescribed threshold matrix. The Second Schedule of the PPADR provides the threshold matrix which provides for the maximum and minimum level of expenditure allowed for the use of a particular procurement method.

Financial thresholds are also set for exclusive preference to citizen contractors in regulation 163, this being: (a) 1 billion shillings for procurements in respect of works, construction materials and other materials which are made in Kenya; and (b) 500 million shillings for procurements in respect of goods and services. The Public Procurement and Asset Disposal (Amendment) Bill, 2022 seeks to amend Section 157 of the PPADA to increase the threshold for exclusive preference for Kenyan citizens from the current five hundred million shillings to 20 billion shillings. This Bill has gone through the first reading in Parliament, as per the National Assembly Bill Tracker dated 7 December 2023.

2.4 Are there aggregation and/or anti-avoidance rules?

Section 54 of the PPADA prohibits splitting of contracts. No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure, except where prescribed.

Collusion among bidders is included in the definition of fraudulent practices in Section 2 of the PPADA. Splitting of contracts contrary to Section 54 of the PPADA and fraudulent acts are listed in Section 176 (h) which outlines prohibitions and offences and provides for penalties for the offences.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

Rules for concession contracts are provided for in the Public Private Partnership Act, Act No. 14 of 2021 (the PPP Act). The Regulations for the PPP Act are currently being drafted.

Section 2 of the PPP Act defines "**concession**" to mean a contractual licence formalised by a project agreement, which may be linked to a separate interest or right over real property, with or without a fee to the Government, entitling a person who is granted the licence to make use of the specified infrastructure or undertake a project and to charge user fees, receive availability payments or both such fees and payments during the term of the concession.

The Second Schedule of the PPP Act provides for a Brownfield Concession permitted for no more than 30 years. Other arrangements in the Second Schedule may qualify as concessions depending on the Agreement.

2.6 Are there special rules for the conclusion of framework agreements?

Yes. Sections 2, 114 and 141 of the PPADA defines framework agreements and contracting and applicable rules. These prescribe circumstances under which a procuring entity may enter into a framework agreement, the maximum term of

the framework agreements (three years), evaluation of bids carried out under the framework agreement and reporting requirements. Framework contracting arrangements allow the making awards of indefinite-delivery contracts and multiple awards of indefinite or definite quantity contracts.

Regulations 101 to 106 of the PPADR provides for the conditions and procedure for use of framework agreements, detailed rules including thresholds, indexing of prices and the process of making call-off orders. The 2022 Edition of the PPADA introduced amendments to Section 82 and 86 of the PPADA to accommodate framework agreements.

2.7 Are there special rules on the division of contracts into lots?

Yes. Regulation 154 of the PPADR stipulates that despite the provisions of Section 54 of the PPADA which prohibits the splitting of contracts to avoid the use of a procurement method, a procuring entity may, for the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, small, micro and medium enterprises in public procurement, unbundle a category of goods, works and services in practicable quantities. A procuring entity in unbundling procurements in paragraph (1) may allocate goods, works or services in quantities that are affordable to specific target groups participating in public procurement proceedings.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Purchasers owe the following obligations to suppliers established outside Kenya:

- Obligation to treat them fairly and equitably.
- Obligation to evaluate their tenders in accordance with the procedures and criteria in the tender document and applicable law.
- Obligation to inform them, in writing, of the outcome of their bids, including why they were unsuccessful.
- Obligation to comply with the terms of the contract entered between the purchaser and the supplier and legal provisions on relating to contracts.
- Ensuring that technical requirements shall be based on international standards or standards widely used in international trade.
- Use of currencies widely used in international trade in tendering.
- Respect and observance of international norms in procurement.
- Providing for use of Letters of Credit in international transactions.
- Ensuring wide reach in advertisement of tenders.
- Allowing adequate time in tender processes.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

Section 86 of the PPADA provides that procuring entities shall award a tender to the tenderer who meets any one of the following requirements as specified in the tender document:

- the tender with the lowest evaluated price;
- the responsive proposal with the highest score determined by the procuring entity by combining the scores assigned to the technical and financial proposals where Request for Proposals method is used;
- the tender with the lowest evaluated total cost of ownership; or
- the tender with the highest technical score, where a tender is to be evaluated based on procedures provides guidelines for arriving at applicable professional charges.

The award procedures are linked to specific procurement methods provided in Part IX of the PPADA and there is no free choice e.g., when using the Open Tender method, an award is made to the tender with the lowest evaluated price. The 2022 Edition of the PPADA introduced an amendment exempting Section 141 of the PPADA on Framework Contracting and Multiple Awards from the provisions of Section 86.

3.2 What are the minimum timescales?

There are no minimum timescales prescribed for award. However, the award must be made before the expiry of the period within which tenders must remain valid.

3.3 What are the rules on excluding/short-listing tenderers?

Any tender submitted after the deadline shall not be accepted by the procuring entity (Section 77 (3) of the PPADA).

Section 78 (7) of the PPADA provides that no tenderer shall be disqualified by the procuring entity during opening of tenders.

During evaluation of tenders, bidders are eliminated if they fail to meet eligibility and mandatory requirements provided in Sections 55 and 79 (1) of the PPADA. Failure to meet mandatory tender formalities, even minor ones, leads to automatic disqualification of a bidder, regardless of the strength of a bidder's technical proposal.

Shortlisting at the technical stage will be based on other procedures and criteria in the tender document (Section 80 of the PPADA). Thereafter, short-listing on price is based on the rules in Section 86 of the PPADA (see question 3.1 above).

Tenderers that have made it past preliminary, technical and financial evaluation may be eliminated during post qualification – due diligence (Section 83 of the PPADA).

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The evaluation committee appointed by the accounting officer pursuant to Section 46 of the PPADA evaluates and compares the responsive tenders other than rejected tenders.

The evaluation and comparison of tenders is carried out using the procedures and criteria set out in the tender documents and, in the tender for professional services, consideration of laws on regulation of fees (Section 80 of PPADA).

The evaluation committee prepares an evaluation report and submits the report to the person responsible for procurement for review and recommendation, who submits such report with recommendations to the accounting officer for approval.

The evaluation and comparison of tenders should be carried out within 30 days or 21 days for requests for proposals.

An award is based on the provisions of Section 86 of the PPADA, including consideration of price, and is dependent on the procurement methods found in part IX and X of the PPADA (see question 3.1 above).

Social value considerations are incorporated through preferences and reservations in Part XII of the PPADA. Tenders may be reserved for disadvantaged groups or impose local content requirements.

3.5 What are the rules on the evaluation of abnormally low tenders?

The rules on abnormally low tenders are addressed under Standard Tender Documents available on the PPRA website. Procuring entities are required to use them as a basis for preparation of their tender documents as stipulated in Section 70 (2) of the PPADA.

Section 70 (6) (b) of the PPADA provides in part that a person shall not be disqualified on the basis that a bidder quoted above or below a certain percentage of engineer's estimates.

Clause 37.2 of the Standard Tender Document for Works provides that in the event of identification of a potentially Abnormally Low Tender, the procuring entity must seek written clarifications from the tenderer, including detailed price analyses of its tender price.

After evaluation of the price analyses, if the procuring entity determines that the tenderer has failed to demonstrate its capability to perform the Contract for the offered tender price, the procuring entity shall reject the tender.

3.6 What are the rules on awarding the contract?

It starts with identification of that tenderer as provided for in Section 86 of the PPADA (see question 3.1 above).

Upon award of the contract and prior to the expiry of the tender validity period, a procuring entity should issue a Notification of Intention to Enter into a Contract/Notification of Award to all tenderers containing the information in Section 87 of PPADA and Regulation 82 of PPADR, such as name and contract price of the successful tender.

A contract should not be signed earlier than the expiry of a standstill period of 14 days to allow any dissatisfied tender to launch a complaint before the PPARB.

3.7 What are the rules on debriefing unsuccessful bidders?

Section 87 (3) of the PPADA requires that when a person submitting the successful tender is notified, the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

Additionally, a debriefing clause is included in format for the notification of intention to award letter contained in the standard tender documents issued by the PPRA. An unsuccessful tenderer may make a written request to the procuring entity for a debriefing on specific issues. The debrief letter stipulates the timelines and manner of the debriefings.

The days spent on the debriefing form part of the 14-day window to appeal to the PPARB. The procuring entity cannot reverse its decision after issuance of the award letters even if the debriefing uncovers a material error. The reversal of the award can only be done by the PPRA or PPARB.

3.8 What methods are available for joint procurements?

A tenderer may be a firm that is a private entity, a state-owned enterprise or institution, or any combination of such entities in the form of a joint venture (JV) or consortium under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent.

The joint venture is required to nominate a representative who should have the authority to conduct all business on behalf of all the members of the JV during the tendering process and contract execution if successful. Some Tenders allow for use of sub-consultants/sub-contractors who may either be individual professionals or incorporated entities.

Section 50 of the PPADA provides for consortium buying where procuring entities with common interests may come together to procure jointly to enjoy economies of scale.

3.9 What are the rules on alternative/variant bids?

The PPADA and PPADR do not contain provisions on alternative/variant bids. Provisions on alternative bids are contained in Standard Tender Documents issued by PPRA.

In the Standard Tender Document for Works, the rules on alternative tenders include:

a. The procuring entity should specify in the tender document whether it will allow alternative bids.
b. A tenderer (individually or JV) shall not participate in more than one tender, except for permitted alternative tenders.
c. Alternative tenders may take the form of allowing for alternative times for completion or alternative technical requirements.
d. Where the tender document allows for alternative technical requirements, more detailed rules should be provided.

3.10 What are the rules on conflicts of interest?

Where a person submitting a tender, proposal or quotation (or if direct procurement is being used, a person with whom the procuring entity is negotiating) has a conflict of interest, that person will be:

- disqualified from entering into a contract for a procurement or asset disposal proceeding; or
- if a contract has already been entered into with the person, the contract shall be voidable.

An employee, agent, member of the Board or committee of a procuring entity who has a conflict of interest with respect to a procurement should not:

- take part in the procurement proceedings;
- take part in any decision relating to the procurement or contract; and
- be either a subcontractor for the bidder to whom the contract was awarded, or a member of the group of bidders to whom the contract was awarded.

Public officers of a procuring entity, their spouses, children, parents, brothers or sisters, children, parents, brothers or sisters of a spouse, their business associates or agents, and firms/organisations in which they have a substantial or controlling interest are not eligible to tender or be awarded a contract. Public officers are also not allowed to participate in any public procurement proceedings.

If an employee, agent, or member of the Board or committee of a procuring entity takes part in the procurement proceedings, and the contract is awarded to either the person, their relative, or to another person in whom one of them had a direct or indirect pecuniary interest; the contract shall be terminated and all costs incurred by the public entity must be made good by the awarding officer.

Standard tender documents contain a form on disclosure of conflict of interest which tenderers are required to fill.

The Conflict of Interest Bill, 2023 which is still before Parliament may introduce additional conflict rules through amending Section 59 of the PPADA.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Market engagement may take the form of pre-bid conferences and site visits, as provided in the Tender Documents and inquiries/request for clarifications from bidders, which may result in the modification of the Tender Documents through issuance of Addenda to factor in feedback from bidders (see Section 75 of the PPADA and Regulations 184 and 186 of PPADR).

In cases regarding a potential bidder, or any of its affiliates, who participate in the preparation of the design or technical specifications of works, goods or services, that are the subject of a procurement procedure as a consultant; or any of its affiliates have been hired (*or are proposed to be hired*) by a procuring entity, or for contract implementation, or would be providing lease items, works, or non-consulting services resulting from, or directly related to, consulting services for the preparation or implementation of a project (that it provided or was provided by any affiliate that directly or indirectly controls, is controlled by, or is under common control with that potential bidder); such a bidder is considered to have a conflict of interest, and the rules outlined in question 3.10 above will apply as appropriate.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Section 4 (2) of the PPADA provides activities which are not considered procurements or asset disposals with respect to which the PPADA applies. The exempt procurements include employment contracts for a limited term other than contract of service, the transfer of assets/procurements between state organs without financial consideration, procurements under the PPP Act and between government under an international agreement or treaty.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

Section 4 (2) (b) and (c) of the PPADA (see question 4.1 above) provides that the PPADA does not apply to such procurements that involve the transfer of assets between public entities without valuable consideration and acquiring services provided by government departments by other government entities.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

Yes. A request for review is an application made to the PPARB by a candidate or a tenderer who claims to have suffered or to risk suffering loss or damage due to breach of a duty imposed on a procuring entity by the PPADA and/or PPADR. The administrative review should be sought within 14 days of notification of award or the date of occurrence of alleged breach at any stage of a procurement process (Section 171 (1) of the PPADA).

- The parties to a request for review consist of the person who requested the review, the accounting officer of the procuring entity, the tenderer who was notified as successful by the procuring entity and such other persons as the PPARB may determine (Section 170 of the PPADA).
- The PPADA affords a person aggrieved by the decision of the PPARB the right to seek judicial review at the High Court within 14 days from the date of the decision of the PPARB with the High Court given 45 days to determine the matter, failure to which the decision of the PPARB will be final and binding (Section 175 (1) and (3) of the PPADA).
- The PPARB has wide powers and may give any of the remedies outlined in Section 173 of the PPADA, including annulling the decision of the accounting officer, terminating the procurement proceedings or ordering costs.
- A person who is aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of the decision of the High Court and the Court of Appeal shall render its decision within 45 days. The decision made by the Court of Appeal shall be final (Section 175 (4) of the PPADA).
- An aggrieved person may also request the PPRA initiate an investigation of procurement or disposal proceedings or contract to determine whether there has been a breach of the PPADA, if the matter is not subject to review by PPARB.
- If the Director General of the PPRA is satisfied there has been a breach of the PPADA, he can make orders such as termination of the procurement proceedings or debarment (Sections 38 and 41 of PPADA).
- A person who is aggrieved by the orders of the PPRA may file a request for judicial review to the High Court within 14 days after the orders are made.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

Yes – one may file a Constitutional Petition. The doctrine of exhaustion may be raised as a bar for not utilising the remedies provided under the PPADA. This procedure takes a long time and may be ineffective without a stay order, since the procurement process may be concluded before the judgment is delivered.

5.3 Before which body or bodies can remedies be sought?

Remedies can be sought from the following:

- The Public Procurement Administrative Review Board (PPARB).
- The Public Procurement Regulatory Authority (PPRA).
- The High Court of Kenya.
- The Court of Appeal.
- The Ethics and Anti-Corruption Commission for corruption complaints.

5.4 What are the limitation periods for applying for remedies?

See question 5.1 above for the limitation periods.

The Court of Appeal has held that the above timelines are cast in stone. The PPARB and the Courts lack jurisdiction to entertain appeals filed outside time (see question 5.8 below).

The PPADA does not specify the timelines within which a person should request the PPRA to initiate an investigation.

No timelines are stipulated for filing and hearing constitutional petitions relating to public procurement. Delays in filing might

deny the aggrieved person a meaningful remedy where the judgment is delivered after implementation of the procurement contract.

5.5 What measures can be taken to shorten limitation periods?

The following measures can be taken to shorten limitation periods:

- Strict compliance by the PPARB and the Courts with the timelines provided in the PPADA by refusing to assume jurisdiction where appeals are filed out of time.
- In the case of constitutional petitions relating to public procurement to address issues in Articles 10, 35, 47, 201, 227 & 232 of the Constitution, timelines need to be prescribed in legislation.
- Prescribing timelines for PPRA investigations.

5.6 What remedies are available after contract signature?

A judicial review or other application can be filed before the High Court, and if dissatisfied with the decision of the High Court, an appeal lies at the Court of Appeal. Contracts signed irregularly may be annulled by PPARB.

5.7 What is the likely timescale if an application for remedies is made?

Please see the timelines in question 5.1 above.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR – an authority which has resulted to the quashing of illegal tender terminations. It was held "*the Board has the obligation to first determine whether the statutory pre-conditions of Section 63 of the Act [PPADA] have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board's jurisdiction is ousted by Section 167 (4) (b) of the Act*".

Republic v. Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR, is a leading authority on compliant tenders and due diligence/post-qualification. It held that "*in public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders*".

Miscellaneous Civil Application 140 of 2019, Republic v. Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR – mandatory requirements in a bid document must be complied with. Deviations from mandatory bid requirements should not be permissible.

Civil Appeal E039 of 2021 Aprim Consultants v. Parliamentary Service Commission & The Public Procurement Administrative Review Board – the timelines under Section 175 of the PPADA cannot be varied as they accentuate the intention of Parliament to ensure public procurement disputes are disposed of expeditiously. This has ensured timely decision making and quashing of judgments issued outside of these timelines.

Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v. CPF Financial Services Limited & two others (Civil Appeal E510 of 2022) [2022] KECA 982 (KLR) (9 September 2022) (Judgment) – the broad powers of the PPARB under Section 28 and 173 of the PPADA include the power to extend tender validity in situations where a rogue accounting officer fails to adhere to statutory timelines or disobeys the Board's directions so as to frustrate tenderers or bidders, even if the stated tender validity period has expired. The accounting officer was ordered to issue a notification of award to the bidder within 30 days of the judgment.

Civil Appeal No. 13 of 2015 – Okiya Omtatah Okoiti & two others v. Attorney General & 4 others [2020] eKLR – in this case on the procurement of the Standard Gauge Railway (SGR), the Court of Appeal held that in enacting Section 6 of the PPADA, it was not intended that the identification of a supplier of goods and services (in effect the procurement) would precede the loan agreement to oust the application of procurement procedures under the PPADA. The contract could not be quashed as it had already been implemented due to the lengthy timelines of the case.

5.9 What mitigation measures, if any, are available to contracting authorities?

The PPADA allows the procuring entity to request for a tender security from tenderers and performance security from the successful bidder and provides for circumstances under which the securities may be forfeited (Sections 61 and 142 of the PPADA). Sections 63 and 153 of the PPADA allow a contracting authority to terminate a procurement process or a contract where procurement processes have been overtaken by operation of law or substantial technological changes, inadequate budgetary provision, *force majeure*, non-performance or upon receiving evidence of fraud or corruption by the tenderer.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Section 75 (1) of the PPADA provides that procuring entities may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum, without materially altering the substance of the original tender and may extend the deadline for tender submission to give sufficient time to bidders to respond.

A person who submitted a tender may withdraw or modify its bid, including by changing the composition of the consortia, before the deadline for submitting tenders.

Once the deadline for submitting tenders has been reached, a procuring entity wishing to introduce changes to the tender document may only do so through tender termination under Section 63 of the PPADA and re-advertising the tender.

A bidder cannot withdraw their bid after the deadline for submission of tenders without forfeiting its tender security as per Section 61 of the PPADA.

Modification of bids after the submission date is not permitted except for pricing where competitive negotiations are permitted subject to the rules in Section 128 and 131 of the PPADA.

The Rules are aimed at promoting fairness by prohibiting the changing of the rules after tender submission or after contract award.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where:

a. there is a tie in the lowest evaluated price by two or more tenderers;
b. there is a tie in the highest combined score points;
c. the lowest evaluated price is in excess of available budget; or
d. there is an urgent need that can be met by several known suppliers.

6.3 To what extent are changes permitted post-contract signature?

An accounting officer of a procuring entity, on the recommendation of an evaluation committee or as prescribed in the signed Contract Agreement, may approve the request for the extension of the contract period, which request shall be accompanied by a letter from the tenderer making justifications for such extension or may approve the request for use of certain costs such as prime costs or contingencies. Contract price variations cannot be made within 12 months of signing the contract.

Amendments and variation of contracts must comply with PPADA provisions such as ensuring the cumulative value of all variations do not exceed by original contract price by 25 per cent (Section 139 of PPADA).

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

If the tender documents do not prohibit subcontracting, the successful tenderer may subcontract part of the tender but only if the person to be subcontracted has not been debarred from procurement proceedings or participated in the procurement of goods, works or services related to that contract. The successful tenderer is then responsible for the sub-contractor's obligations towards the procuring entity (Section 149 (1) of the PPADA).

Tender Documents contain clauses on assignment of contracts with conditions such as requiring the procuring entity be informed and give prior approval for sub-contracting.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Yes. For a long time, matters of privatisation were governed by the Privatization Act, No. 2 of 2005 which provided for the privatisation of public assets and operations, including State corporations, by requiring the formulation and implementation of a privatisation programme by a Privatization Commission to be established by the Privatization Act. The Privatization Act, 2005 inhibited privatisations since only the Privatization Commission is mandated to exclusively manage and implement any privatisation programme.

In October 2022, the President of the Republic of Kenya instructed relevant parties to commence the review of the Privatization Act with a view to repealing and replacing it with a more facilitative framework that will accelerate privatisations and the Privatization Bill, 2023 was enacted and debated by Parliament. The Bill was passed by Parliament on 14 September 2023 and assented by the President on 9 October 2023.

The new privatisation law introduces a raft of changes, including replacing the Privatisation Commission with the Privatisation Authority, assigning roles to the Cabinet Secretary for the National Treasury such as developing the privatisation programme, simplifying the privatisation process by reducing the number of steps and creating a Privatisation Review Board to hear appeals. The next few years and the Regulations for the new law will determine if the new law effectively addresses the challenges of the previous Act.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

Yes. PPPs are governed by the PPP Act, 2021. It provides for the participation of the private sector in the design, financing, construction, development, rehabilitation, operation, equipping or maintenance of infrastructure, or development projects through PPPs, and streamlines the regulatory framework for PPPs.

The provisions of the PPADA do not apply to PPP projects, if all the monies for the project are from the private party but apply if there is counterpart public funding for the PPP project.

The PPP Act includes a framework for streamlined project processes with clear timelines, expanded procurement options and robust processes for Privately Initiated Investment Proposals (PIIP).

Under the PPP Act, the role of the private sector in PPP initiatives is stipulated beyond financing to include construction, operation and maintenance of the projects. It adds permissible contract structures, including public-private joint ventures and strategic partnerships. This has broadened the scope of what is classified as a PPP, channelling more contracting arrangements between the public and private sector. The Regulations for this law have still not been enacted.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

The PPADA has recently been revised and we are currently using the 2022 Revised Edition. The 2022 Edition introduced a raft of changes, from adding to the definitions, clarifying framework contracting and correction of cross-referencing errors in the previous edition. Some provisions such as those requiring publishing and publicising procurement plans and advertisement of expressions of interest for Request for Proposals are positive as they have promoted the values of transparency and competition. One of the retrogressive additions to this Edition was the amendment to Section 41 of the PPADA to add debarment as a punishment for bidders who file reviews at the PPARB

that are considered frivolous and vexatious as this may have a chilling effect on potential litigants.

Current proposals to change the law include the following:

- The Public Procurement and Asset Disposal (Amendment) Bill, 2022 which seeks to revise Section 157 of the PPADA to increase the exclusive preference threshold for Kenyan citizen contractors from the current five hundred million to 20 billion shillings.
- The Tribunals Bill, 2023 will introduce changes to the status of the PPARB from being an unincorporated Board to the status of a subordinate court under the Judiciary which is established under Part Ten of the Constitution of Kenya, 2010.
- The Conflict of Interest Bill, 2023, which if passed into law, may result to a consequential amendment of Section 59 of the PPADA which deals with limitation on contracts with state and public officers.
- Though not yet reduced to a Bill, there are ongoing discussions that may alter training responsibilities in procurement for PPRA and the procurement institutes in the country.

As per information in the National Assembly and Senate Bills Trackers dated 7 December 2023 and 8 December 2023, respectively, the above Bills are pending at various stages before both houses of Parliament and it would take no less than six months for them to be enacted into law if passed.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

As mentioned in question 8.1 above, there are various Bills that are likely to impact the PPADA. Some of the significant changes likely to be brought by these legislative changes are as follows:

The Public Procurement and Asset Disposal (Amendment) Bill, 2022 – this is an affirmative action Bill that seeks to increase the threshold of exclusive preference to Tenders for Kenyan citizen from the current 500 million to 20 billion. This means that foreign companies will not be eligible to participate in tenders which are exclusively funded by the Government of Kenya which have a contract value of 20 billion shillings or less. In as much as this Bill has the positive intention of promoting contractors who are Kenyan citizens, the challenge may come in implementation if the companies owned by Kenyan citizens do not have the capacity to implement contracts of such a magnitude.

The Conflict of Interest Bill, 2023 seeks to amend Section 59 of the PPADA which places limitations on contracts with state and public officers. The proposed amendment will not result in any significant changes as it is more editorial in nature. However, the passing and proper implementation of the Bill may have a positive impact on enforcement of conflict of interest issues in public procurement matters.

The Tribunals Bill, 2023 which seeks to amend Section 27 of the PPADA to alter the status of the PPARB from being an unincorporated Board to the status of a subordinate court pursuant to Article 169 (1) (d) of the Constitution. The passing of this Bill is likely to bring about significant and possibly positive changes in the settlement of procurement disputes as explained below:

Assigning the PPARB the status of a subordinate court places it under the direct control of the Judiciary, which is an independent arm of government.

The independence that comes with the status of a subordinate court/tribunal under the judiciary as opposed to an unincorporated Board under an Act of Parliament will likely result in more independence in decision making in procurement matters.

The PPARB may benefit from more resources as it is likely to be funded by the Judiciary from the Judiciary Fund.

The PPARB may also benefit from other facilities such as use of the Judiciary e-filing system, and thus change the process of filing disputes from the current manual/physical filing system to using the online judiciary e-filing system which is more efficient and environmentally friendly.

The proposal in the Bill to amend Section 29 of the PPADA to change the appointing authority of the PPARB from the Cabinet Secretary (a political appointee of the President) to the Judicial Service Commission (an independent Commission created under Article 171 of the Constitution) is likely to inject more independence into the institution.

The proposal under the Bill to deploy a Deputy Registrar and such staff as may be necessary for the proper discharge of the functions of the PPARB may result in the provision of increased and more experienced manpower to the PPARB.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

The coming into force of the PPADA, 2022 Edition may have some positive impact in procurement practice in Kenya as some of the amendments in the 2022 edition, as summarised in question 8.1 above are likely to inject transparency, bring more inclusivity for disadvantaged groups and increase competition.

The passing of the Public Procurement and Asset Disposal (Amendment) Bill, 2022 may result in fewer procurement opportunities for foreign contractors since they will no longer be eligible for procurements of 20 billion shillings and below which are funded by the Government of Kenya. This may reduce competition and may have an impact on quality of the projects, noting that the capacity of local contractors is somewhat limited. On the other hand, this may create room for citizen contractors to build their capacity over time and be able to compete against foreign contractors in the future, since they now have easier access to procurement opportunities.

The finalisation of the PPP Regulations may divert some capital-intensive infrastructure projects from the PPADA to the PPP Act, to reduce use of public funding and expensive debt instruments for procurement.

The passing of the Tribunals Bill, 2023 is one that is expected to have the greatest impact on the PPADA since it brings with it a major change of the dispute resolution mechanism for procurement disputes in Kenya. The changes that are anticipated to come with the passing of this Bill, as outlined in question 8.2 above, are likely to have a positive impact on be positive if well implemented.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

In Macau, there is no general law or statute governing public procurement. Besides some very broad provisions in the Code of Administrative Procedure, the following pieces of legislation are worthy of note:

- Decree-Law 122/84/M: legal framework of expenses with construction works and procurement for goods and services;
- Decree-Law 63/85/M: legal framework of procurement for the provision of goods and services by tender made pursuant to Decree-Law 122/84/M;
- Order 52/GM/88: establishes the procedure for the acquisition of real estate assets by public authorities;
- Law 3/90/M: legal framework of public works and services concessions;
- Law 14/96/M: establishes the obligation for public works and services concessionaires under Law 3/90/M to make their balance sheet and the reports issued by their board of directors and supervisory board publicly available on a yearly basis;
- Order 39/GM/96: establishes mechanisms for the acquisition and rental of IT equipment by public authorities;
- Decree-Law 74/99/M: legal framework of procurement for public construction works, including provisions on contract negotiation, applicable administrative procedures and contract performance;
- Order 66/2006: provides instructions on the economic classification of public revenues and expenses; and
- Administrative Regulation 6/2006: financial framework of public services.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

Despite there being principles scattered across different laws and regulations, the Code of Administrative Procedure foresees that all public authorities should abide by the following principles: legality; impartiality; equality; proportionality; good faith; pursuit of public interest; and protection of the rights and interests of citizens.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

As stated in question 1.1 above, because the legal framework of public procurement is not in a single piece of legislation, several laws and regulations apply to different public contracts and procurement procedures.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Apart from the principles listed in question 1.2 above, any procurement procedure must at all times observe all relevant anti-money laundering and anti-terrorism regulations.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Being a Special Administrative Region of the People's Republic of China (hereinafter, the 'PRC'), Macau signed several cooperation agreements with the PRC which, among other things, involve the construction of public infrastructure. These agreements include, *inter alia*:

- the Framework Agreement on Deepening Guangdong-Hong Kong-Macau Cooperation in the Development of the Greater Bay Area, which implements the principle of 'One Country, Two Systems' by encouraging the integration of Macau with its surrounding urban centres and the development of the Guangdong-Hong Kong-Macau Greater Bay Area; and
- the Framework Agreement on Cooperation between Guangdong and Macau, which fosters the development of the neighbouring island of Hengqin, in the PRC, particularly through the construction of cross-border public infrastructure, so as to enable the flow of people, goods, capital and information.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The Macau government, public departments granted administrative autonomy, independent public services and public funds are all covered by the relevant legislation as purchasers.

2.2 Which types of contracts are covered?

Public procurement laws and regulations apply to the procurement of goods and services, public construction works and public services.

2.3 Are there financial thresholds for determining individual contract coverage?

Generally, minimum financial thresholds serve as indicators to determine the type of procedures used in public procurement. Pursuant to Decree-Law 122/84/M, when the cost of construction works exceeds MOP$15 million, or the cost of acquiring goods and services exceeds MOP$4.5 million, the contracting authority must necessarily carry out an open tendering procedure.

2.4 Are there aggregation and/or anti-avoidance rules?

The legal framework of procurement for public construction works of Decree-Law 74/99/M states that contracting authorities may choose between an open tendering procedure and direct negotiation with a prospective contractor. However, in the particular case of procurement for public construction works, the relevant provisions stipulate that all acts or agreements likely to distort the normal conditions of competition are forbidden and that, as consequence, tenders submitted in breach of this rule should be rejected.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

In Macau, the right to operate games of chance in casinos and the right to manage and use land owned by the government are subject to special rules given that, in principle, both of these belong exclusively to the Macau Special Administrative Region. Private entities may nevertheless benefit from those rights when the government grants them a concession.

Concessions of the right to operate games of chance in casinos are regulated by Law 16/2001 and subject to very strict rules and oversight. They follow an open tendering procedure ordered at the highest level by the Macau Chief Executive, with the total number of resulting concessionaires not allowed to exceed six and concessions granted for a maximum term of 10 years.

Through a concession of the right to manage and use land owned by the government, individual plots of land are made available for lease, private use or temporary occupation by individuals and entities. Upon submitting their tender, all candidates must pay a temporary deposit in the amount of 2% of the open tendering procedure's base price.

2.6 Are there special rules for the conclusion of framework agreements?

Framework agreements are subject to the rules regarding the conclusion of public contracts in general.

2.7 Are there special rules on the division of contracts into lots?

There are no special rules on the division of contracts into lots.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

The general principles governing foreign trade are stated in Law 7/2003 and in related regulations. Furthermore, as a result of cooperation agreements signed with the PRC, all goods imported from Mainland China are exempt from import tariffs.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

Pursuant to the Code of Administrative Procedure, public contracts in general may be the result of an open tendering procedure, of a limited open tendering procedure with or without prior qualification, or of direct negotiation. In certain cases, however, the law itself might specify a determined procurement procedure, such as, *inter alia*:

- *Provision of goods and services by tender*: open tendering procedure, limited open tendering procedure with prior qualification, or direct negotiation.
- *Acquisition of real estate assets by public authorities*: open tendering procedure or direct negotiation.

An open tendering procedure comprises the following steps:

- Announcement of the open tendering procedure and tender conditions.
- Tender submission and provision of a provisional guarantee by the bidder.
- Opening and assessment of the tenders.
- Awarding of the contract to the winning bidder.
- Provision of a performance guarantee by the contractor.
- Execution of the public contract.

A limited open tendering procedure with prior qualification follows the same rules as those regulating open tendering procedures, but only bidders pre-selected by the contracting authority and able to meet certain requirements and conditions (e.g. technical, professional or financial) are allowed to take part in the procedure. Within those eligible, three bidders are invited to submit their tender, among which the most inexpensive is then selected. In turn, a limited open tendering procedure without prior qualification foregoes the necessity of bidders meeting certain requirements and conditions.

Direct negotiation can be used by contracting authorities when an open tendering procedure is either not mandatory, or has been waived (in the instances where the law expressly provides for that possibility). A procurement procedure with direct negotiation will usually start by surveying at least three specialised entities domiciled in Macau. This survey must necessarily take place in writing when the estimated cost of the public

construction works or of the goods or services sought by the contracting authority exceeds MOP$90,000 or MOP$900,000, respectively.

3.2 What are the minimum timescales?

The timescale for the submission of tenders varies greatly according to what is being procured. For instance, when procuring goods or services, it can be situated between 15 and 180 days, depending on the importance and nature of the goods or services in question. In the case of procurement for public construction works, the timescale may range from 20 to 90 days, depending on the volume and complexity of the project. Nevertheless, all relevant deadlines are expressly set forth either in the tender conditions or in the law.

3.3 What are the rules on excluding/short-listing tenderers?

Please refer to question 3.1 above, regarding the situations where the contracting authority initiates a limited open tendering procedure.

Pursuant to Decree-Law 63/85/M and Decree-Law 74/99/M, following the deadline for the submission of tenders in an open tendering procedure, a committee appointed by the contracting authority opens all tenders and examines the bidders' qualifications, which enables them to draft a shortlist of admitted bidders. The committee then analyses the tenders to decide which bidder will be awarded the contract.

If there is a tie, the contracting authority summons the bidders in question to improve their tenders and, if neither of them is able to lower their price, the award decision will be issued at the authority's own discretion.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

Without prejudice to the indication of other criteria in the tender conditions, as a general rule contracts are awarded to the bidder with the most inexpensive tender. In the particular case of procurement for public construction works, the contracting authority further takes into account the proposed deadline for construction, profitability and technical value, among other things.

3.5 What are the rules on the evaluation of abnormally low tenders?

Although there are not any rules on the evaluation of abnormally low tenders, in the particular case of procurement for public construction works, the relevant provisions stipulate that all acts or agreements likely to distort the normal conditions of competition are forbidden and that, as consequence, tenders submitted in breach of this rule should be rejected. Refer to question 2.4 above.

3.6 What are the rules on awarding the contract?

Refer to question 3.4 above.

Contracting authorities must issue a decision within 90 days from opening the tenders, after which the winning bidder will be summoned to provide the performance guarantee so as to finalise the awarding decision.

3.7 What are the rules on debriefing unsuccessful bidders?

There are no rules on debriefing unsuccessful bidders.

3.8 What methods are available for joint procurements?

Although contracting authorities may allow joint procurements, if this option is not made available in the tender conditions, two or more bidders may nevertheless resort to an incorporated joint venture and submit their tender through a new entity.

3.9 What are the rules on alternative/variant bids?

The law does not establish the rules on alternative/variant bids, leaving them to be decided by the contracting authority in the tender conditions.

3.10 What are the rules on conflicts of interest?

The law does not establish rules on conflicts of interest. Therefore, the general rules set forth in the Commercial Code and in the bylaws for public servants set forth in Decree-Law 87/89/M apply when necessary.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Although there are no rules on market engagement, refer to question 3.1 above regarding the involvement of bidders in procurement procedures pre-award.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

The relevant public procurement laws and regulations do not expressly provide for any exclusions or exemptions.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

Please refer to question 3.1 above, regarding procurement procedures by direct negotiation and by limited tender.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

In general terms, a contracting authority's decision may be reviewed by the authority itself, in the context of an administrative claim (*reclamação*), or by its immediate superior, through an administrative appeal (*recurso hierárquico*). Administrative claims

and appeals can be filed by individuals and entities vested in the interests or rights affected by an authority's decision.

A third and highest level of review is provided for in the form of a judicial appeal (*recurso contencioso*), filed with courts either directly or, subject to particulars, following a previous administrative claim or appeal dismissing the claimant or appellant's challenge. Under certain circumstances, a judicial appeal may also take the form of a class action lawsuit.

Likewise, public procurement contracts can be challenged through a specific lawsuit (*acção sobre contratos administrativos*) whereby plaintiffs file suit to petition the annulment of a decision taken by the contracting authority during the award procedure (pre-award decision) and the consequent termination of an administrative contract; to challenge the validity, interpretation or performance of an administrative contract; or to seek compensation for damages.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

No remedies can be sought outside of the legislation.

5.3 Before which body or bodies can remedies be sought?

Remedies can be sought before the contracting authority who issued the decision itself, before that authority's immediate superior or before the courts of law. Please also refer to question 5.1 above.

5.4 What are the limitation periods for applying for remedies?

Different limitation periods exist depending on the nature of the procurement procedure and the challenging mechanism. Unless otherwise provided for in the law, the following generally apply to administrative acts:

- 15 days to file an administrative claim;
- 30 days to file an administrative appeal; and
- 30 to 365 days to file a judicial appeal, depending on the residency of the appellant or on the type of decision in question.

If an administrative act is challenged on the grounds of its supposed nullity, no limitation period applies.

Other special limitation periods exist, such as, *inter alia*:

- In procurement for the provision of goods and services by tender, the resolutions taken by the tender commission during the public act of opening and accepting the proposals can be challenged in the course of the public act itself in what amounts to an administrative appeal, with the appellant's statement of claim sent in writing within the next 10 days.
- In procurement for public construction works, an administrative claim against the acts or omissions of the contracting authority can be filed within a limitation period of 10 days and the contract itself can be challenged in court within a limitation period of 180 days.

5.5 What measures can be taken to shorten limitation periods?

There currently are no measures available to shorten limitation periods.

5.6 What remedies are available after contract signature?

Challenges to the validity of administrative contracts, including on the grounds of the nullity or invalidity of a pre-awarding act, as well as to their interpretation, can be submitted in court within a general limitation period of 180 days. Claims regarding the performance of an administrative contract can be submitted within a limitation period of 30 to 60 days, depending on the residency of the claimant.

5.7 What is the likely timescale if an application for remedies is made?

The law provides for general time limits of 15 and 30 days for a decision on an administrative claim or on an administrative appeal to be issued, respectively. If no decision is issued within these, the claim or appeal is deemed as rejected by the contracting authority in question.

There are no mandatory time limits for a court to issue a decision on a judicial appeal. The length of these proceedings varies depending on multiple factors, such as the complexity of the matter, the number of parties involved, or the workload of the judge. However, the judicial appeal of pre-awarding decisions in procurement for public construction works, continuous supply contracts and services contracts for purposes with immediate public benefit are urgent in nature and therefore a decision must be issued no more than seven days after all other procedural formalities are completed.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

In 2018, the Court of Final Appeal annulled the decision which awarded the provision of maintenance services at the facilities of the Taipa Ferry Terminal on grounds of violation of the tender conditions by the open tendering procedure's evaluation committee, a situation which was brought to the attention of authorities when one of the losing bidders challenged the award decision.

5.9 What mitigation measures, if any, are available to contracting authorities?

Contracting authorities are granted far-reaching powers by law, namely:

- To unilaterally change the content of the contract, provided that the contract's original scope and financial balance are respected.
- To manage the performance of the contract.
- To terminate the contract for reasons of duly substantiated overriding public interest, without prejudice to the contractor's right to compensation.
- To supervise the performance of the contract.
- To enforce penalties.

Apart from the general framework of the Code of Administrative Procedure outlined above, other powers are provided for in separate laws and regulations regarding specific contracts, such as, *inter alia*, the power to terminate a contract for the provision of goods and services in the event that the contractor does not comply with the authority's written instructions on the contract's performance.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

The legislation does not govern changes pre-contract award, as means of ensuring the legality of the procedure and fair competition among bidders.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

As a general rule, no changes or amendments to the final tender are allowed after submission and therefore no negotiation is carried out with the preferred bidder. The terms and conditions of the draft contract also are not subject to negotiation between the parties, but may be challenged by the bidder on grounds of discrepancy with the tender conditions.

Contracting authorities may summon bidders to discuss matters such as the particulars of the deliverable before making their decision on which tender will be awarded. In procurement for public construction works, the contracting authority and the winning bidder may negotiate certain amendments to the tender, provided that the new solutions are not part of the tender submitted by another bidder.

6.3 To what extent are changes permitted post-contract signature?

As stated in question 5.9 above, contracting authorities are broadly granted the power to unilaterally change the content of the contract, provided that the contract's original scope and financial balance are respected.

Pursuant to Decree-Law 79/99/M, which regulates contracts for public construction works, contractors can propose amendments to a project's work plan and, in the event of an abnormal and unpredictable change in circumstances, are granted the right to review the contract with the objective of being compensated for an increase in effective costs or of updating prices.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

Although the Code of Administrative Procedure does not specifically cover this matter, special provisions can again be found in Decree-Law 79/99/M, under the terms of which a contractor may assign their position to a third party with the contracting authority's prior approval.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

There are no special rules in relation to privatisations.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

There are no special rules in relation to PPPs, although a small number of what the Macau government refers to as these have been created. In each instance, an *ad hoc* regulatory framework was specifically approved, as was recently the case with the Macau Medical Centre of the Peking Union Medical College Hospital, regulated by Administrative Regulation 36/2023.

In addition to this, Law 3/90/M establishes the legal framework of so-called "public works and services concessions", defined as the transfer to a private third party (an individual or company) of the power to, respectively, build and operate real estate or facilities destined for public use, or to exclusively operate the means suitable to meet a public need, in both instances at the third party's own expense and risk and for a period of time which allows for the amortisation of their investment.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

There currently are no proposals to change the law.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

Refer to question 8.1 above.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

There have been no regulatory developments which are expected to impact on the law.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The main act regulating public procurement in Poland is the Law dated 11 September 2019 Public Procurement Law ("**PPL**"), which came into force on 1 January 2021. PPL implements the EU Directives: 2014/24/EU; 2014/25/EU; 2009/81/EC; 89/665/EEC; and 92/13/EEC.

The PPL comprehensively regulates the entire process of awarding public contracts and conducting competitions in a transparent manner and focuses on obtaining the best quality product or service, and not only on meeting formal requirements.

The PPL defines the entities obliged to apply its provisions, exclusions from its application, principles of awarding contracts, stages of preparing and conducting the procedure, modes of awarding contracts, framework agreements and special areas of procurement with specific procedures/requirements, competent bodies, legal remedies available to contractors, amicable methods of resolving disputes, as well as control over the award of public contracts and fines for violations.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The tender procedure must be prepared and conducted in a manner that ensures fair competition and equal treatment of economic operators.

Proceedings must be conducted in a transparent and proportionate manner. Contract award procedures are open and contracts are awarded to the economic operator selected in accordance with the rules. Proceedings are conducted in writing unless an exception to this rule is provided for in the PPL.

The proceedings are conducted in Polish; however, in justified cases the contracting entity may allow to present documents or negotiate in a language commonly used in international trade specifying it in the documentation.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

PPL contains regulations for sectoral procurement procedures and procedures in the area of defence and security.

In addition, concessions for works and services and public-private partnership are regulated in separate acts containing comprehensive provisions on all issues related to them.

Special procurement rules, regulated in a separate legal act, apply to the sale of state-owned real properties. These procedures are very similar to the PPL's regulations.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Tender proceedings conducted by public entities are controlled for compliance with the rules on spending public funds. Persons conducting the proceedings are subject to criminal liability for violation of public finance discipline.

The main acts that apply in this case are the Public Finance Discipline Act and the Public Finance Act.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The Polish procurement system implements EU directives and is fully compliant with the standards developed under the GPA (Government Procurement Agreement) to which Poland is a party.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

PPL applies to **public contracting entities**, which are:

(i) entities in the public finance sector;
(ii) other state organisational entities without legal personality;
(iii) other legal persons established for the specific purpose of meeting public needs, if public entities finance them for more than 50%, or own more than half of their shares, or exercise supervision over their management body, or have the right to appoint more than half of their management/supervisory body; and
(iv) associations of the above-mentioned entities.

The obligation to apply the PPL covers **sectoral contracting entities**, i.e.:

(i) public contracting entities;

(ii) other entities over which public procurers exercise directly or indirectly a dominant influence; and
(iii) entities carrying out activities on the basis of special or exclusive rights, which perform activities in the sectors of water management, electricity, gas and heat energy, transport services, ports, harbours and airports, postal services, extraction of fuels, i.e. sectoral activities as defined in art. 5(4) PPL.

The PPL's provisions also apply to **subsidised contracting entities**, i.e., entities other than public or sectoral contracting entities, if the following cumulative circumstances are met:
(i) more than 50% of the value of the contract is financed from public funds;
(ii) it exceeds the EU thresholds; or
(iii) its subject matter is civil engineering works (Annex II to Directive 2014/24/EU), construction of hospitals, sports, leisure or recreational facilities, school/university buildings or public administration buildings and services related to such works.

2.2 Which types of contracts are covered?

PPL's provisions apply to:
(i) classic contracts/competitions with value equal or exceeding PLN 130,000 in case of public contracting entities;
(ii) sectoral contracts and design contests with value equal or exceeding the EU thresholds in case of sectoral contracting entities;
(iii) contracts in the fields of defence and security with value equal or exceeding the EU thresholds in case of public and sectoral contracting entities; and
(iv) classic contracts and design contests with value equal or exceeding the EU thresholds in case of subsidised contracting entities.

The main contract covered by PPL is a public procurement contract between a contracting entity and an economic operator for the acquisition of works, supplies or services. The PPL also foresees framework agreements, which may be entered into with one or more contractors to establish terms and conditions for contracts that may be awarded over a specified period.

In addition, PPL also regulates the basic issues that must be included in subcontracts.

2.3 Are there financial thresholds for determining individual contract coverage?

Every two years the European Commission updates the thresholds applying to public procurement contracts.

The **thresholds for the years 2024 and 2025** are as follows:
(1) **Classic contracts**
- Construction works – €5,538,000.
- Supplies and services – central contracting entity – €143,000.
- Supplies and services – regional contracting entity – €221,000.
- Social services and other special – €750,000.

(2) **Sectoral contracts**
- Construction works – €5,538,000.
- Supplies and services – € 433,000.
- Social services and other special – €1,000,000.

The exchange rate EUR/PLN was raised and will amount to PLN 4,6371.

2.4 Are there aggregation and/or anti-avoidance rules?

Art. 29 PPL forbids the contracting entity to underestimate the value of the contract/competition or choose how to calculate such value in order to avoid the application of PPL. A contract cannot be divided into parts only to circumvent the PPL's provisions when it is not justified by objective circumstances.

A contracting entity cannot award contracts/organise competitions jointly with a contracting entity from another EU country, nor purchase services and products from a central contracting entity from another EU country just to avoid the application of provisions implementing EU law.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

The concession contracts are regulated in the Act on concession contract for construction works and services dated 21 October 2016. PPL applies to matters not covered therein.

Under a concession contract, the contracting entity entrusts the concessionaire with execution of works or provision of services and management of those services for remuneration. The concessionaire bears the economic risk associated with the operation of the construction object or the performance of the services, including the risk associated with demand or supply.

2.6 Are there special rules for the conclusion of framework agreements?

The framework agreements can be concluded with more than one economic operator after conducting a procedure for the award of a public tender. The provisions applicable to the different types of proceedings apply accordingly.

The framework agreement is valid for a period not longer than four years (eight years in sectoral procurement), but in specific cases the contracting entity may extend such term. The framework agreement may not limit the competition and significant changes to the conditions of the tender in comparison with the ones defined in the framework agreement cannot be introduced.

2.7 Are there special rules on the division of contracts into lots?

The contracts may be divided into lots, but not to deliberately omit PPL provisions. The contracting entity may award the contract in lots corresponding to a separate tender or require submission of partial bids within one procedure indicating the scope and subject of the lot.

The number of lots in which the economic operator may submit a bid can be limited if needed, with such limitation included in the tender documentation.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

PPL does not foresee specific provisions regulating obligations towards bidders established outside Polish jurisdiction.

However, the tenders in the defence and security sector and sectoral tenders may foresee limitations in this regard.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The contracting entity may award the tender in the mode of open or restricted procedure. The remaining modes may be used in cases indicated in the PPL where additional conditions are met. The most used are the first three types of procedures.

In an **open tender procedure**, all the interested economic operators may submit a bid in response to the tender notice, whereas the restricted procedure foresees the stage of submission of requests to participate in the procedure that may be presented by all the interested entities and the bids are submitted in a second stage by the offerors invited by the contracting entity.

In the **negotiations with publication** the contracting entity shortlists entities invited to present a preliminary offer, which is in an additional stage negotiated to improve it and complete the negotiations the contracting entity invites the chosen economic operators to submit a final offer.

The **competitive dialogue** foresees a submission of the request to participate by all interested entities. A stage of dialogue with the bidders is introduced in this procedure regarding the proposed solutions and afterwards the entities are invited to submit offers.

In response to the **innovation partnership** notice all interested economic operators may present requests to participate in the procedure. The contracting entity shortlists the operators which are invited to submit preliminary offers, which in turn are negotiated to improve their content. After the completion of the negotiations the economic operators are invited to submit offers including research and development works, which goal is the development of innovative products, service or construction works. The contracting entity purchases them if the level of efficiency and maximum cost is agreed between the economic operator and contracting entity.

In the **negotiations without publication** the contracting entity negotiates the conditions of the contract with the chosen economic operators and invites them afterwards to submit offers.

The **sole-source procedure** is an award procedure where the contract is concluded after negotiations with only one chosen economic operator.

For low-value contracts (under thresholds) **a simplified procedure** is introduced. A special contest procedure is introduced for design activities.

Sectoral procurement and the **defence and security area** provide special conditions for use of different tender modes or limitations in their use.

The contracting entity may request the submission of a bid bond in the value not exceeding 3% of the tender value. The bid bond must be submitted before the expiry of the deadlines for the presentation of bids in one of the allowed forms (among other bank/insurance guarantee, cash).

3.2 What are the minimum timescales?

PPL specifies the minimum deadlines for the submission of requests to participate in the procedure and bids, which are:

(1) **Open tender above thresholds** – not less than 35 days from the communication of the contract notice to the EU Publications Office, which in specific cases may be reduced to 15 days.

(2) **Restricted tender above thresholds** – not less than 30 days from the communication of the contract notice to the EU Publications Office, which in specific cases may be reduced 15 days (in the case of requests) or 10 days (in the case of bids).

(3) **Negotiations with an announcement and sectoral open tender and negotiations with an announcement** – not less than 30 days from the communication of the contract notice to the EU Publications Office, which in specific cases may be reduced to 10 days (in the case of bids).

(4) **Competitive dialogue, innovative partnership (also sectoral)** – not less than 30 days from the communication of the contract notice to the EU Publications Office (requests). In other cases, the deadline is determined by the contracting entity depending on the specificity of the subject matter of the contract.

3.3 What are the rules on excluding/short-listing tenderers?

PPL contains two types of provisions regarding the exclusion of economic operators: (i) mandatory, which are included in art. 108 PPL; and (ii) facultative (art. 109 PPL).

To use the facultative grounds the contracting entity must indicate them in the tender notice, although mandatory grounds should be specified as well in the notice. Sectoral procedures and defence and security tenders may limit the use of mandatory grounds.

The contracting entity shortlists economic operators based on points awarded for the satisfaction of the requirements specified in the documentation.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The most advantageous bid is chosen based on the evaluation criteria: (i) qualitative criteria and price/cost; or (ii) only price/cost.

Public contracting entities cannot use the price as the only criterion or with weight above 60% unless the qualitative requirements regarding the main elements of the tender subject are described in the tender description.

The evaluation criteria are indicated along with their weight in the tender documentation. The qualitative criteria may include social aspects (including social integration), environmental aspects, innovation or professional qualifications.

3.5 What are the rules on the evaluation of abnormally low tenders?

In case the offer's price is lower of at least 30% from the value of the tender with VAT or the arithmetic average of the offers not subject to rejection, the contracting entity can request mandatory explanations from the economic operator along with proofs regarding the calculations.

Those may refer in example to the production processes, special technical solutions or very convenient commercial conditions, originality of the supplies, services or works, conformity with the provisions regarding the costs of labour, public aid, social security and labour law, environment protection or using a subcontractor.

The explanations may refer to other circumstances which confirm the correctness of the calculations.

3.6 What are the rules on awarding the contract?

The contract is awarded to the bidder whose bid receives the most points after applying the evaluation criteria (most advantageous bid).

3.7 What are the rules on debriefing unsuccessful bidders?

The contracting entity informs all bidders on the choice of the most advantageous bid and rejected bids.

An information is provided to all bidders as well in the case of cancellation of the procedure. Both require legal and factual justification.

3.8 What methods are available for joint procurements?

Contracting entities may jointly prepare or conduct a procedure/competition, conclude a framework agreement, establish a dynamic purchasing system or award a contract based on a framework agreement/dynamic purchasing system on the basis of an arrangement. They may also entrust one of them with the performance of activities in the procedure for and on behalf of the others.

It is also possible to conclude an arrangement to prepare or conduct a procurement procedure/competition with contracting entities established in other EU Member States.

3.9 What are the rules on alternative/variant bids?

The variant bid may be mandatory or facultative upon decision of the contracting entity.

Such requirement must be indicated in the tender notice or tender documentation if notice is not required and describe the minimum requirements for the variant bid, as well as evaluation criteria.

3.10 What are the rules on conflicts of interest?

The director of the contracting entity, member of the tender commission and other persons performing activities within the proceedings in case of conflicts of interest. The declarations on the lack of conflict of interest must be submitted before initiating the procedure.

The activities performed by the person who is subject to exclusion are repeated apart from the opening of the bids and factual activities not having impact on the result of the procedure.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

The contracting entity may conduct the preliminary market consultations to prepare the procedure and inform the economic operators about the requirements, which cannot limit competition nor violate the rules of equal treatment of economic operators and transparency. The information on the consultations is included in the tender notice.

If an economic operator participated in the preparation of the procedure, the contracting entity must take all measures to ensure that it does not limit competition. The economic operator is excluded from the proceedings if otherwise the limitation of competition cannot be eliminated but has the possibility to prove to the contracting entity lack of impact on the competition.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

As a rule, the PPL does not apply to contracts awarded in a non-statutory procedure or financed by an international organisation or international financial institution.

Other exclusions include certain contracts awarded by the National Bank, the Bank of National Economy or related to the telecommunications activities, arbitration or conciliation services, some legal services, certain research or development services, services related to issuance of securities, loans or credits.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The in-house procurement is permitted by the PPL. The following conditions must be met:

(i) the contracting entity exercises control over a legal entity equivalent to that exercised over its own entities;
(ii) more than 90% of the activities are related to the performance of tasks entrusted to it by the controlling entity; and
(iii) there is no direct participation of private capital in the controlled legal entity.

In case of in-house contracts, a subcontractor may not be entrusted with the performance of part of it that relates to the main subject matter.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

The remedies are foreseen for economic operators, participants of a competition and other entities holding an interest in the award of the tender/prize, who has suffered or may suffer a damage as a result of the violation of the PPL's provisions by the contracting entity.

The National Appeal Chamber ("**NAC**") is designated to examine the appeals submitted by the authorised entities. The judgment may be complained against to the District Court of Warsaw – Public Procurement Court. A cassation to the Supreme Court is available.

The appeal may be submitted against:

(i) an activity of the contracting entity violating the PPL's provisions;
(ii) lack of activity within the procedure for the award of the contract to which the contracting entity was obliged; and
(iii) lack of conducting the procedure based on PPL. Appeals may be presented against the content of the tender documentation.

The appeal is examined only if does not contain formal errors and the appropriate fee was paid.

The NAC may order the performance or repetition of the action of the contracting entity, cancel the performed activity, change the proposed provision of the documentation or in cases where a contract is already concluded and circumstances for

cancellation occur (i) cancel the contract, (ii) cancel it in reference to the obligations not performed and apply a financial penalty, or (iii) apply a financial penalty or shorten the validity of the contract.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

In property cases where a settlement is permitted, each of the parties of the contract may submit a request to perform mediation or another amicable resolution to the Arbitration Court of the General Counsel to the Republic of Poland (*Prokuratoria Generalna Rzeczypospolitej Polskiej*), to a selected mediator or other authorised person. Under general rules a claim for damages in civil proceedings is available.

5.3 Before which body or bodies can remedies be sought?

See question 5.1.

5.4 What are the limitation periods for applying for remedies?

For tenders above UE thresholds, the appeals submission deadline is 10 or 15 days (depending on the publication method of the notice). The deadlines are indicated in art. 515 PPL.

The claim against the judgment of NAC must be submitted within 14 days and the cassation deadline is two months both from receiving the judgment with justification.

5.5 What measures can be taken to shorten limitation periods?

Those are statutory deadlines.

5.6 What remedies are available after contract signature?

See question 5.2.

Additionally, where the circumstances for the cancellation of contract are met under art. 454, 455 or 457(1) PPL, the President of the Public Procurement Office may submit to a common court an action for contract/change of contract cancellation.

The economic operator having interest in the award of the tender may submit to the court an action for cancellation when the circumstances of art. 457(1) occur.

Both those rights expire within four years from the conclusion of the contract.

5.7 What is the likely timescale if an application for remedies is made?

The appeals are usually examined within 15 days from the receipt by the President of NAC. The proceedings before common courts are usually longer.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

The average amount of appeals examined each year is around 3,000. The key matters examined are valorisation clauses, new declaration required from economic operators and recently the need to adapt the maximum cap of contractual penalties to the characteristics of the contract.

5.9 What mitigation measures, if any, are available to contracting authorities?

If the appeal is submitted, the contracting entity may comply with the economic operator's request and in turn the proceedings before NAC are discontinued.

Only in exceptional circumstances where the appeal is submitted (i) solely to impede the signature of the contract and the contracting entity provides evidence for that, or (ii) the prohibition to sign the contract will cause harm to public interest, the contracting entity may request NAC to lift the automatic prohibition to sign the contract which applies until the completion of examination of the submitted appeal by NAC.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Before submission of the requests to participate and tenders, the economic operators have the possibility to request changes in the documentation and present proposals to change contract provisions.

If the changes in the document will be substantial, the contracting entity will extend the deadline of submission of request/bids. Each of such changes is published by the contracting entity and submitted to the EU Publication Office. The tender may be cancelled due to the change of its scope too significantly due to proposed changes.

During the procedure, when already requests were submitted the changes to consortium are limited and equal to the ones possible at the post-signature stage.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

As a general rule, negotiations after submission of final tender are not possible. Some room for adaptations of the offer are foreseen in the competitive dialogue procedure.

6.3 To what extent are changes permitted post-contract signature?

The change is possible if:

(1) foreseen directly in the tender documentation or contract and the type and scope of change, the conditions of its inclusion are indicated, and the change does not modify the general character of the contract;
(2) please refer to question 6.4;
(3) additional supplies, services or works and the change of contractor cannot be made due to economic/technical reasons, would cause inconvenience/cost increase and increase in the price does not exceed 50% of the original contract value; and

(4) change is caused by unforeseeable circumstances and does not modify the general character of the contract, the increase in price does not exceed 50% of the original contract value.

Changes for a total value lower than thresholds and lower than 10% (services/supplies) or 15% (works) of the original contract value not affecting the general character of the contract.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

The possibility to transfer occurs only in the circumstances indicated in PPL:

(1) such transfer was foreseen directly in the documentation;
(2) as a result of succession, assumption of the rights and obligations, takeover, merger, division, transformation, bankruptcy, restructuring, inheritance or purchase, provided that the new economic operator meets the conditions for participation, there are no grounds for exclusion and it does not involve other significant amendments to the contract, nor is it aimed at evading the PPL's provisions; or
(3) assumptions of the economic operator's obligations towards its subcontractors by the contracting entity.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The PPL does not contain any special rules regarding privatisations – these are included in other legal acts.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

PPPs are regulated in the Law of 19 December 2008, on public-private partnerships. Public-private partnerships and are a way of carrying out public tasks based on a multi-year agreement that specifies both the division of tasks and the risks that partners take on.

According to PPP it is the offer that presents the most favourable balance of remuneration of the private partner or SPV, or the cost of the project borne by the public entity and other criteria relating to the project.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

After two years of the new Public Procurement Law, the law is being examined for possible improvements. The primary goal remains the further electronification of the public procurement system, which includes further development of the e-Zamówienia Platform, as well as proceedings before the National Appeal Chamber.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

The latest amendment extended the application of the PPL to contracts or competitions whose subject matter is public services in the field of passenger transport by rail or metro. For the proceedings that were initiated and for the contracts concluded before 28 September 2023 the previous provisions apply, i.e., the specific provisions of the act on public mass transport.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

The law has been in effect for a relatively short period of time, but some inaccuracies or areas for improvement may already be apparent. In addition, the efficiency with which the new solutions are being applied now will allow for more effective implementation of the initiated, and more long-lasting changes, particularly those related to the electronisation of the process.

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He has participated in highly complex processes in different sectors advising clients on the preparation of bids in public tender processes and negotiating contracts with public entities. He represents clients in negotiations with public entities (Polish State Railways (PKP), the Directorate-General of National Roads and Motorways (GDDKiA), the Armament Agency of the Polish Ministry of Defence (Agencja Uzbrojenia), the Polish Air Navigation Services Agency (PANSA), port authorities). He is representing the clients before the Polish National Appeals Chamber (NAC), ordinary courts, the ICC Court of International Arbitration in Paris, and the Polish Chamber of Commerce (KIG).

Over the last 16 years, he has also actively advised on major greenfield investments in Poland, amassing broad experience in several areas of the law and in-depth know-how of the Polish market, enabling him to offer comprehensive advice on all types of investment in Poland, including:

- Advice on the entire process for greenfield investment or business acquisition.
- Advice on investments where the other party is a public entity (negotiation with public entities such as port authorities, cities, regional authorities, and State-owned enterprises).

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Since January 2007, Garrigues has been providing legal and tax services via the office in Warsaw through a team of specialised and experienced lawyers.

The Warsaw office offers comprehensive legal services, including advise on cross-border investments by entities investing in the Polish market, as well as advice on contracts executed by entities already present in the domestic market and seeking business opportunities outside Poland and the region, always operating in accordance with the firm's principles of quality, ethical conduct and professionalism.

Garrigues has become an important law firm in Poland, participating not only in important transactions on the Polish market, executing complex mergers and acquisitions. We guide our clients throughout all processes of greenfield investments and participate in very extensive projects in infrastructure, renewable energy and defence and space sectors.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

As a European Union Member State, Romania's legislation on public procurement reflects the transposition of the European directives in public procurement; namely, Directive 2014/24/EU, Directive 2014/25/EU, Directive 2014/23/EU and the remedies Directives 89/665/EEC and 92/13/EEC as subsequently amended.

The core of the Romanian public procurement legislation ("**PPL**") is thus formed of:

- Law no. 98/2016 on public procurement ("**Law no. 98/2016**");
- Law no. 99/2016 on utilities procurement ("**Law no. 99/2016**"); and
- Law no. 100/2016 on works concession contracts and services concession contracts ("**Law no. 100/2016**").

Secondary legislation was also adopted for the application of these pieces of legislation:

- Government Decision ("**GD**") no. 395/2016 on the approval of the Application Norms of Law no. 98/2016;
- GD no. 394/2016 on the approval of the Application Norms of Law no. 99/2016; and
- GD no. 867/2016 on the approval of the Application Norms of Law no. 100/2016.

In addition to the above general legal framework that provides the principal rules for organising and carrying out award procedures, a remedies law was also adopted, namely Law no. 101/2016 on remedies and review procedures in the field of the award of public procurement contracts, utilities contracts and works and services concession contracts, as well as for the organisation and functioning of the National Council for Solving Complaints ("**Law no. 101/2016**").

The public procurement institutional framework is also regulated by specific primary and secondary pieces of law, such as:

- GD no. 1037/2011 on the approval of the Regulation on organisation and functioning of the National Council for Solving Complaints ("**Council**" or "**NCSC**");
- Government Emergency Ordinance ("**GEO**") no. 13/2015 on the setting up, organisation and functioning of the National Agency for Public Procurement ("**NAPP**"); and
- GD no. 634/2015 on the organisation and functioning of NAPP.

These pieces of legislation are supplemented by tertiary legislation consisting of orders and instructions adopted by NAPP on the interpretation and application of the current PPL.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

Law no. 98/2016 provides the fundamental principles governing public procurement procedures, namely: non-discrimination; equal treatment; mutual recognition; transparency; proportionality; and accountability.

These principles are of paramount importance for the interpretation and application of the PPL, as they create a general framework for the award of public procurement contracts. Moreover, any situation for which there is no express regulation shall be construed in light of these principles.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

Some of the relevant special rules regard:

- **defence procurement** – GEO no. 114/2011 for defence procurement applies to the award of contracts for the supply of: military products and/or sensitive products; works, products and services directly related to the aforementioned products; works and services designated for military purposes; or sensitive works and services;
- **technical specifications** – technical specifications are subject to specific legal provisions relevant to the scope of the contract (e.g. construction legislation, utilities legislation or energy legislation);
- **transportation** – transportation is subject to regulations such as GEO no. 71/2021 on promoting eco-friendly road transport vehicles in support of low-emission mobility;
- **public passenger transport service** – the standard documents and the framework contract to be used in the procedures for delegating the management of the public transportation service for persons are approved by Order no. 131/1401/2019 of the president of the National Regulatory Authority for Community Services for Public Utilities and the president of NAPP;
- **supply of products** – the template of the standard documentation for awarding public/utilities contracts for the procurement of products, as well as the method to fill in contract notices, are approved by Order no. 1554/2023 of the president of NAPP;
- **European funds** – a significant number of procedures are carried out by economic operators and contracting authorities accessing European funds, the specific legislation, e.g.

GEO no. 66/2011, GD no. 875/2011 or GD no. 519/2014, with regard to projects financed from European funds, being thus applicable;

- **green public procurement** – a guide on green public procurement sets minimum technical specifications on environmental protection for certain categories of products or services to be included in tender books;
- **protective masks for sanitary use** – the content, the method of completion and the manner of use of the standard documents "Instructions for bidders/candidates" and "Technical Specifications" when awarding a framework agreement/public procurement/utilities contract for protective masks for sanitary use, types II, II R, FFP2, FFP3 are approved by Order no. 2376/2020 of the president of NAPP;
- **fruits, vegetables, milk and dairy products and bakery products within the Romanian School Program** – the qualification criteria on the capacity of bidders, the evaluation factors and the tender book when awarding a supply framework agreement/public procurement contract for fruits, vegetables, milk and dairy products are approved by Order no. 346/1718/2023 of the minister of agriculture and rural development and the president of NAPP; and
- **nuclear security, radiological security, physical protection, protection against cyber threats and the reliable operation of nuclear installations** – specific conditions regarding the award of certain public procurement contracts and utilities contracts for products, services and/or works intended for systems that ensure the functions of nuclear security, radiological security, physical protection, protection against cyber threats and the reliable operation of nuclear installations are approved by Order no. 264/2583/2022 of the president of the National Commission for the Control of Nuclear Activities and the president of NAPP.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Both contracting authorities and tenderers are bound by specific normative acts, such as Competition Law no. 21/1996, Law no. 544/2001 on free access to information of public interest and Law no. 161/2003 on certain measures to ensure transparency in the exercise of public office, public functions and the business environment, as well as the prevention and punishment of corruption.

Technical specifications are also subject to specific legal provisions relevant to the scope of the contract (e.g., construction legislation, utilities legislation, energy legislation, public utility services legislation, etc.).

Law no. 129/2019 on the prevention and combating of money laundering and terrorist financing is also relevant for procurement procedures. Pursuant to the PPL, contracting authorities are entitled to request the identification data of the holders/beneficial owners of bearer shares where the tenderer/candidate/supporting third party or subcontractor within a procedure is a joint stock company, with a share capital represented by bearer shares. The legal representative submits a "statement on own liability" regarding the holders/beneficial owners of the bearer shares.

Last but not least, as a significant number of procedures are carried out by economic operators who access European funds, the complex legislation in this field is applicable as well.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

In 2006, Romania transposed for the first time the EU rules in force at that time, namely Directive 2004/18/EC, Directive 2004/17/EC, Directive 92/13/EEC and Directive 89/665/EEC, which became the very basis of the PPL.

When acceding to the EU in 2007, Romania also became part of the World Trade Organization Agreement on Government Procurement ("**GPA**") and is thus bound by this agreement.

In May 2016, the newly adopted directives, namely Directive 2014/24/EU, Directive 2014/23/EU and Directive 2014/25/EU, were duly transposed by Romania as well.

The European treaties (Treaty on European Union – "**TEU**" and Treaty on the Functioning of the European Union – "**TFEU**") and the Commission regulations are directly applicable.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The PPL covers the award of contracts by both public and private entities.

In terms of **public entities**, the contracting authorities acting as purchasers under Law no. 98/2016 are as follows:

1. Central or local public authorities and institutions, as well as the structures therein which have been delegated the capacity of authorising officers and which have responsibilities in the public procurement field.
2. Public bodies – the public body is defined as any entity, except for those provided for in paragraph 1, which, regardless of its organisation and legal form, cumulatively meets the following conditions: (i) is established for the specific purpose of meeting general interest needs without having an industrial or commercial character; (ii) has legal personality; and (iii) is mostly financed by entities provided for in paragraph 1 or by other public bodies; or is under the authority or in the subordination/coordination/control of one of the entities provided for in paragraph 1 or of another public body; or more than half of its board of directors, or the members of its management or supervisory bodies, are nominated by one of the entities mentioned under paragraph 1 or by another public body.
3. Any association of one or several contracting authorities as defined under paragraphs 1 and 2.

As regards **private entities**, the provisions of Law no. 98/2016 apply to private entities acting as purchasers when they award services/works contracts that are directly financed for more than 50% by a contracting authority and the estimated value of the contract is equal to or above RON 1,042,363 (approximately EUR 215,000) for services contracts and RON 26,093,012 (approximately EUR 5,382,000) for works contracts.

The provisions of Law no. 98/2016 apply to works contracts fulfilling the above requirements and including one of the following activities:

- civil engineering works; and
- construction works for hospitals, facilities designed for sport, recreation and leisure, school and university buildings, and buildings used for administrative purposes.

2.2 Which types of contracts are covered?

The PPL provides for the following types of contracts: (i) services, works or supply public procurement contracts; (ii) services, works or supply utilities contracts; and (iii) services or public works concession contracts.

2.3 Are there financial thresholds for determining individual contract coverage?

Romanian legislation stipulates several financial thresholds for determining individual contract coverage. Thus, contracting authorities must publish a contract notice/award notice in the Official Journal of the European Union ("**OJEU**") in the following cases:

- the estimated value of the supply or services contracts/framework agreements is equal to or above RON 678,748;
- the estimated value of the supply or services contracts/framework agreements is equal to or above RON 1,042,363 for contracts awarded by the local/county council, Bucharest General Council, as well as public institutions in their subordination;
- the estimated value of the services contracts/framework agreements is equal to or above RON 3,636,150 for social and other specific services (provided in Annex 2 of Law no. 98/2016); and
- the estimated value of the works contracts/framework agreements is equal to or above RON 26,093,012.

A simplified procedure is applied for contracts/framework agreements with an estimated value below the above-mentioned thresholds, but which exceed RON 270,120 for supply and services contracts, and RON 900,400 for works contracts. Within a simplified procedure, contract notices are published only in the Electronic System for Public Procurement ("**ESPP**"). Below the threshold of RON 270,120 for every product or services purchase, or RON 900,400 for every works purchase, contracting authorities may purchase goods, services or works directly.

2.4 Are there aggregation and/or anti-avoidance rules?

According to Law no. 98/2016, the contracting authority does not have the right to subdivide a public procurement contract into several separate contracts of lower value, nor to use calculation methods leading to a sub-evaluation of the estimated contract value, to avoid the application of the award procedures provided for in the law.

The rules on the estimation of the contract value follow the same reasoning and require the contracting authority to consider, for each type of contract, the total of all estimated amounts payable, net of VAT, including any form of option and any renewals of the contract as explicitly set out in the procurement documents. The same applies for services, supply, or works contracts awarded by lots, where the estimated value of the contract results from adding up the value of all lots.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

The PPL does indeed provide special rules for concession contracts in Law no. 100/2016.

The works concession contract is defined as a contract for pecuniary interest, assimilated under the law into the administrative act, concluded in writing, by means of which one or more contracting entities/authorities entrust(s) the execution of works to one or more economic operators, and in consideration of the executed works, the contractor receives from the contracting entity/authority either solely the right to exploit the works, or this right together with the payment of an amount previously established.

The services concession contract is defined as a contract for pecuniary interest, assimilated under the law into the administrative act, concluded in writing, by means of which one or more contracting entities/authorities entrust(s) the provision and management of services, other than the execution of works referred to above, to one or more economic operators, and in consideration of the services provided, the contractor receives from the contracting entity/authority either solely the right to exploit the services, or this right together with the payment of an amount previously established.

2.6 Are there special rules for the conclusion of framework agreements?

The PPL provides a series of special rules for the conclusion of framework agreements.

Firstly, contracting authorities are not allowed to use framework agreements improperly or abusively so as to prevent, restrict or distort competition.

Secondly, contracting authorities do not have the right to conclude a framework agreement for more than four years (classic procurement) or eight years (utilities), except for extraordinary cases duly justified, especially as per the specific subject of that framework agreement.

Furthermore, a framework agreement may be concluded with one or several economic operators. Should the framework agreement be concluded with several economic operators, the contracting authority is entitled to award the subsequent contracts either:

- without reopening the competition;
- by reopening the competition between the economic operators who signed the framework agreement; or
- partially without reopening the competition between economic operators and partially by reopening the competition, only if this possibility was provided in the award documentation and if the framework agreement sets out all the terms and conditions governing the execution of works/provision of services/supply of products subject to the framework agreement.

At the same time, once it concludes a framework agreement, in principle, the contracting authority is no longer entitled to initiate a new award procedure for a contract having as subject the purchase of products/services/works included in the respective framework agreement, if the maximum estimated quantities were not exceeded or exceeding them does not represent a substantial amendment of the agreement. If the economic operator asked to conclude a subsequent contract cannot meet the request due to its own fault, the contracting authority is entitled to initiate a new award procedure only if: (i) the framework agreement is concluded only with the respective economic operator; or (ii) although the framework agreement is also concluded with other economic operators, they cannot meet the respective request either.

2.7 Are there special rules on the division of contracts into lots?

The PPL provides a set of specific rules in relation to the division of contracts into lots.

Contracting authorities have the right to divide the contracts into lots provided that the procurement documents include the following information:

- the subject matter of each lot on a qualitative or quantitative basis; and
- the dimensions of individual contracts adapted to better reflect the capacity of small and medium-sized enterprises.

If this is the case, contracting authorities must justify their choice not to divide the contracts into lots.

The contracting authority mentions within the award documentation whether tenders can be submitted for one, more or all lots. The contracting authority also has the right to limit the number of lots which can be awarded to one tenderer.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Although not limited to the nationality criteria, from such perspective, the principles of non-discrimination, equal treatment and mutual recognition ensure access to public procurement procedures for suppliers outside the Romanian jurisdiction under conditions similar to those for Romanian suppliers.

As such, the principle of non-discrimination compels purchasers to grant appropriate conditions for real competition, to enable any economic operator, irrespective of its nationality, to:

- participate in the public procurement procedure; and
- have the chance to become a contractor.

Also, purchasers must set and apply, during the entire public procurement procedure, identical rules, requirements and criteria for all economic operators, to grant them an equal chance of becoming contractors.

The mutual recognition principle compels purchasers to accept: products, services or works legally present on the European market; diplomas, certificates or any other documents issued by competent foreign authorities; and technical specifications equivalent to the national ones.

The contracting authorities use the e-Certis information system and request those certificates or justifying documents available on e-Certis.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

Law no. 98/2016 provides for the following award procedures:

- **Open procedure**, within which any interested economic operator has the right to submit a tender. This procedure is carried out in one stage.
- **Restricted procedure**, within which any economic operator is entitled to submit a request for participation, but only selected candidates are permitted to submit a tender. This procedure is carried out in two stages: submission of requests for participation and selection of candidates; and submission and evaluation of tenders.
- **Competitive procedure with negotiation**, within which any economic operator is entitled to submit a request for participation, but only selected candidates are allowed to submit an initial tender, on the basis of which the contracting authority carries out negotiations for its improvement. The negotiated procedure is carried out in two stages: submission of requests for participation and selection of candidates; and submission of initial tenders and negotiations.
- **Competitive dialogue**, within which any economic operator is entitled to submit a participation request, but only selected candidates are permitted to take part in the dialogue stage. The candidates remaining at the end of the dialogue stage are entitled to submit the final tender. This procedure is carried out in three stages: submission of requests for participation and selection of candidates; dialogue with the selected candidates; and submission and evaluation of final tenders.
- **Innovation partnership**, a procedure applicable by the contracting authority for the development and subsequent purchase of innovative products, services or works, when the solutions available on the market at a certain moment do not satisfy its needs. This procedure is carried out in three stages: submission of requests for participation and selection of candidates; submission of initial tenders based on which negotiations will be carried out with the contracting authority; and negotiation, submission and evaluation of the final tenders.
- **Negotiated procedure without prior publication**, a special procedure applicable in one of the following situations: (i) when no tender/request for participation has been submitted within the open/restricted procedure or simplified procedure or when only inadequate tenders/requests for participation have been submitted, provided that the initial procurement requirements are not substantially amended and, upon request of the European Commission, a report is sent in this respect; (ii) when the works/products/services can be provided only by a certain economic operator for certain specific reasons set by the PPL (e.g. protection of exclusive rights, intellectual property rights); or (iii) as a strictly necessary measure when the timelines for the open/restricted procedure, competitive procedure with negotiation or simplified procedure cannot be met for reasons of extreme urgency brought about by events that could have not been foreseen by the contracting authority; the rescission, unilateral denunciation or early termination due to contractor's fault of public procurement contracts for transport infrastructure projects and/or county roads is assimilated to this situation.
- **Design contest**, a special procedure through which the contracting authority purchases, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or a design by selecting it through a jury, on a competitive basis, with or without the award of prizes.
- **Award procedure applicable for social and other specific services** provided in Annex no. 2 to Law no. 98/2016, namely a distinct procedure set by the contracting authority, in compliance with the public procurement principles. The contracting authority may reserve the right for certain economic operators (e.g. social enterprises or protected units) to participate in procedures for the award of public contracts exclusively for the health, social and cultural services covered by certain Common Procurement Vocabulary ("**CPV**") codes.
- **Simplified procedure**, the procedure applicable for the award of contracts below EU thresholds and above direct purchase thresholds, which involves shorter deadlines and fewer procedural formalities than the other procedures. This procedure is carried out in either one stage or several stages consisting in the selection of candidates, negotiation and evaluation of tenders. A new technical facility shall be implemented in the ESPP for the carrying out of simplified procedures, known as the "informatic mechanism for simplified procedures". This mechanism is meant to grant access for contracting authorities simultaneously to all documents submitted by tenderers on the ESPP.

As a general rule applicable to classic procurement, contracting authorities should apply the open or restricted procedure. In specific circumstances, expressly provided by the law,

cont-racting authorities may award public contracts by means of other award procedures.

Additionally, Law no. 98/2016 provides for three special instruments and specific techniques to award public procurement contracts:

- **Framework agreement** – the written agreement between one or more contracting authorities and one or more economic operators, which establishes the terms and conditions governing the public procurement contracts to be awarded during a given period, in particular with regard to price and, where appropriate, to quantities.
- **Dynamic purchasing system** – the contracting authority has the right to use a dynamic purchasing system only through the ESPP and only for the purchase of everyday consumer products, with features generally available on the market, that meet the needs of the contracting authority.
- **Electronic auction** – the electronic auction can be used: as a final stage of the open/restricted procedure, competitive procedure with negotiation or simplified procedure; upon reopening the competition between economic operators which are part of a framework agreement; or upon submission of tenders for the award of a contract within a dynamic purchasing system.

3.2 What are the minimum timescales?

The PPL provides several timescales for different steps depending on the specific procedure.

Specifically, the law stipulates certain minimum timescales between the publishing of the contract notice in the OJEU/ESPP and the deadline for submission of tenders/requests for participation:

- for the open procedure – 35 days;
- for the restricted procedure, competitive procedure with negotiation, competitive dialogue and innovation partnership – 30 days; and
- for the simplified procedure – 10 days for services/supply contracts, six days for low-complexity product supply contracts, and 15 days for works contracts (the timescales may be further reduced in urgent cases).

In the case of a design contest, the public authority sets an adequate and sufficient time limit between the publishing of the contest notice and the deadline for submission of projects, in order to allow economic operators to draft the projects. The contest notice must be published in any case at least 30 days before the deadline for submission of projects.

Most of the above timescales can be reduced under certain conditions, such as publication of a prior information notice and/or accepting the submission of tenders through electronic means.

Other timescales include the publishing of the award notice within 30 days after the conclusion of the public procurement contract.

3.3 What are the rules on excluding/short-listing tenderers?

According to Law no. 98/2016, contracting authorities have the right to apply qualification and selection criteria only with regard to exclusion grounds of the candidate/tenderer, and the capacity of the candidate/tenderer.

Exclusion grounds

On the one hand, the exclusion grounds of the candidate/tenderer stipulated by the PPL are those provided by Directive 2014/24/EU. All exclusion grounds are stipulated as mandatory under national law, the contracting authority thus being bound to exclude the economic operators falling under such cases. The exclusion grounds concern aspects such as: the economic operator being under a conflict of interest within or in connection to the procedure; the economic operator's participation in the preparation of the procurement procedure leading to a distortion of competition; the economic operator having entered into an agreement with other economic operators aimed at distorting competition; or the economic operator having committed serious professional misconduct which renders its integrity questionable.

The grounds are conditional either upon the impossibility of the contracting authority to remedy the situation by taking other, less intrusive, measures (the first two grounds) or the contracting authority having reasonable enough evidence/concrete information/appropriate means of proof, such as a decision of the court or an administrative authority (the last two grounds). As regards distortion of competition:

- in the case where a tenderer submits a tender individually or as a member of a consortium and is also designated as a subcontractor within another tender, before exclusion, the contracting authority must request in written the opinion of the Competition Council on the matter; and
- due to the economic operator's participation in the preparation of the procedure, before exclusion, the contracting authority must grant the respective tenderer/candidate the possibility to prove that its prior involvement cannot distort the competition.

Further grounds for exclusion include the case where the economic operator set up as a joint-stock company, with share capital represented by bearer shares, has not proven the identity of the holders/beneficial owners of the bearer shares. The contracting authority also excludes from the procedure any natural/legal person – individual tenderer/member of a consortium/candidate/supporting third party/subcontractor – who does not fall under the legal definition of the economic operator (e.g. which refers to lawfully offering the execution of works, supply of products or provision of services on the market).

The PPL provides for the tenderer/candidate's possibility to prove that appropriate self-cleaning measures in relation to the exclusion grounds have been adopted. If the self-cleaning measures are deemed insufficient, the contracting authority has to send a statement of the reasons that led to its exclusion from the procedure to the economic operator.

The absence of the exclusion grounds must also be checked by the contracting authority in relation to the subcontractors proposed by the tenderer/candidate, as well as to the supporting third parties. Should such grounds exist, the contracting authority will request the tenderer/candidate only once to replace the respective subcontractor/supporting third party.

Capacity criteria

On the other hand, the capacity criteria may concern only the following: suitability to pursue the professional activity (e.g. certain authorisations); economic and financial standing (e.g. a minimum level of the turnover); and technical and professional ability (e.g. similar experience).

Contracting authorities may also require the submission of specific certificates ascertaining compliance with certain quality assurance standards or with environmental management standards or systems, in which case the European standards series shall be taken into consideration.

Contracting authorities may establish minimum levels for the above-mentioned criteria and may request supporting documents. Tenders not fulfilling the qualification criteria shall be rejected as unacceptable.

Within restricted procedures, competitive procedures with negotiation and competitive dialogue, the contracting authority selects/preselects the candidates in accordance with the criteria and rules mentioned in the contract notice. Contracting authorities are also bound to mention in the contract notice the minimum and maximum number of candidates intended to be selected.

Participation bonds

A participation bond may be also required (of up to 1% of the estimated value of the contract). The absence of such a bond or the submission of an improper bond may lead to the rejection of the tender. The contracting authority has to return the bond if no incident that might lead to its retention occurs (i.e., the successful tenderer refuses the conclusion of the contract or the submission of the good performance bond or the tenderer withdraws its tender during its validity period) to both unsuccessful and successful tenderers.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

According to the PPL, when awarding a public procurement contract, the contracting authority has the obligation to appoint the persons in charge of the evaluation of tenders. These persons form the evaluation committee. In order to support the evaluation activities, the contracting authority may also appoint co-opted external experts.

The evaluation committee has the obligation to analyse and verify each tender from a technical and a financial point of view. The evaluation committee also has the obligation to check compliance with the qualification and selection criteria by analysing the content of the European Single Procurement Document ("**ESPD**"), which is filled in by tenderers/candidates directly in the ESPP.

During the evaluation process, the evaluation committee establishes the clarifications and subsequent supplements, whether formal or confirmatory, necessary for the evaluation of each tender/request for participation and the period granted for the transmission of such clarifications.

The term must be established in working days, depending on the complexity of the request (as a rule, a minimum of one working day and a maximum of 15 working days, including any extension thereof if justified by the tenderer) and the contracting authority cannot set a specific hour within the deadline.

In cases of simplified procedures for the award of contracts within infrastructure projects financed through European funds, contracting authorities have the right to request clarifications from the tenderers/candidates, at most twice within the evaluation process, in compliance with the principles of equal treatment and transparency. If the tenderer does not send the required clarifications within the term established by the evaluation committee, or if the clarifications submitted are not conclusive, the tender shall be considered unacceptable.

Specific terms are provided for the documents supporting the information in the ESPD. Within one working day from establishing the tenderer ranked first (or issuance of approval from the NAPP, when the procedure is monitored), the contracting authority must request to this tenderer updated supporting documents in accordance with the submitted ESPD, granting for this purpose a term of maximum seven working days. This period can be extended with maximum three working days, upon duly justified request of the candidate/tenderer. In case of procedures in two stages, the supporting documents are requested before invitations to the second stage are sent to the selected candidates.

Equally important, the evaluation committee has the right to correct, under certain conditions, any arithmetical errors, formal flaws or minor technical errors, only with the tenderer's approval.

The evaluation committee must reject unacceptable, inadequate and non-conforming tenders.

The contracting authority must draw up the procedure report within a maximum term from the submission of tenders/initial tenders/projects, depending on the award procedure:

- 60 working days, for the open procedure, restricted procedure, innovation partnership and design contest;
- 20 working days, for the negotiated procedure without prior publication and the simplified procedure; and
- 100 working days, for the competitive procedure with negotiation and for the competitive dialogue.

The intermediate report must be drawn up within 20 working days as from the submission of the requests for participation, in case of restricted procedure, competitive procedure with negotiation, competitive dialogue and innovation partnership.

These periods may be extended in duly justified cases and with the approval of the head of the contracting authority, only once, by a maximum of 30 working days, 15 working days or 50 working days, depending on the type of procedure. In case of procedures with several lots, the period for drawing up the report of the procedure may be extended only once, by a maximum of 50 working days. The contracting authority must inform the economic operators involved in the procedure of the decision to extend the term, within a maximum of two working days from the expiration of the initial evaluation term.

The contract is awarded to the tenderer who submitted the most economically advantageous tender. In order to establish the most economically advantageous tender, the contracting authority applies one of the following criteria: (i) best quality-price ratio; (ii) best quality-cost ratio; (iii) lowest price (only for procedures below the OJEU publication thresholds or in a certain case of negotiated procedure without prior publication of a contract notice); and (iv) lowest cost. The contracting authority cannot use the lowest cost/price as an award criterion for: (i) contracts for intellectual services; (ii) design and execution or services contracts for trans-European transport infrastructure projects and county roads; and (iii) certain types of contracts for products with an impact on the environment, during the entire life cycle. The award criteria "best quality-price ratio" and "best quality-cost ratio" are mandatorily applied in case of award procedures for social services and other specific services whose estimated value is equal to or greater than the value threshold of RON 3,636,150.

Best quality-price/quality-cost ratio is determined based on evaluation factors including quality, environmental and/or social aspects, in connection with the subject of the contract. Such factors may include:

- the quality, including technical advantages, aesthetic and functional characteristics, accessibility, design concept for all users, the social, environmental and innovative characteristics, as well as marketing and conditions thereof;
- the organisation, qualification and experience of the staff assigned for performing the contract, if the quality of the staff assigned may have a significant impact on the quality level of contract performance; or
- the post-sale services, technical support and supply conditions, such as delivery time, delivery process and delivery or completion term.

Should two or more tenders be equivalent, the contracting authority can apply an additional criterion, e.g., combatting unemployment. The additional criterion must be mentioned *expressis verbis* in the contract notice.

3.5 What are the rules on the evaluation of abnormally low tenders?

The PPL provides for a threshold below which the price of a tender is considered as an apparently abnormally low price, namely 80% of the estimated value of the contract. The ascertainment of price elements is also made by the evaluation committee as per market prices (through information such as statistical bulletins or stock market quotes).

In case of apparently abnormally low tenders, contracting authorities have the obligation to: (i) request clarifications from the tenderer about the price/costs proposed in the tender; (ii) assess the information provided by the tenderer; and (iii) reject the tender only when the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

The clarifications required by the contracting authority may, in particular, relate to: (i) the economics of the price formation by reference to the manufacturing process, the services provided or the construction methods used; (ii) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the works; (iii) the originality of the works, supplies or services proposed by the tenderer; (iv) compliance with the legal obligations in the environmental, social and labour fields, during performance of the public procurement contract; (v) compliance with the obligations related to payment of subcontractors; and (vi) the possibility for the tenderer to benefit from state aid.

3.6 What are the rules on awarding the contract?

The contract is awarded to the successful tenderer based on the award criterion and evaluation factors specified within the contract notice and award documentation. The following conditions must be met:

- the respective tender complies with all requirements, conditions and criteria stipulated in the contract notice and award documentation; and
- the respective tender was submitted by a tenderer fulfilling the qualification and, where applicable, selection criteria, and does not fall under the exclusion grounds.

Should the contracting authority not be able to conclude the contract with the successful tenderer, due to a *force majeure* situation or a fortuitous impossibility of performance, the contract is awarded to the subsequent tenderer, provided that such a tender exists and is admissible.

After the evaluation of tenders is completed, the evaluation committee drafts the award procedure report. The report must be approved by the head of the contracting authority. Both the intermediate report and the report of the procedure signed with electronic signature must be published in the ESPP on the same day the communication of the result of the procedure is sent. The reports should not disclose any information declared and proven confidential or protected under the intellectual property of the economic operators.

3.7 What are the rules on debriefing unsuccessful bidders?

Contracting authorities have the obligation to inform all economic operators involved in the award procedure of the decisions regarding the result of the selection or of the award procedure, in writing, no later than three days as of their issuance. The communication of the procedure's result is based on the award procedure report.

Within this communication, the contracting authorities must inform the unsuccessful tenderers/candidates of the reasons that led to the decision, as follows: (i) to each rejected candidate/tenderer, the concrete reasons which led to the rejection; (ii) to any admissible but unsuccessful tenderer, the characteristics and relative advantages of the winning tender(s) in relation to its tender, as well as the name of the successful tenderer; and (iii) to any admissible tenderer, information regarding the development and the progress of the negotiations and dialogue with the tenderers.

The contracting authority is entitled not to disclose the above information if the disclosure would: (i) impede the application of a legal provision; (ii) be contrary to public interest; (iii) prejudice the legitimate commercial interests of the economic operators; or (iv) prejudice fair competition.

3.8 What methods are available for joint procurements?

According to the PPL, any association of one or more contracting authorities is also a contracting authority.

The setting up of centralised procurement units, as well as the conditions under which contracting authorities purchase products/services from such units, and the conditions under which the centralised procurement units award public procurement contracts/framework agreements for other contracting authorities, may be established through government decision or the decision of the local deliberative authorities.

An example in this regard is represented by the National Office for Centralised Procurement, which was established through GEO no. 46/2018 as a public institution, under the subordination of the Public Finances Ministry. The National Office for Centralised Procurement was designated as a centralised procurement unit, which provides the following activities in the name and on behalf of the users (i.e., the contracting authorities): (i) the conclusion of framework agreements; and (ii) the management of dynamic purchasing systems.

The users must conclude subsequent contracts pursuant to the framework agreements signed by the National Office for Centralised Procurement, or public procurement contracts within the dynamic purchasing systems managed by the Office. For example, in the context of the COVID-19 pandemic, the National Office for Centralised Procurement was empowered to carry out award procedures in order to conclude framework agreements to cover the necessities of medical emergency stock products (e.g., thermal scanners, isolation chambers, special types of isolated stretchers to transport patients at high risk of transmission, medical ventilators, medical monitors, injectors, coveralls, protective visors, gloves, protective masks or disinfectants).

On the same note:

- the Ministry of Health was appointed as a centralised procurement unit for the purchase of medicines, medical supplies, medical equipment, protective equipment, services, fuels and lubricants for car fleets in the name of and for public health units of the Ministry of Health and the network of local public administration, as well as for public institutions subordinated or coordinated by the Ministry of Health, through GEO no. 71/2012;
- the General Inspectorate for Emergency Situations was appointed as a centralised procurement unit for the purchase of special trucks and ambulances for certain emergency national services and of light/medium/heavy helicopters, as well as of flight simulators for the General Aviation Inspectorate of the Ministry of Internal Affairs, necessary for the preparation and performance of

operative missions in emergency situations, through GEO no. 74/2017 and GEO no. 68/2018; and

- the Supply, Management and Repairs Base, a unit with legal personality subordinated to the National Prison Administration, was designated through GD no. 257/2019 as the centralised public procurement unit that performs the centralised public procurement for the units of the penitentiary administration system.

Although not widespread, the Romanian procurement system also includes centralised procurement entities at local level (municipal level). For example, local public procurement units are operated by the Local Council of 3rd District Bucharest or the Local Council of Oradea Municipality through their procurement departments.

Also, currently, NAPP develops EU project SIPOCA 625 (Support in the implementation of the National Public Procurement Strategy); a project aiming, *inter alia*, to encourage the aggregation of demand between local contracting authorities, by creating at least two pilot units of centralised procurement at the local level. The aim is to streamline the use of public funds and disseminate the importance and benefits of establishing local centralised procurement units (efficient centralised procurement, determining less irregularities and financial corrections). The main expected results of the project include establishing three pilot units of centralised procurement at local level by developing configuration and organisation models to be used by other public authorities at the national level and organising multiple conferences at the regional level. As a result of the project, three local centralised procurement units have already been established at the level of Sibiu County Council, Harghita County Council and Timisoara City Hall. Nine other local public institutions (Bihor County Council, Buzau County Council, Brasov County Council, Vrancea County Council, Abrud City Hall, District no. 6 of Bucharest City Hall, Bacau City Hall, Cluj-Napoca City Hall and Calinesti City Hall) benefited from support for establishment of local centralised procurement units.

A new institutional collaboration agreement for technical assistance services between NAPP and the European Investment Bank was launched for the project for the establishment and operationalisation of centralised public procurement units at the local level and the promotion of green procurement at their level.

By way of example, NAPP and the European Investment Bank published a Guide for the establishment of a Centralized Procurement Unit at the level of the local public administration in Romania – an essential tool for supporting the authorities who wish to establish a local centralised procurement unit.

3.9 What are the rules on alternative/variant bids?

When variants are requested/permitted, the technical specifications must provide the minimum requirements which tenders must observe and any other specific requirements for the submission of variants; in particular, whether variants can only be submitted together with a tender which is not an alternative.

Variants which do not meet these minimum requirements shall not be taken into consideration by the contracting authority.

3.10 What are the rules on conflicts of interest?

Contracting authorities are bound to take all necessary measures to avoid, identify and remedy situations leading to a conflict of interest, for the purpose of avoiding distortion of competition and ensuring equal treatment of all economic operators.

Conflict of interest situations are expressly regulated by the legal provisions. For example, the following persons are not entitled to participate in the verification/evaluation of requests for participation/tenders:

- persons who hold social parts, parts of interest or shares in the subscribed capital of one of the tenderers/candidates, supporting third parties or subcontractors, or of the persons that are part of the board of directors/management or supervisory body of one of the tenderers/candidates, supporting third parties or subcontractors;
- husbands/wives or close family relatives up to and including the second degree relatives, of persons who are part of the board of directors/management or supervisory body of one of the tenderers/candidates, supporting third parties or subcontractors; or
- persons ascertained to have, or with regard to whom there is reasonable evidence/concrete information that they may have, a personal/financial/economic/any other kind of interest, or that they may be in another situation which is likely to affect their impartiality and autonomy in the process of verification/evaluation of requests for participation/tenders.

Other potential conflict of interest situations include the cases where any tenderer/candidate/subcontractor/supporting third party has, as members of its board of directors/management or supervisory body, and/or as significant shareholders or associates, persons who are husbands/wives or a close family relative up to and including the second degree relatives, or who have commercial relations, with either persons holding positions of decision within the contracting authority or the public procurement services provider involved in the award procedure. The same applies for the candidate/tenderer that nominated such persons as main persons designated for the execution of the contract, and the tenderer/candidate/member of the consortium/subcontractor/supporting third party organised as a joint-stock company with share capital represented by bearer shares who does not comply with the obligations imposed by the PPL (the obligation to submit a "statement on own liability" regarding the identification data of the beneficial owners).

For this purpose, the members of the evaluation committee and the co-opted experts are requested to submit a 'statement on own liability' confirming the absence of conflict of interest, and contracting authorities must mention in the award documentation the persons holding such positions of decision and/or the name of the public procurement services provider.

If the contracting authority identifies a potential conflict of interest situation, it is obliged to take all measures to establish if there is indeed a conflict of interest and present its reasoned opinion to the tenderer/candidate. The opinion of the candidate/tenderer is also sought. Where a conflict of interest exists, the contracting authority must adopt all measures to eliminate such circumstances, such as replacing the members of the evaluation committee or rejecting the respective tenderer/candidate.

Furthermore, additional measures have been adopted at an institutional level in order to prevent conflicts of interest in public procurement procedures, through the setting up of an *ex ante* verification mechanism from the perspective of situations that may give rise to conflicts of interest. This mechanism refers to procedures initiated through the ESPP, and its purpose is to enable the elimination of such situations without affecting the respective procedures.

Thus, the National Integrity Agency implemented an integrated IT system, named PREVENT, aimed at preventing and identifying potential conflicts of interest, which works based on an integrity form, available in electronic format to each contracting authority when initiating an award procedure.

Contracting authorities are under an obligation to ensure that the integrity forms are completed and updated, as from the publication of the award documentation, throughout the procedure, until the publication of the award notice.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Before launching a procurement procedure, when it intends to purchase products, services or works of high technical, financial or contractual complexity or in fields with quick technological progress, the contracting authority may conduct market consultations for the purpose of preparing the procurement and informing economic operators of its procurement plans and requirements.

Contracting authorities may invite independent experts, public authorities or economic operators, and may hold individual or common meetings, or open events, for the interested persons/organisations in order to discuss the proposed advice/suggestions/recommendations or subjects of general interest (e.g., the market structure; price tendencies and other commercial elements specific to the field of interest; technical, innovative and social integration aspects; or those related to environment protection, that might be highlighted in the award procedure).

The advice, suggestions or recommendations may be used or implemented by contracting authorities in the planning and conduct of the procurement procedure, provided that such advice, suggestions or recommendations do not have the effect of distorting competition and/or violating the principles of non-discrimination and transparency.

The market consultation process is initiated by publishing a notice regarding the consultation in the ESPP, or via any other means, The contracting authority has an obligation to publish the result of the market consultation in the ESPP, before launching the procedure at the latest.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Certain public contracts are excluded *de jure* from the scope of Law no. 98/2016; e.g., the PPL does not apply to the following public contracts:

- Contracts for which the contracting authority is bound to apply the utilities legislation.
- Contracts which the contracting authority is bound to award pursuant to a specific procedure: (i) established through a legal instrument creating international public law obligations, such as an international convention, concluded in compliance with the provisions of the EU Treaties between Romania and one or more states which are not members of the EU or subdivisions thereof, and which have as their subject the supply of goods, provision of services or performance of works destined for the implementation or exploitation of a project in common by the signatory states or as a result of applying a specific procedure provided by the European legislation, in the context of programmes and projects for territorial cooperation; or (ii) established by an international organisation.
- Contracts having as their subject the purchase or lease, by any financial means, of lands, existing buildings, other real estate or rights over such real estate.
- Contracts regarding the purchase, development, production or co-production of programmes designed for broadcasting, awarded by radio-broadcasting service suppliers.
- Contracts regarding the provision of arbitration and conciliation services.
- Contracts regarding the provision of financial services related to the issuance, purchase, sale or transfer of equity or other financial instruments.
- Employment contracts.
- Services contracts awarded to another contracting authority/contracting entity/association of contracting authorities, based on an exclusive right to provide those services pursuant to laws or normative administrative acts, to the extent that they are compatible with the TFEU.
- Contracts the award and performance of which are included in the category of state secret information, as well as contracts requiring the imposition of special security measures in order to protect national interests, under certain conditions.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The PPL will not apply to contracts concluded exclusively between two or more contracting authorities should the following conditions be met: (i) the contract establishes or implements cooperation between the contracting authorities with the purpose of ensuring that the public services are provided in order to meet common objectives; (ii) the purpose of the cooperation is exclusively based on considerations of public interest; and (iii) the contracting authorities perform on the free market less than 20% of the activities targeted by the cooperation.

Moreover, the PPL does not apply to contracts concluded between a contracting authority and a public or private legal person when the following conditions are met: (i) the contracting authority exercises over the respective legal person a control similar to the one exercised over its own departments or services; (ii) more than 80% of the activities of the controlled legal person are performed in order to fulfil the tasks entrusted by the contracting authority exercising the control or by other legal persons controlled by the said contracting authority; and (iii) there is no direct private participation in the share capital of the controlled legal person, except for the participations which do not grant control or a veto right, but which are required by the applicable legislation in accordance with the TFEU and TEU and which do not exercise a determined influence over the controlled legal person. The same conditions also apply when the control is exercised by more contracting authorities.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

The remedies procedure against the acts issued by contracting authorities during award procedures include the following phases: complaint before the NCSC (an administrative-jurisdictional body) or a tribunal (a judicial body); and appeal against the NCSC's/tribunal's decision.

The harmed economic operator may file the complaint in front of the NCSC or in front of the tribunal from the headquarters of the contracting authority.

When submitting a complaint to the NCSC, economic operators have an obligation to submit a bond amounting to 2% of the estimated value of the contract within five days as from the filing of the complaint. The value of the bond is limited to:

- In the case of contracts with an estimated value below the financial thresholds for publication in the OJEU:

- RON 35,000 for complaints filed before the submission of tenders/requests for participation/projects.
- RON 88,000 for complaints filed after the submission of tenders/requests for participation/projects.

- In the case of contracts with an estimated value equal to or above the financial thresholds for publication in the OJEU:
  - RON 220,000 for complaints filed before the submission of tenders/requests for participation/projects.
  - RON 2,000,000 for complaints filed after the submission of tenders/requests for participation/projects.

In the case that the bond is not submitted, the complaint shall be rejected. The submitted bond is released upon request of the economic operator, no sooner than 30 days from the date the ruling of the NCSC becomes final, if the contracting authority does not claim any damages against the economic operator within this term. The bond is, however, released immediately if the contracting authority expressly states that it does not intend to oblige the economic operator to pay any damages resulting from the filing of the complaint.

If the contracting authority definitively wins a complaint, it has the obligation to take the necessary steps to withhold the bond submitted by the economic operator, in order and within the limits to cover the damages caused by delays in finalising the award procedure.

When submitting a complaint before the tribunal, the economic operator has to pay a judicial fee of 2% of the estimated value of the contract, but not more than RON 100,000,000. The judicial fee is not subject to refund. In cases of winning the complaint definitively, the economic operator is entitled to recover the incurred court costs, including the judicial fee.

If the award procedure is divided into lots, the 2% bond/judicial fee is calculated as per the estimated value of the lot. In cases of framework agreements, the 2% bond is calculated by reference to double the estimated value of the largest subsequent contract, whilst the 2% judicial fee is calculated by reference to the estimated value of the largest subsequent contract.

Any interested economic operator can file a voluntary intervention claim. When ruling on the complaint, the NCSC/tribunal shall also rule on this claim.

The decision of the NCSC/tribunal can be further appealed in front of the court of appeal where the public authority is headquartered. If the appeal against the ruling of the NCSC is filed by another person than the complainant, a bond amounting to 50% of the above-mentioned values has to be submitted, together with the appeal. If the appeal is filed against the decision of the tribunal, the appellant has to pay a judicial fee of 50% of the initial fee paid for the complaint. The decision of the court of appeal is final. Only the extraordinary means of appeal might be filed against this decision in the strict and limited cases provided by the Civil Procedure Code.

Claims regarding compensation for damages caused during the award procedure may be filed separately before the tribunal from the headquarters of the contracting authority or from the headquarters/domicile of the claimant. The interested person may seek compensation for the damages caused by the contracting authority under the following conditions:

- if the damages were caused by an act of the contracting authority, or are a result of not solving a request regarding the award procedure within the legal term, then the damages may be granted only after the act was annulled, or if remedial measures were adopted by the contracting authority; and
- if the damages consist of the expenses incurred for preparing the tender or participating in the procedure, the damaged party must not only prove the damage and the breach of the provisions of the PPL, but also that the chance to win the contract was real and was lost because of the respective breach; the extent of the reparation of the damage is limited to the amount of the costs for preparing the tender and participating in the award procedure.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

The remedies options regarding public procurement procedures are limited to those provided by Law no. 101/2016 and the Civil Procedure Code.

5.3 Before which body or bodies can remedies be sought?

Remedies can be sought before the NCSC/tribunal and the competent court of appeal, as per question 5.1 above.

5.4 What are the limitation periods for applying for remedies?

Complaints can be filed before the NCSC or the tribunal within seven or 10 days from the day following the acknowledgment of the act of the contracting authority deemed illegal. If the claim regards the award documentation published in the ESPP, the date of acknowledgment is the date the award documentation was published.

The voluntary intervention claim can be filed within 10 days as from the date on which the complaint is published in the ESPP by the contracting authority.

The appeal against the ruling of the tribunal/NCSC upon the complaint must be filed within 10 days as from the date of communication of the decision.

Claims for compensation for damages caused during the award procedure can be filed within a one-year prescription term. Claims regarding performance, annulment or nullity of contracts can be filed within three years. For claims arising from the rescission, unilateral denunciation or early termination of public procurement contracts, the term for lodging the claim is of 30 days from the birth of the right to claim, if no other limitation periods are provided by special laws in relation to the breached legal or contractual obligations. Such litigations should be settled in a maximum term of 45 days.

Claims against certificates issued by contracting authorities regarding fulfilment or non-fulfilment of contractual obligations should be filed within 30 days as of their communication to the contractor.

5.5 What measures can be taken to shorten limitation periods?

Law no. 101/2016 does not provide for measures to be taken in order to shorten the limitation periods, no such shortening being thus admissible.

5.6 What remedies are available after contract signature?

Law no. 101/2016 provides that any interested person as well as ANAP can request the total/partial absolute nullity of public procurement contracts/addendums in the following cases:

(i) the contracts are concluded without the prior publication by the contracting authority of a contract notice;

(ii) the contract should be framed in the category of contracts subject to the PPL; however, the contracting authority concludes another type of contract, without complying with the legal award procedure;
(iii) the contract/addendum thereto is concluded under less favourable conditions than the ones provided for in the financial and/or technical proposals included in the winning tender;
(iv) the contract is concluded without regard to the qualification and selection criteria and/or the evaluation factors provided for in the contract notice on the basis of which the winning tender was selected, which led to the outcome of the procedure being altered by cancelling or reducing the competitive advantages;
(v) the contract is concluded before the NCSC/court of law communicates its ruling upon the complaint, when a complaint was filed against the award procedure, or in breach of such decision;
(vi) the contracting authority awards the contract pursuant to an award procedure that was subject to *ex ante* control and within which NAPP issued a conditional approval, and the contracting authority carried out and finalised the procedure without remedying the faults identified by NAPP; and
(vii) the contracts are concluded in breach of the standstill periods.

However, should the court consider that there are imperative reasons of general interest for the effects of the contract to be maintained, alternative sanctions might be ruled, such as (i) limitation of the effects of the contract, by reducing its duration, and/or (ii) imposing a fine on the contracting authority, of between 1% and 5% of the value of the contract.

5.7 What is the likely timescale if an application for remedies is made?

The NCSC has the obligation to rule upon the merits of the complaint within 20 days from the receipt of the public procurement file from the contracting authority or within 10 days where an exception occurs which prevents an analysis of the complaint on the merits. However, in duly justified cases, the initial term can be extended by 10 days and the extension has to be communicated to the contracting authority. In general, complaints are ruled upon within three to six weeks as of the date the complaint is filed, depending on the file's complexity. In practice, the term can be extended even more depending on the volume of activity of NCSC.

The tribunal has the obligation to rule upon the judicial complaint within 45 days of its referral to the court.

Appeals filed against the administrative or judicial decisions must be solved within 45 days of their referral to the court. In general, appeals submitted before the competent courts are ruled upon within an average timescale of one to two months.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

Romania was well known as one of the EU Member States with the highest number of bid complaints (in 2009, over 9,000 complaints were filed with the NCSC). However, this number has substantially decreased in recent years; in 2022, 3,233 complaints were filed with the NCSC. Over the past 15 years, VASS Lawyers has been representing clients in a large number of public procurement disputes in front of the NCSC, competent tribunals and courts of appeal.

In 2022/2023, VASS Lawyers obtained remedies in public procurement disputes concerning contracts in the fields of medical equipment and vehicles, medical gas, construction and infrastructure, the food industry, sanitation services, waste management, urban landscaping, information technology and communications, tourism, railway vehicles and biocide products, in contracts exceeding EUR 2 billion.

The remedies obtained ranged from the annulment of the decision to annul an award procedure, to re-evaluation of the tender declared wrongly as winner of the procedure, or of tenderers rejected without grounded reasoning. Certain claims even led to the annulment of the procedures where serious deviations from the legal provisions were identified and no remedial measures could be taken.

By way of example, a significant project that required legal advice, assistance, and representation before the National Council for Solving Complaints from our team referred to the challenging of a crucial award procedure for providing services for the planning and management of urban green spaces for the next four years, organised by Alba Iulia Municipality, with an estimated value of approximately EUR 6.5 million. The battle begun intensely with no fewer than three subsequent requests for access to the procurement file. Study of the file was crucial for suitably grounding the complaint. We advised the client on both procedural aspects as well as arguments on the merits of the case. The complaint submitted by the company was complex and envisaged numerous non-compliant tenders submitted within the award procedure. Other participants also appealed the procedure's result and also mutually intervened in each other's complaints. The case culminated with no fewer than five appeals against the NCSC's decision.

Several other claims filed against public procurement procedures for works contracts led either to the rejection of the tenders initially declared as successful and award of the contract to a lower-ranked company, or to annulment of rejection decisions of contracting authorities.

5.9 What mitigation measures, if any, are available to contracting authorities?

After receipt of the complaint, the contracting authority may adopt remedial measures within a three-day period.

Any such measure must be communicated to the complainant, to the other economic operators involved in the award procedure, and to the NCSC/tribunal, no later than one day from the date when the measure was adopted. Remedial measures adopted before the deadline for submission of tenders/requests for participation are published in the ESPP, in order to be made available to all interested economic operators.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

The PPL provides for certain rules regarding changes of the award documentation during the award procedure, such as: (i) an *erratum* to the contract notice has to be published at least three working days before the initially established deadline for submission of tenders/requests for participation; (ii) the possibility to

extend the deadline for submission of tenders if necessary; and (iii) the tenderer may submit, within the tender, proposals to amend the contract clauses within the tender documentation, but if the proposals are obviously disadvantageous to the contracting authority and the tenderer does not waive these amendments, even though it is asked to, the tender will be considered non-conforming. Certainly, contracting authorities may amend the tender documentation, within the limits imposed by the PPL, exclusively before the deadline for submission of tenders.

It should be mentioned that the contracting authority is obliged to extend the deadline for submission of tenders in case the changes lead to adjustments/completions to the award documentation that require additional time for potential tenderers. According to a recent amendment of the PPL, the obligation of the contracting authority to extend the deadline for submission of tenders in this case no longer refers only to changes of the technical specifications, but to changes of the entire award documentation.

Moreover, substantial amendments of the award documentation lead to the cancellation of the procedure when such amendments:

- affect the elements that describe the context of public procurement to such an extent that they have the effect of changing the main indicators characterising the outcome of the contract to be awarded, which affects the level of competition or changes the targeted market; or
- lead to substantial changes in the qualification and selection criteria, as they extend their level or introduce new ones, thus restricting competition or favouring certain economic operators.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

Given that the general rule in open and restricted tender procedures is that no changes are permitted to tenders already submitted (except for arithmetical errors, formal flaws and minor technical errors) prior to the award of the contract, there should be no negotiation with the preferred bidder following the submission of a final tender.

In case of a competitive procedure with negotiation, negotiations are carried out regarding the initial tenders submitted by the participants. Their scope is to improve the initial tenders and to adapt them to the concrete conditions in which the contract shall be performed. Negotiations can refer to any technical, financial or contractual element, except for the minimum requirements of the contracting authority, the award criterion and the evaluation factors.

6.3 To what extent are changes permitted post-contract signature?

Upon conclusion of the contract, changes to a public procurement contract are permitted without a new procurement procedure in the following situations:

- Where the amendments, irrespective of their monetary value, have been provided for in the initial procurement documents as clear, precise and unequivocal review clauses, which may include price revision clauses.
- For additional works, services or supplies up to a maximum of 50% of the value of the original contract, that have become necessary to be purchased from the original contractor and that were not included in the initial contract, where a change of contractor (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial public procurement award, and (ii) would cause a significant increase in costs for the contracting authority.
- Where all of the following conditions are fulfilled: (i) the amendment became necessary pursuant to circumstances which a diligent contracting authority could not foresee; (ii) the amendment does not alter the overall nature of the contract; and (iii) any increase in price is not higher than 50% of the value of the original contract/framework agreement (for classic public procurement contracts only).
- Where a new contractor replaces the one with whom the contracting authority initially concluded the contract as a consequence, *inter alia*, of an unequivocal review clause or an option provided in compliance with the legal provisions, or of a universal or partial succession following corporate restructuring, or if the contracting authority undertakes the obligations of the main contractor towards its subcontractors and the subcontractors towards the contracting authority.
- Where the amendments, irrespective of their value, are not substantial.
- Where all of the following conditions are fulfilled: (i) the value of the amendment is below the thresholds set out for applying the PPL; (ii) the value of the amendment is below 10% of the initial contract value for services and supply contracts or 15% of the initial contract value for works contracts; and (iii) the amendment does not alter the overall nature of the contract or the framework agreement under which the contract is awarded.

Where the price of the contract is increased through several successive amendments, the cumulative value of the amendments cannot exceed 50% of the value of the initial contract.

An amendment to a public contract/framework agreement during its term shall be considered substantial where it renders the contract or the framework agreement materially different in characteristics from the initial document. In any event, an amendment shall be considered substantial when at least one of the following conditions is met:

- the amendment introduces conditions which, had they been included in the initial award procedure, would have allowed the selection of other candidates than those initially selected or the accepting of another tender than originally accepted, or would have attracted more participants in the procedure;
- the amendment changes the economic balance of the public procurement contract/framework agreement in favour of the contractor in a manner not provided for in the initial public procurement contract/framework agreement;
- the amendment substantially extends the subject of the public procurement contract/framework agreement; or
- a new contractor replaces the original contractor, in cases other than those provided by the law.

Furthermore, the adding of new subcontractors during the performance of the contract is permitted, provided that it does not lead to a substantial change to the contract.

Adjustment of the contract price is also a highly debated topic during contract performance. Price adjustment might become applicable, depending on the contract clauses and the provisions of the award documentation as well as fulfilment of the legal conditions.

As a general rule, the possibility of price adjustment must be specified both in the award documentation and in the framework agreement/contract to be concluded, through special clauses in this regard. The contracting authority is bound to include price adjustment/revision clauses for services or supply contracts with a duration of more than 24 months and for works contracts with a duration of more than six months.

However, price adjustment is directly applicable in case of legislative changes or administrative acts issued by the local authorities which establish, amend or waiver certain local taxes/fees, the effect of which is reflected in the increase/decrease of the costs on which the price of the framework agreement/contract was based.

The contracting authority is also obliged to adjust the contract price if:

- the duration of the award procedure is extended beyond the validity period of the tender initially established in the award documentation, for reasons that are not attributable to the contractor; or
- the supply/performance/execution period stipulated in the contract is extended, and this extension is not due to the contractor's contractual liability.

If the performance of the contract has become excessively onerous due to an exceptional change in circumstances that would make it manifestly unfair to oblige the contractor to maintain the original prices, such as, but not limited to, the change caused by a *force majeure* or fortuitous event, the contract price may be adjusted, in order to fairly distribute between the parties the losses and benefits resulting from the change in circumstances. Certain legal conditions must, however, be fulfilled.

Last, but not least, it is important to underline that any amendment of the public procurement contract shall not lead to the infringement of the public procurement principles of transparency, non-discrimination and equal treatment. Contracting authorities must publish all modifications to contracts/framework agreements in the dedicated section in the ESPP, so that they reflect the final price or duration upon the termination of contracts.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

The transfer of a contract to another entity post-contract signature is allowed in one of the following situations: (i) as a consequence of an unequivocal review clause or an option provided in compliance with the legal provisions; (ii) the rights and obligations of the initial contractor resulting from the contract are undertaken, as a result of a universal or partial succession following corporate restructuring or bankruptcy, by another economic operator that fulfils the initial qualification and selection criteria, as long as such amendment does not entail other substantial amendments of the contract and is not made for the purpose of eluding the application of the award procedures under the PPL; and (iii) if the contracting authority undertakes the obligations of the main contractor towards its subcontractors, and in turn, the subcontractors towards the contracting authority.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Privatisations do not fall under the scope of the PPL and are the subject of specific pieces of legislation.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

Public-private partnerships are regulated separately by GEO no. 39/2018. This legislation appeared as a result of the failure to implement PPP projects under the previous Law no. 233/2016.

GEO no. 39/2018 was also adopted in light of the provisions of Government Program 2018–2020, which proposed a significant increase in investments in order to achieve the objectives of economic growth and to strengthen fiscal-budgetary sustainability. In this context, the Government has undertaken both to launch public investment projects with a significant impact on the economy, and to stimulate private investment (e.g., through the implementation of public-private partnership projects).

In order to achieve these objectives, the National Commission for Strategy and Prognosis was initially granted the competence in the preparation and award of strategic investment projects of the central public administration which are implemented in public-private partnerships.

Through this Commission, the Government adopted a list of strategic investment projects to be prepared and awarded in a public-private partnership. The list included projects such as: the Ploiesti-Brasov highway; the Bucharest–Craiova–Calafat–Drobeta-Turnu Severin–Lugoj highway; the construction of Bucharest South Airport; the arrangement of the Arges and Dambovita rivers for navigation; the Ploiesti–Buzau–Focsani–Bacau–Pascani–Iasi–Suceava–Siret (Vicsani) high-speed railway line; and the extension of the metro intended to increase the metropolitan area of Bucharest. Subsequently, the projects intended to be awarded in public-private partnership were taken over from the National Commission for Strategy and Prognosis by the competent ministries, e.g., the above-mentioned infrastructure projects were taken over by the Ministry of Transport, Infrastructure and Communications.

The contract notices published in 2019 for the award of public-private partnerships for projects such as the Targu Neamt–Iasi highway, the Ploiesti–Brasov highway or the Multifunctional Clinic "Dr. Calistrat Grozovici" did not result in the conclusion of the contracts. The award procedures were cancelled in the meantime.

In 2022 an award procedure was published in SEAP by a local municipality which resulted in the selection of a private partner for the setting up of a public-private partnership for the rehabilitation and administration of sports fields within a leisure complex.

No contract notices for the award of public-private partnerships published until November 2023 were identified.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

In April 2023, NAPP published a government decision draft aimed at amending the methodological norms on G.E.O. no. 98/2017 on the *ex-ante* control function of public procurement contracts/framework agreements/utilities contract, and work concession and services concession contracts. The status of the project remains uncertain at the beginning of November 2023.

New tertiary legislation is constantly being issued and is expected to be further adopted by NAPP in order to clarify the interpretation and application of the PPL.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

An updated National Public Procurement Strategy for 2023-2027 has been adopted through G.D. no. 554/2023.

The general objective of the strategy aims to promote the use of public procurement as a strategic tool to contribute to the resilience and economic recovery of Romania, including by

ensuring the social, environmental and innovation benefits and by ensuring the increased access of Small and Medium Enterprises ("**SMEs**") at the public procurement market.

As regards the proposals to change the law, the strategy includes the following:

- revision of Law no. 101/2016 to ensure the communication of the decisions pronounced by the courts of law to NAPP;
- repeal of Law no. 69/2016 on green public procurement and the amendment and completion of public procurement legislation to this purpose;
- the elaboration and adoption of a National Plan for ecological public procurement;
- amending and completing G.E.O. no. 57/2019 regarding the Administrative Code in order to add a specific public management function in the field of public procurement;
- amending and completing G.E.O. no. 13/2015 for the establishment, organisation and operation of the NAPP in order to clarify the function of initiation and elaboration of public policy documents in the field of professionalisation of public procurement; and
- amending Order of the Ministry of Labour, Family and Social Protection no. 1832/2011 regarding the approval of the Classification of occupations in Romania - occupation level (six characters), for the introduction of the occupation of Public Procurement Manager.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

Romania's Recovery and Resilience Plan (drawn up in order to benefit from EU funding under the Recovery and Resilience Facility) shall also impact the public procurement field. As an example, one of the investments envisaged within the reform to increase digital competence in the exercise of public functions is the implementation of eForms in public procurement. The goal of this investment is to operationalise the standard electronic forms that should be used for the publication of public procurement notices, which will simplify public procurement practices at national and European level, in accordance with Regulation (EU) 2019/1780. Although the implementation of eForms was initially planned for October 2023, following cyber attacks on some IT service providers that indirectly affected several IT platforms, the transition to the use of the eForms in SEAP was postponed.

In addition, one of the declared objectives of the good governance component is a more efficient national public procurement system, including by consolidating the administrative capacity of the contracting authorities/entities into a flexible and coherent legal framework. Within the reform of the system, several actions are envisaged, with corresponding deadlines, such as: (i) amending the remedies law in order to streamline the award process (March 31, 2022) (the PPL has been subject to multiple amendments during the past two years and NAPP also announced that one of the measures within its responsibility was achieved by amending the remedies law with the obligation for the contract to be signed with the successful tenderer immediately after the ruling of NCSC, and before the settling in court of the challenge against NCSC's decision); (ii) adopting an updated National Strategy for Public Procurement (June 30, 2023) (the strategy has been adopted in June 2023); (iii) making operational the joint public procurement units for local authorities (December 31, 2025); (iv) specialised training in public procurement for at least 350 persons (December 31, 2023); (v) interconnection of the ESPP with other databases (December 31, 2023); and (vi) making the electronic public procurement system operational, including eForms, automatic evaluation of qualifications, electronic catalogues, and electronic invoicing and payment (March 31, 2025).

Romania's Recovery and Resilience Plan was adopted by the Council in October 2021.

Iulia Vass is the founding Managing Partner of VASS Lawyers and is acknowledged as one of the leading experts in Romania in public procurement and public-private partnerships. As a lawyer specialised in public procurement, concessions and PPP, during the past 17 years, Iulia has advised a wide range of private investors and public bodies in all phases of the tendering process and project implementation, in meaningful projects with a great impact on the country's development, such as infrastructure, healthcare and education.

Iulia has helped bring to life public procurement projects ranging from smaller contracts to billion-euro projects, for the entire spectrum of domestic and international bidders, from SMEs or NGOs to Fortune 500 companies, as well as various public entities, state-owned companies, international and trade organisations. She also has extensive experience in representing clients before the National Council for Solving Complaints and the competent courts in public procurement litigation.

Over the last 17 years, Iulia has written, spoken, and been published widely on public procurement and PPPs, and has attended numerous national and international conferences in the field. Moreover, for the past eight years, Iulia has been acknowledged by *The Legal 500* as a Leading Individual in PPP and Procurement practice, for being "outstanding, by international standards". She is also recommended by *Global Law Experts*, a guide to the world's top lawyers, in the Public Procurement field in Romania. Iulia holds a Bachelor's degree from the University of Bucharest Law School and an LL.M. with distinction in Public Procurement Law and Policy from the University of Nottingham. She also holds a Master's degree in International Relations – Conflict Analysis and Resolution from the National School of Political Studies and Public Administration.

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During the past 15 years, VASS Lawyers has grown to be a leading law firm in Romania, specialised in Public Procurement, Concessions and PPP. The clients and the legal market itself have acknowledged the firm's leading role in the field of public procurement. *The Legal 500* EMEA, the independent legal directory of the best law firms in the region, drawn up based on clients' feedback, has been recommending VASS Lawyers as a top-tier law firm in public procurement and PPP since 2013.

As one of the first law firms in Romania specialised in public procurement, VASS Lawyers has advised a wide range of private investors and public bodies in public procurement, utilities, defence and sensitive security, concession and PPP projects, in all phases of the tendering and project implementation process. The team also represents its clients in disputes on the interpretation, performance or termination of contracts, both in the amicable settlement phase and in front of the courts.

In its 15 years of practice, the firm has worked closely with renowned clients from Romania and international markets such as Austria, the People's Republic of China, Denmark, Germany, Ireland, Japan, the Netherlands, Norway, Spain, the United Kingdom and the United States of America, covering complex sectors of business and industry such as construction, infrastructure, healthcare, education, real estate, utilities, research services, oil & gas, mass media, IT, environment, defence, energy, rolling stock and rail transport.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Relevant legislation in the field of public procurement in the Republic of Slovenia consists of the Public Procurement Act (PPA) and Legal Protection in Public Procurement Procedures Act (LPPPPA). The PPA establishes rules on the procedures for procurement by contracting authorities with respect to contracts and design contests. The LPPPPA governs legal protection of tenderers, contracting authorities and the public interest, including legal protection of defence and security interests, in procedures of awarding public contracts; and it designates bodies responsible for protecting rights pursuant to this Act. The LPPPPA also defines legal protection after the conclusion of a contract or framework contract. Furthermore, Slovenia has a Public Procurement in the Defence and Security Sector Act (PPDSA) which establishes rules of conduct of contracting authorities and tenderers in the procurement of goods, services and works in the field of defence and security. Due to the effects of a natural disasters (Floods in August), the Slovenian legislature adopted the Act Amending the Natural Disaster Recovery Act (ZOPNN-F) to mitigate its consequences for the Economy, which contained certain measures that have an impact on public procurement, some of which are in force until 31 December 2023.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The organisation, development and implementation of the public procurement system are based on: the principles of free movement of goods, freedom of establishment and freedom to provide services, which are derived from the Treaty on the Functioning of the European Union (TFEU); and the principles of economy, efficiency and effectiveness, competition among tenderers, transparency of public procurement, equal treatment of tenderers, and proportionality.

In the performance of public contracts, economic operators must comply with applicable obligations in the fields of environmental law, social law and labour law established by European Union (EU) law, regulations in force in the Republic of Slovenia, collective agreements, or international environmental, social and labour law provisions. Other principles used in public procurement that need to be interpreted within the PPA are: the principles of economy, efficiency and effectiveness; the principle of competition among tenderers; the principle of transparency of procurement procedures; the principle of equal treatment of tenderers; and the principle of proportionality.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

The PPA divides public procurement into the general and infrastructure fields. The provisions of the PPA apply to all contracting authorities, regardless of the field of procurement, except where a particular provision provides that it can apply only to the general field or the infrastructure field. The infrastructure field is divided into the following subcategories: gas and heat; electricity; water; ports and airports; postal services; extraction of oil and gas; and exploration for, or extraction of, coal or other solid fuels. As a "special situation", the PPA also lists procurement involving aspects of defence or security – see question 1.1.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

There are rules on the publication of contracts in the field of public procurement, concessions and public-private partnerships. The core of the legislation is that all contracts in the field of public procurement, concessions and public-private partnerships that are entered into by the Government are published.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Slovenia is a Member State of the EU and is therefore subject to the applicable EU legislation on public procurement. Slovenia has implemented the following directives into its legislation:

- Directive 2009/81/ES, implemented in the LPPPPA;
- Directive 2014/24/EU, implemented in the PPA;
- Directive 2014/25/EU, implemented in the PPA;
- Council Directive 89/665/EEC, implemented in the PPA and the LPPPPA; and
- Council Directive 92/13/EEC, implemented in the PPA and the LPPPPA.

The Slovenian public procurement market is open to all signatory countries of the Government Procurement Agreement within the framework of the World Trade Organization, as well as all Member States of the European Economic Area.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The following are recognised as contracting authorities under the PPA:

(a) authorities of the Republic of Slovenia;
(b) authorities of self-governing local communities;
(c) other bodies governed by public law;
(d) public undertakings which pursue one or more activities in the infrastructure field; and
(e) entities that are not referred to in points (a) to (d) but pursue one or more activities in the infrastructure field, operating on the basis of special or exclusive rights granted by a competent authority of the Republic of Slovenia.

An association formed by one or several contracting authorities can also be considered a contracting authority.

2.2 Which types of contracts are covered?

Slovenian public procurement law covers public contracts, framework agreements and design contests. Public contracts are defined as contracts for pecuniary interest concluded in writing between one (or more) economic operator and one (or more) contracting authority, and having as their object the execution of works, the supply of products or the provision of services.

2.3 Are there financial thresholds for determining individual contract coverage?

In the general field, rules are applicable to procurements with a value net of value-added tax (VAT):

- EUR 40,000 for public supply or services contracts or design contests;
- EUR 80,000 for public works contracts; and
- EUR 750,000 for public services contracts for social and other specific services, with the exception of services that are covered by CPV codes 79713000–5, 79100000–5, 79110000–8, 79111000–5, 79112000–2, 79112100–3 in 79140000–7.

In the infrastructure field:

- EUR 50,000 for public supply or services contracts or design contests;
- EUR 100,000 for public works contracts; and
- EUR 1,000,000 for public services contracts for social and other specific services, with the exception of services that are covered by CPV codes 9713000–5, 79100000–5, 79110000–8, 79111000–5, 79112000–2, 79112100–3 in 79140000–7.

In the defence and security field:

- EUR 40,000 for public supply or services contracts; and
- EUR 80,000 for public works contracts.

As regards contracts with a value estimated to be less than the thresholds referred to in the preceding paragraph, the contracting authority is obliged to comply with the principles of economy, efficiency, effectiveness and transparency. The contracting authority must keep a record of the awarding of these contracts, which must include an indication of the subject matter and value of the public contract net of VAT, and must also report information regarding these contracts. Public contracts which have as their subject matter two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject matter of the contract in question.

2.4 Are there aggregation and/or anti-avoidance rules?

The splitting of purchase orders to avoid any threshold is not permissible, as the aggregation rule applies.

Public supply or services contracts

Procurement thresholds apply to the aggregate (total) value of all requirements for the purchase, lease, rental or hire of goods and services of a similar type. In judging whether supplies/services are "of the same type", it should be taken into account, for instance, whether they would normally be ordered together and/or from the same suppliers. Aggregate values may be calculated by one of the following methods: the estimated value of separate contracts for meeting a single requirement; the total value of goods and services purchased during the last financial year; the estimated total value of all contracts/orders expected to be placed in the next financial year, or during the term of the contract if that is longer; or, where contracts have no definite duration, 48 times the monthly value.

Public works contracts

Where a single work involves more than one contract, the estimated value of all the contracts must be aggregated to decide whether the threshold is reached. Where the threshold is reached, each of the works contracts will be covered by the rules, except small contracts (known as small lots), the value of which falls below the *de minimis* level provided for in the regulations.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

The Certain Concession Contracts Act regulates certain works and services concession contracts in accordance with Directive 2014/23/EU. Concession under this Act means a concession for works and a concession for services.

The concession contract is concluded with the concessionaire, and is selected on the basis of objective criteria in accordance with the principles of this Act. The criteria should be set in such a way that the tenders are evaluated under conditions of real competition, so that the overall economic benefits that the grantor will have can be determined.

This Act applies to concession contracts whose estimated value, net of VAT, is equal to or higher than EUR 5,186,000. In other cases, the Public-Private Partnership Act can be applied instead.

Otherwise, general rules for concessions are set out in the Public-Private Partnership Act.

2.6 Are there special rules for the conclusion of framework agreements?

Contracting authorities may conclude framework agreements, provided that they apply one of the procedures provided for in the PPA. A framework agreement means an agreement between one (or more) contracting authority and one (or more) economic operator, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. The term of a framework agreement for contracts in the general field and for contracts in the infrastructure field may not exceed four and eight years respectively, save for exceptional cases duly justified, in particular, by the subject matter of the framework agreement.

Contracts based on a framework agreement are awarded in accordance with procedures laid down in the PPA, which may be applied only between those contracting authorities clearly identified for this purpose in the call for competition or the invitation to confirm interest, and those economic operators party to the framework agreement as concluded. Contracts awarded on the basis of a framework agreement may under no circumstances include substantial modifications to the terms laid down in that framework agreement. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement must be awarded within the limits of the terms laid down in the framework agreement. For the award of contracts, contracting authorities may consult the economic operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

2.7 Are there special rules on the division of contracts into lots?

Where the subject matter of the public contract so permits, and where this adds to the economy and efficiency of the performance of the contract, contracting authorities shall award the contract in the form of separate lots and determine the size and subject matter of such lots. In doing so, they shall ensure non-discriminatory treatment of economic operators, thus making the contract accessible to a wider circle of economic operators.

Contracting authorities must state – in the contract notice or the invitation to confirm interest, in a periodic indicative notice if such is used as a means of calling for competition, or, where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender or the invitation to negotiate – whether tenders may be submitted for one, for several or for all of the lots. Even where tenders may be submitted for several or all lots, contracting authorities may limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the notice that is used as a means of calling for competition, in the invitation to confirm interest, or in the invitation to tender or to negotiate. In such a case, contracting authorities should indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

Where more than one lot may be awarded to the same tenderer, contracting authorities may award a contract combining several or all lots where they have specified in the notice or in the invitation to confirm interest, or in the invitation to tender, a means of calling for competition; or may negotiate that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined. Notwithstanding the thresholds mentioned in the answer to question 2.3, contracting authorities may award contracts for certain excluded lots without applying the procedures provided for under the PPA, provided that the estimated value of the excluded lots, net of VAT, is less than EUR 80,000 for supplies or services; however, the aggregate value of the lots thus awarded without applying the PPA must not exceed 20% of the aggregate value of all the lots into which the proposed acquisition of similar supplies, or the proposed provision of services, has been divided.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

There are no such obligations on purchasers in Slovenia.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

When awarding public contracts, contracting authorities may, in the manner and under the conditions laid down in the PPA, apply the following procedures:

(a) open procedure;
(b) restricted procedure;
(c) competitive dialogue;
(d) innovation partnership;
(e) competitive procedure with negotiation;
(f) negotiated procedure with publication;
(g) negotiated procedure without prior publication; and
(h) low-value contract procedure.

There is no free choice amongst them. The main feature of these procedures is that they can be divided into one-phase and two-phase processes. The open procedure consists of one phase, while four of the remaining procedures (restricted procedure, competitive dialogue, innovation partnership, negotiated procedure with publication and low-value contract procedure) consist of two phases.

The main difference between the one-phase procedure and the two-phase procedure is that in the one-phase procedure, all interested parties may submit their bids upon publication of the public notice; whereas in the two-phase procedure, in the first stage, all interested parties are invited to pre-qualify. In the second stage, only pre-qualified bidders may submit their financial offers.

3.2 What are the minimum timescales?

The minimum timescales regarding receipt of tenders and the date on which the contract notice is sent for publication are the following:

- **Open procedure**: the minimum time limit for the receipt of tenders is 35 days from the date on which the contract notice is sent for publication. Where the contracting authority has published a prior information notice or, in the case of procurement in the infrastructure field, a periodic indicative notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders may be shortened to 15 days, provided that both of the conditions stated in the PPA are fulfilled.
- **Restricted procedure**: the minimum time limit for the receipt of requests to participate is 30 days from the date on which the contract notice is sent for publication. Notwithstanding the preceding timescale, for public contracts in the infrastructure field, the minimum time limit for receipt of requests to participate is, as a general rule, fixed at no less than 30 days from the date on which the contract notice is sent for publication or, where a periodic indicative notice is used as a means of calling for competition, no less than 30 days from the date on which the invitation to confirm interest is sent to candidates. In any event, this time limit cannot be less than 15 days. The minimum time limit for receipt of tenders is 30 days from the date on which the invitation to tender is sent.

Notwithstanding the preceding deadline, for public contracts in the infrastructure field, the time limit for the receipt of tenders may be set by mutual agreement between the contracting authority and the selected candidates, provided that the selected candidates have equal time to prepare and submit their tenders. In the absence of an agreement on the time limit for the receipt

of tenders, the time limit is set to at least 10 days from the date on which the invitation to tender is sent.

- **Competitive dialogue**: the minimum time limit for the receipt of requests to participate is 30 days from the date on which the contract notice is sent for publication. Notwithstanding the preceding timescale, for public contracts in the infrastructure field, the minimum time limit for the receipt of requests to participate is, as a general rule, fixed at no less than 30 days from the date on which the contract notice is sent for publication or, where a periodic indicative notice is used as a means of calling for competition, no less than 30 days from the date on which the invitation to confirm interest is sent to candidates. In any event, this time limit cannot be less than 15 days.
- **Innovation partnership**: the minimum time limit for the receipt of requests to participate is 30 days from the date on which the contract notice is sent for publication. Notwithstanding the preceding timescale, for public contracts in the infrastructure field, the minimum time limit for the receipt of requests to participate is fixed, as a general rule, at no less than 30 days from the date on which the contract notice is sent for publication. In any event, this time limit should not be less than 15 days.
- **Competitive procedure with negotiation**: the minimum time limit for the receipt of requests to participate is 30 days from the date on which the contract notice is sent for publication. The minimum time limit for the receipt of initial tenders is 30 days from the date on which the invitation to tender is sent to candidates. Where the contracting authority has published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders referred to in the preceding paragraph may be shortened to 10 days, provided that the conditions stated in the PPA are fulfilled.
- **Negotiated procedure with publication**: the minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice is sent for publication or, where a periodic indicative notice is used as a means of calling for competition, no less than 30 days from the date on which the invitation to confirm interest is sent to candidates. In any event, this time limit cannot be less than 15 days.

3.3 What are the rules on excluding/short-listing tenderers?

In a two-phase procedure, the contracting authority may limit or reduce the number of tenderers it intends to invite to submit a tender. This means that it is not necessary for the contracting authority to invite all tenderers who are qualified (or have been recognised as qualified to perform the contract). Unlike the open procedure, the restricted procedure allows the contracting authority to limit the number of suitable candidates that it subsequently invites to participate, but the contracting authority must send a call for proposals by submitting technical specifications and a sample contract to at least five selected tenderers.

With regard to the minimum number, having less than five tenderers does not guarantee adequate competition. However, if the number of candidates who qualify for participation and the minimum number of qualifications is less than the minimum number, the contracting authority may continue the procedure by inviting all candidates with the required abilities.

In addition, the contracting entity may not involve economic operators who have not applied for participation, or candidates who do not have the required competencies. The contracting authority provides the criteria or the rules which it intends to apply in order to reduce the number of suitable candidates, and the minimum, or on occasion the maximum, number of candidates it intends to invite to participate in the contract notice. Only the publication of such criteria or rules guarantees an adequate level of transparency and compliance with the principle of equal treatment of tenderers in the procurement process. However, the rules or the criteria for reducing the number of candidates are objective and non-discriminatory. Therefore, no rules or criteria beyond those permitted by the Directive itself are permitted.

The best way to set rules and criteria for reducing the number of candidates is by taking into account their economic and technical capacity. In this way, it is easiest to classify qualified economic operators and to identify those who are most qualified to undertake the procurement subject. In doing so, the rules or the criteria that may be considered to reduce the number of suitable candidates need not be the same as those used to determine whether economic operators are qualified to perform the contract. They may be used in the form of additional criteria (which must, however, be selected from those criteria laid down in the Directive). In any case, these additional criteria must be designed to identify those economic operators who are most qualified to perform the contract, and must therefore be linked to the contract to be awarded.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

Contracting authorities base the award of public contracts on the most economically advantageous tender. The other two factors on which the award of a contract can also be based are salary and length of employment.

The most economically advantageous tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach such as life-cycle costing, as provided for in the PPA, and may include the best price-to-quality ratio, which shall be assessed on the basis of criteria relating to qualitative, environmental or social aspects linked to the subject matter of the public contract in question. Such criteria may comprise, for instance:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, a design for all users, social, environmental and innovative characteristics, and trading and its conditions;
(b) the organisation, qualifications and experience of staff who are to perform the contract where the quality of the staff assigned can have a significant impact on the level of performance of the contract; and
(c) after-sales service, technical assistance and delivery conditions such as delivery date or period of completion, delivery process or performance process, and duration of delivery or of works.

The cost element may also take the form of a fixed price or cost, on the basis of which economic operators compete on quality criteria only. In the award of contracts for the development of computer software, for architectural and engineering services, and for translation and advisory services, contracting authorities may not use price as the sole award criterion. Contract award criteria must be non-discriminatory, proportionate and linked to the subject matter of the contract. Award criteria shall be considered to be linked to the subject matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life-cycle, including factors involved in the specific process of production, provision or trading of those works, supplies or services or a specific process for another stage of their life-cycle, even where such factors do not form part of their material substance.

The award criteria do not confer an unrestricted freedom of choice on the contracting authority. They ensure the possibility of effective competition, and are accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In cases of doubt, contracting authorities verify the accuracy of the information and proof provided by the tenderers in respect of the award criteria.

In the procurement documents, the contracting authority must specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where such a tender is identified on the basis of price alone. These weightings may be expressed by providing for a range with an appropriate maximum spread. Where weighting is not possible for objective reasons, the contracting authority indicates the criteria in descending order of importance.

Tender selection criteria for procurement of foodstuffs gives preference to foodstuffs covered by quality schemes (e.g., seasonal integrated food production or seasonal organic food production), foodstuffs produced in conformity with national food quality regulations, and foodstuffs that are sustainably produced and processed, and are of high quality in terms of freshness, or where their transportation causes less environmental impact.

3.5 What are the rules on the evaluation of abnormally low tenders?

Where for a given contract, and in relation to the contract requirements, tenders appear to be abnormally low compared to market prices; or there is doubt as to whether the performance of the contract is possible; the contracting authority identifies whether the tenders are indeed abnormally low, and requires tenderers to explain the price or costs proposed therein. The contracting authority will also verify whether a tender is abnormally low if the value of the tender is more than 50% lower than the average value of timely tenders received, and more than 20% lower than the next-ranked tender; but only provided that at least four timely tenders have been received. Where, in a procurement procedure, the contracting authority verifies the admissibility of all tenders, it will, in accordance with the preceding sentence, also verify whether a tender is abnormally low compared to the admissible tenders.

Before rejecting an abnormally low tender, the contracting authority requires the tenderer to provide, in writing, details of and justification for the elements of the tender which it considers relevant to the execution of the contract, or which have an impact on the ranking of the tenders received.

The contracting authority assesses the explanation provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained state aid, the tender may be rejected on that basis alone, only after consultation with the tenderer and where the latter is unable to prove that the aid in question was compatible with the internal market within the meaning of Article 107 of the TFEU.

3.6 What are the rules on awarding the contract?

After completing the evaluation of tenders, the contracting authority selects the most favourable tenderer. It then informs the tenderers thereof by publishing the signed decision on the Public Procurement Portal.

For each procurement other than public contracts awarded under the low-value procurement procedure, and for each framework agreement, except for contracts awarded under framework agreements, and each establishment of a dynamic purchasing system and qualification system, the contracting authority must draw up a written report. The contracting authority must also document the progress of all procurement procedures, whether or not they are carried out by electronic means. To this end, it must ensure that it maintains sufficient documentation to justify decisions taken at all stages of the procurement process, such as documentation on communications with economic operators and internal discussions, the preparation of documents relating to the award of the contract, possible dialogue or negotiations, and selection and award of the contract. The documentation is kept for at least five years from the date of the award decision or at least two years after the expiry of the contract.

3.7 What are the rules on debriefing unsuccessful bidders?

The contracting authority notifies tenderers and candidates of all decisions made, by publishing a signed decision on the Public Procurement Portal. The contracting authority will also provide reasons for its decision.

Each decision must include the reasons for rejecting the tender of each unsuccessful tenderer who has not been selected, the characteristics and advantages of the successful tender, the name of the successful tenderer or signatories to the framework agreement, and, in the case of negotiations or dialogue, a brief description of the negotiations and dialogue with the tenderers.

In their decisions, contracting authorities must notify tenderers and candidates of the possibility of legal protection, and specify the following:

- where and within what time limit a request for legal protection can be made during the contract award procedure; and
- the level of the fee applicable to legal protection during the contract award procedure, the number of the transaction account to which this fee is to be paid, the reference number to be indicated in this respect, and an indication that the review request is to be accompanied by the proof of payment of the fee.

3.8 What methods are available for joint procurements?

For joint procurements, the following methods are available:

- joint procurement by the Government and centralised purchasing activities;
- occasional joint procurement; and
- procurement involving contracting authorities from different Member States (this method is practically never used, but it is possible under the PPA).

3.9 What are the rules on alternative/variant bids?

Contracting authorities may authorise or require tenderers to submit variants. They indicate (in the contract notice, or where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender or negotiate), whether or not they authorise or require variants. Where variants are not authorised or required, they cannot be submitted. Variants must be linked to the subject matter of the contract.

Contracting authorities authorising or requiring variants must state in the procurement documents the minimum requirements

to be met by the variants and any specific requirements for their submission; in particular, whether variants may be submitted only where a tender, which is not a variant, has also been submitted. They must also ensure that the award criteria can be applied to variants meeting those minimum requirements, as well as to conforming tenders which are not variants.

3.10 What are the rules on conflicts of interest?

Conflict of interest exists when the person who is conducting the procurement procedure and is involved in the preparation of the procurement documents or parts thereof, or in the decision-making at any stage of the procurement procedure, is directly or indirectly associated with the selected tenderer in such a way that this person's relationship with the successful tenderer or its private, financial or economic interests could affect the impartial and objective performance of their contract-related tasks, or cast doubt on their objectivity and impartiality.

Contracting authorities may exclude an economic operator from participating in a procurement procedure where a conflict of interest cannot be effectively remedied by other, less intrusive measures.

It is the contracting authority's responsibility to ensure that the tasks in the procurement procedure are carried out in a lawful and impartial manner.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Bidders or participants that have cooperated with the contracting authority in the preparation of a procurement procedure may participate in the tender, provided that such advice or recommendations do not have the effect of preventing or restricting competition and do not result in a violation of the principle of equal treatment of tenderers or the principle of transparency of public procurement.

Contracting authorities may exclude an economic operator from participating in a procurement procedure where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure cannot be effectively remedied by other, less intrusive, measures.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

The PPA provides a detailed list of exclusions in Article 27. General exclusions relate to: the acquisition or rental of land, existing buildings or other immovable property; media services; arbitration and conciliation services; legal services; services for loans; employment contracts; public passenger transport services; civil defence; civil protection; and danger prevention services.

Public procurements in the general field, which are awarded for resale or leasing to third parties, must obey the condition that the contracting authority does not enjoy any special or exclusive rights in relation to the sale or leasing of the objects of such public procurements, if the value of the public contract does not exceed the value beyond which a contract notice must be published in the Official Journal of the European Union. Furthermore, if the value of the public procurement does not exceed the value of further publication in the Official Journal of the European Union, the PPA does not apply to public supply contracts intended for official gifts, or other forms of promotion of the Republic of Slovenia, public contracts for food products, and to the public service contracts for mandatory audits.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

Article 28 of the PPA regulates in-house arrangements. Vertical cooperation falls outside the scope of the PPA if:

- the contracting authority exercises a control over the legal person concerned which is similar to that which it exercises over its own departments. Such control may also be exercised by another legal person which is itself controlled in the same way by the contracting authority;
- more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority;
- there is no direct private capital participation in the controlled legal person; and
- the value of the subject matter of the procurement is equal to or lower than the price of such subject matter on the market.

The in-house arrangements within a group are excluded if:

- the contracting authority exercises, jointly with other contracting authorities, a control over that legal person which is similar to that which it exercises over its own departments;
- more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and
- there is no direct private capital participation in the controlled legal person.

Non-institutionalised/horizontal cooperation is excluded if:

- the contract establishes or implements cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- the implementation of that cooperation is governed solely by considerations relating to the public interest;
- the participating contracting authorities perform less than 20% of the activities on the open market that are the subject of the cooperation; and
- the value of the subject matter of the procurement is equal to, or lower than, the price of such subject matter on the market.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

As a remedy, the LPPPPA provides three different procedures: (1) the pre-review procedure, which takes place before the contracting authority; (2) the review procedure, which takes place before the National Commission for Reviewing Public Procurement Award Procedures, and a right to an administrative dispute against decisions of such Commission; and (3) judicial proceedings at the first instance that take place at the District Court, which is exclusively competent according to the act regulating Courts.

In accordance with the LPPPPA, the party to the review and judicial proceedings is a business entity as defined in the PPA, when submitting a review claim, a representative of public interest, or a contracting authority or other entity that carries out, or should carry out, the public procurement procedure according to the PPA. Furthermore, with regard to initiating the pre-review and review procedures, each person having or having had interest in being awarded a public contract, concluding a framework contract or being included on the dynamic purchasing system or a system of establishing capability, and who suffers, or could suffer damages from the alleged infringement, and the representative of public interest, has the capacity to do so.

In case of a submitted review claim, the contracting authority may continue the public contract award procedure, but it may not conclude the contract, stop the public procurement procedure, reject all tenders or start a new public procurement procedure for the same procurement object. However, the claimant may forward its proposal to suspend the public contract award procedure to the contracting authority.

In addition, in accordance with the LPPPPA, bidders may file lawsuits before the Court for voidability of public procurement contracts. Furthermore, the bidder can file a lawsuit for damages arising from the contractor's infringement of public procurement rules. The latter shall be judged according to the rules of the law of obligations regarding responsibility without guilt.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

Unsuccessful tenderers may file a request for access to public information in accordance with the Public Information Access Act, where they can demand the successful tenderer's documents. The request is filed with the Information Commissioner of the Republic of Slovenia. Other than that, unfortunately no such additional remedies are possible.

According to Article 35 of the PPA, the specifications of the offer, the quantity from this specification, the price per unit, the value of each item and the total value from the offer and all information that influenced the classification of the offers are always considered to be public information.

5.3 Before which body or bodies can remedies be sought?

The pre-review procedure takes place before the contracting authority. The review procedure takes place before the National Commission for Reviewing Public Procurement Award Procedures and, if an administrative dispute is initiated against decisions of such Commission, the court procedure takes place before the Administrative Court.

Claims for annulment of public procurement contracts or damages are submitted to the District Court of Ljubljana.

5.4 What are the limitation periods for applying for remedies?

A review claim referring to the contents of the call, the invitation to submit tenders, or the tender documentation must be filed within **10 working days** from the day of the call for tenders or receipt of the call for tenders. A review claim can be filed for supplementary information, information on pending procedure or corrections, if such information needs to be amended or to supplement requirements or criteria for selecting the most advantageous tenderer. Such claim can be made within **10 working days** from the day of the notice of such information.

However, such claim may not be filed after the time limit to receive tenders has expired, except if the contracting authority has set the time limit to receive tenders shorter than 10 working days. In this case, the review claim can be filed within **10 working days** from the day of the contract notice or the call for tenders.

Following receipt of the decision to award a public contract or recognition of capability, the time limit to file a review claim is **eight working days**. If, in the procedure for awarding a low-value contract, a review claim refers to the decision of a public contract award or recognition of capability, the time limit to file a review claim will be **five working days** following receipt of the decision.

If a tenderer, who in a negotiated procedure with or without prior publication of the contract notice, which the contracting authority in accordance with the PPA carries out on the grounds of a previous unsuccessful public contract award procedure in which a contract notice was not published, is not invited to participate in this procedure, but should have been invited according to the PPA, the tenderer may submit a review claim referring to an infringement in the invitation to submit a tender, the tender documentation or the decision on awarding the public contract within **eight working days** of publication of the notice ensuring prior transparency on the Public Procurement Portal. If this notice was not published, the tenderer may submit a review claim within **eight working days** of publication of the contract award notice on the Public Procurement Portal. If the contracting authority published neither a notice to ensure prior transparency nor a contract award notice, the tenderer may submit a review claim no later than **six months** after contract performance began.

If the contracting authority failed to publish the contract notice, although it should have done so according to the PPA, a review claim referring to an infringement in the invitation to submit a tender, the tender documentation or the decision on the public contract award may be submitted by the tenderer within **eight working days** of the date when he or she became or should have become aware of the infringement, but no later than within **eight working days** of publication of the contract award notice on the Public Procurement Portal. If no notice was published, the tenderer may submit a review claim within **six months** after contract performance began.

5.5 What measures can be taken to shorten limitation periods?

The limitation periods set out in question 5.4 above cannot be shortened.

5.6 What remedies are available after contract signature?

Upon signing of the contract, unsuccessful bidders may file a lawsuit with the District Court of Ljubljana. Such remedies include termination of the awarded contract (request for annulment of the public contract) or monetary compensation to the complainant.

5.7 What is the likely timescale if an application for remedies is made?

The timescale varies on a case-by-case basis. The statutory timescale is as follows.

When a review claim refers to an infringement in the contents of the call, the invitation to submit tenders or the tender

documentation, the contracting authority must adopt a decision and send it to the claimant within **eight working days** of receipt of the complete review claim. If the review claim refers to an infringement in the decision awarding a public contract or recognising capability, the contracting authority must adopt the decision within **eight working days** of the expiry of the time limit for the successful tenderer to deliver its opinion.

When the National Commission for Reviewing Public Procurement Award Procedures accepts the review claim for consideration, it must decide thereon and issue a decision no later than within **15 working days** of receipt of the complete claim and whole documentation. In justified cases, the National Commission for Reviewing Public Procurement Award Procedures may prolong the time limit by no more than **15 working days**, and must inform the contracting authority, the claimant and the successful tenderer of such extension prior to the expiry of the time limit.

The time period for a Court to hear and decide a case is highly dependent on the complexity of the case, and therefore it varies from months to years.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

The National Commission for Reviewing Public Procurement Award Procedures resolves multiple review claims yearly. In the past year, there have not been any leading examples of cases that can be pointed out.

Nevertheless, even though decisions by the National Commission for Reviewing Public Procurement Award Procedures do not hold precedent, established case-law is taken into consideration when making a final decision.

5.9 What mitigation measures, if any, are available to contracting authorities?

As mentioned above, the filed review claim prevents a contracting authority from awarding and concluding a public procurement contract, rejecting all of the tenders, and initiating a new public procurement procedure for the same procurement object or stopping the public procurement procedure. However, there is an exception under the LPPPPA.

After receipt of the review claim, or at any time during the pre-review or review procedure, the contracting authority shall address to the National Review Commission a proposal to adopt a decision to allow, despite the submitted review claim:

- the conclusion of the contract;
- the public procurement procedure to be stopped;
- the rejection of all tenders; or
- the initiation of a new public procurement procedure for the same procurement object.

The National Review Commission must comply with the contracting authority's proposal, if it establishes – after examining all relevant circumstances of the case and taking into account the relationship between any harmful consequences of complying with the proposal, benefits in the public interest, and benefits to persons who could have incurred damage – that there are prevailing reasons related to the public interest, including defence and security interests, which require its consent to the proposal. Solely economic interests may be deemed compelling reasons related to the public interest. Compelling reasons related to defence and security interests shall be deemed those connected with the implementation of a defence and security programme, of which the public contract forms a part.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

No, it does not. The underlying principles are regulated in Article 67 of the PPA. During the procedure, the contracting authorities are not allowed to amend or modify the procurement documents after the expiry of the time limit for the receipt of tenders. The contracting authorities may, in the case of missing documents, request the bidder to submit the missing documents or to supplement, correct or clarify the relevant information or documentation within an appropriate time limit. Such a correction or supplementation must not result in the submission of a new tender, and the bidder may not supplement or correct:

- the price per unit, net of VAT; the value per item, net of VAT; or the aggregate value of the tender, net of VAT, except where the aggregate value is changed due to calculation errors or the tender criteria;
- the part of the tender related to technical specifications of the subject matter of the contract; and
- those elements of the tender that affect or might affect the classification of the tender in relation to other tenders received by the contracting authority during the procurement procedure.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

The use of negotiations with the preferred bidder is restricted and is only possible in the competitive dialogue, innovation partnership, negotiation procedure and low-value contract procedure. The latter is permitted only if it is determined in advance.

6.3 To what extent are changes permitted post-contract signature?

In accordance with Article 95 of the PPA, contracts can be modified without a new procurement procedure in any of the following cases:

- where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options;
- for additional works, services or supplies which have become necessary and that were not included in the initial procurement – any increase in price shall not be higher than 30% of the value of the original contract; and
- where the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen and the modification does not alter the overall nature of the contract – any increase in price shall not be higher than 30% of the value of the original contract.

The modification of a contract is considered to be substantial where at least one of the following conditions is met:

- the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those

initially selected, or for the acceptance of a tender other than that originally accepted, or would have attracted additional participants in the procurement procedure;
- the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement; or
- the modification extends the scope of the contract or framework agreement considerably.

For the possibility of changing the contractor without initiating a new procurement procedure, see question 6.4.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

Transfer of contract to another entity during its performance is possible if this option is stated in an unequivocal review clause, and in the case of universal or partial succession to the position of the initial contractor, following corporate restructuring including takeover, merger, acquisition or insolvency.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The PPA does not provide special rules in relation to privatisation in Slovenian legislation. However, the sale of public assets is subject to the Physical Assets of the State and Local Government Act and Public Finance Act. In Slovenia, the sale of state-owned capital must be as efficient as possible, and therefore the state is obliged to accept the most economically advantageous offer.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The PPA does not provide special rules in relation to PPPs.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

No, there are no such proposals at this time.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

Not applicable.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

No, there have been no such developments recently.

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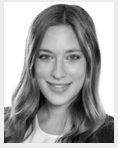
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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The legislation applicable to public procurement in Spain is mainly shaped by Law 9/2017, of 8 November, on Public Sector Contracts, which transposes into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU of 26 February 2014 (the "**LPSC**").

In all matters not regulated in this LPSC or its implementing regulations, the general regulations on the functioning of Public Administrations are applicable: Law 39/2015, of 1 October, on the Common Administrative Procedure for Public Administrations.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

Public procurement shall comply with the following principles: freedom of access to public tenders, publicity and transparency of procedures, non-discrimination and equal treatment of bidders.

Regarding the value for money, this is a criteria in order to award the relevant public tender rather than a principle of Spanish regulations.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

The areas of defence and security, innovation and investigation, and specific international contracts have their own specific regulations and the LPSC or other specific applicable regulations.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

There are two main regulations to take into account aside for the ones included in question 1.1. The first is Law 19/2013 of 9 December on transparency, access to public information and good governance, which implies that the public administration must publish on its transparency portals all issues related to its procurement processes. The second, Royal Decree 1098/2001, of 12 October, which approves the General Regulations of the Public Administration Contracts Law, which regulates in extension some of the matters contained in the LPSC.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The regulations applicable to Spanish public procurement, solely apply to the relevant Spanish "public entities", which are defined in question 2.1. This implies that other international agreements or supra-national bodies will have their own regime, falling outside of the scope of LPSC.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

Any corporation, company or individual in Spain that will contract with a "public entity" in Spain will be subject to the application of LPSC. The following bodies are considered "public entities" under LPSC:

(a) The General State Administration, the Administrations of the Autonomous Communities, the Autonomous Cities of Ceuta and Melilla and the Entities that make up the Local Administration.
(b) The Management Entities and the Common Services of the Social Security.
(c) Autonomous Bodies, Public Universities and independent administrative authorities.
(d) Consortiums endowed with their own legal personality as referred to in Law 40/2015, of 1 October, on the Legal Regime of the Public Sector, and local government legislation, as well as consortiums regulated by customs legislation.
(e) Public foundations.
(f) Mutual Societies collaborating with the Social Security.

(g) Public Business Entities (referred to in Law 40/2015).
(h) Trading companies in whose share capital is held, directly or indirectly, by public entities.
(i) Funds without legal personality.
(j) Any entities with their own legal personality, which comply with minimum levels of participation of public entities in their share capital and management body.
(k) Associations set up by the entities mentioned in the previous paragraphs.
(l) Regional Councils and the General Assemblies of the Historical Territories of the Basque Country as regards their contracting activity.

2.2 Which types of contracts are covered?

The LPSC covers mainly the following types of contracts: works contracts, works concessions, service concessions, supply and services and contracts subject to harmonised regulation.

2.3 Are there financial thresholds for determining individual contract coverage?

Under to LPSC, in terms of economical thresholds, there is solely one distinction; minor contracts and regular contracts.

Minor contracts are those public contracts with a value under €15,000, and that can only have a time execution of one year. Minor contracts have less formalities than the regular public contracts, and have to be simply published and justified in the relevant transparency portals of the contracting body.

The remaining contracts will be processed under the regular rules included in LPSC.

2.4 Are there aggregation and/or anti-avoidance rules?

Title IV, Chapter I of LPSC (arts. 106 seq.) provides the general regime for bidders that have been awarded with a public contract, to avoid non-compliance, by providing certain economic guarantees before the execution of the contract takes place. Usually there are two types of guarantees: (i) the provisional guarantee that is provided before the formalisation of the contract; and (ii) the definitive guarantee, that is provided by the bidder at the formalisation of the public contract.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

Concession contracts may relate to works or services: while the purpose of a **works concession contract** is the performance by the concessionaire of construction or civil engineering works, intended to fulfil an economic or technical function in themselves, on an immovable property, including the restoration and repair of existing constructions, as well as the conservation and maintenance of the constructed elements (Article 14 LPSC); the purpose of a **service concession contract** is the management of a service by the concessionaire whose provision is under the Administration competence (Article 15 LPSC). In both cases, the consideration to be received by the concessionaire consists either of the right to exploit the works or services covered by the concession contract, or of this right together with the right to receive a price.

2.6 Are there special rules for the conclusion of framework agreements?

Framework agreements are specifically regulated in Section 2 of Chapter II of Title I of the LPSC (Article 219 *et seq.*). They have a specific procedure that is easy to follow, being the main characteristic that, through the process of awarding the relevant contracts, the main terms and conditions (price, mode of execution, etc.), will need to be maintained.

2.7 Are there special rules on the division of contracts into lots?

Article 99 of the LPSC provides that whenever the nature or purpose of the contract so permits, provision must be made to divide the contract into lots. Although this is the general rule, the LPSC also states that a contract may not be split up for the purpose of reducing the value of the contract and avoiding the corresponding publicity requirements or those relating to the standard procurement procedure.

Along these lines, the LPSC obliges the contracting body to justify the reasons why the division has not been made, although some discretion is allowed when publishing the lots, such as limiting the number of lots that a single bidder may bid for.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

The specifications necessary for bidders established outside of Spain, will be included on a case-by-case basis depending on the specifications of the public tender. However, it is customary that regarding the technical documents to be provided to accredit the existence and capacity of the bidder (see question 4.1), need to be duly translated, notarised and apostilled. Some public tenders may require additional documents to prove the capacity of bidders established outside Spain.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The following procedures are available: Open procedure; Restricted procedure; Negotiated procedure; Competitive dialogue procedure; and Innovation partnership procedure.

In general, the stages of the procedure, with certain specifications for each type of procedure, are as follows: publication of the invitation to tender and its specifications; submission of bids; evaluation of bids; and publication of the award.

The choice is up to the administration, and is not free, but for the application of each procedure the requirements established in the LPSC must be fulfilled.

3.2 What are the minimum timescales?

The Administration sets the deadlines for the submission of tenders, taking into account the time reasonably necessary to prepare them (depending on the complexity of the contract), and respecting the minimum deadlines set by law:

- Open procedure:
  On contracts subject to harmonised regulation, no less than 35 days for works, supply and service contracts; and at least 30 days for works and service concessions.
  On contracts not subject to harmonised regulation, no less than 15 days. For works contracts and works and service concessions, the time limit is at least 26 days.
- Simplified: no less than 15 days. For works contracts, at least 20 days.
- Super-simplified: no less than 10 working days. In the case of current purchases of goods available on the market, the time limit is five working days.
- Restricted, negotiated and competitive dialogue procedures:
- For contracts subject to harmonised regulation: no less than 30 days.
- For contracts not subject to harmonised regulation: no less than 10 days.
- Innovation partnership procedure: at least 30 days where the contract is subject to harmonised regulation. Where the contract is not subject to harmonised regulation, the time limit may not be less than 20 days.

Once the bids have been submitted, they must be opened within a maximum period of 20 days from the end of the deadline for their submission. When the sole criterion for selecting the successful bidder of the contract is price, the award must be made within a maximum period of 15 days from the date following the opening of the bids.

3.3 What are the rules on excluding/short-listing tenderers?

The rules to exclude a bidder are based on the lack of compliance with the minimum requirements included in the administrative and technical specifications of each tender (see point 4.1).

There is no shortlisting procedure, but should all the tenderers comply with the relevant minimum specifications, a system of points is established.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

In accordance with Article 145 LPSC, contracts will be awarded using a plurality of award criteria on the basis of the best value for money. The LPSC also includes the possibility of taking into account other award criteria, such as the quality of the services, the organisation of the companies, or social criteria to be met by the bidders. These criteria will be established on a case-by-case basis.

3.5 What are the rules on the evaluation of abnormally low tenders?

The Administration may reject tenders that are "unfeasible" because they have been formulated in terms that make them abnormally low. To identify those abnormally low tenders, the contracting body must compare the tender to the parameters set out in the public tender specifications, which must make it possible to identify the cases in which a tender is considered abnormal.

The contracting body must request the tenderer or tenderers who have submitted the abnormally low bids, to justify and provide a reasoned and detailed breakdown of the low level of prices. In any case, the contracting body will reject tenders if it finds that they are abnormally low because they violate the regulations on subcontracting or do not comply with the applicable environmental, social or labour, national or international obligations, including non-compliance with the sectoral collective agreements in force.

3.6 What are the rules on awarding the contract?

According to LPSC, the contracting bodies will need to respect the principles of public procurement in Spain, and respect the terms included in the tender specifications regarding the granting of points and the best price offer presented by the relevant bidders.

3.7 What are the rules on debriefing unsuccessful bidders?

Under Spanish law, depending on the contracting body, the results of the public procurement, and thus the information to the bidders, will be published through the State public procurement platform, or the relevant regional platform available. This information will be available to all the bidders participating in the tender. This also relates to the transparency procedures applicable under LPSC.

3.8 What methods are available for joint procurements?

In case the contracting body will want to have a joint procurement, the principles of said procurement and how it will be established will need to be defined in the tender specifications. In any case, these joint procurements will need to respect the general rules of LPSC.

3.9 What are the rules on alternative/variant bids?

The variants, defined in Article 142 LPCS, are an exception to the prohibition on the presentation of simultaneous bids, so that the specifications authorise the contracting body to choose one of them from among two or more offers by the same bidder.

Thus, when the award must take into account criteria other than price, the contracting body may take into consideration the variants offered by the bidders, provided that the variants are foreseen in the specifications.

3.10 What are the rules on conflicts of interest?

In accordance with the provisions of Article 64.2 LPCS, a conflict of interest is understood as any situation in which the personnel in the service of the contracting body, who also participates in the development of the tender procedure or may influence the outcome of the same, directly or indirectly has a financial, economic or personal interest that could appear to compromise their impartiality and independence in the context of the tender. In this respect, it is characterised by a collision between the private interest and the public interest in the exercise of a public function or decision, which leads to a disruption of the normal functioning of the administration.

The practice of this figure entails the sanction of the person involved, in addition to the payment of damages caused (see the judgment of the Court of Justice of the European Union of 12 March 2015 (Case C-538/13)).

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Pursuant to Spanish legislation, and in particular, under the LPCS; any natural or legal persons, Spanish or foreign, who have full capacity to act, who are not prohibited from contracting under LPSC and who can prove their economic, financial and technical or professional solvency or, when required, are duly classified, may contract with the public entities.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Title II, Chapter II of LPSC (Articles 65 seq.), provides the regulations to have a minimum criteria for bidders to participate in public tenders that includes the capacity and solvency of the bidder.

The capacity consists of having the legal documents that accredit the incorporation and existence of the relevant bidder (e.g., incorporation deed, authority of its legal representatives, etc.).

On the solvency, there are two types that LPSC regulates: (i) technical solvency, meaning the experience of the bidder in the field of the tender; and (ii) economical solvency, meaning the invoicing of the bidder in previous years in services or works equal or similar to the ones in the tender.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The LPSC does not provide these kinds of "in-house" arrangements, but instead apply the relevant rules for bidders to participate in a public tender. Where there are bidders that jointly want to participate in a tender, there are several formulas that LPSC provides, having an internal agreement by the bidders in terms of solvency or capacity or forming a joint venture (*union temporal de empresas*) being the most frequent.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

The LPSC provides different appeal procedures for the claim of the Contracting Public Entity. In general terms, there are two remedies in the process of a public procurement: (i) an administrative appeal; or (ii) a judicial appeal.

The administrative appeal is usually the previous step to the judicial appeal, although there is the possibility to directly file the judicial appeal.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

The distinction between administrative contracts and private contracts has consequences both in the applicable regime and in the competent jurisdiction.

In general, for issues on public contracts awarded through a procurement process by a public entity, the contentious-administrative jurisdiction will be competent. On the other hand, for issues on private contracts entered into by a public body excluding a procurement procedure, the civil or mercantile jurisdiction will be competent.

5.3 Before which body or bodies can remedies be sought?

The differentiation between public contracts and private contracts within the public entities is the one that leads us to determine the competent jurisdiction. It falls under the jurisdiction of the contentious-administrative jurisdiction the following acts:

(a) Acts relating to the preparation, award, effects, modification and termination of administrative contracts.
(b) Acts in connection with the preparation and awarding of private contracts of the Public Administrations.
(c) Acts referring to the preparation, awarding and contractual modifications.
(d) Acts relating to the preparation and awarding of contracts of public sector entities that are not considered contracting authorities.
(e) Appeals filed against the resolutions issued by the administrative bodies.
(f) Questions arising in connection with the preparation, award and modification of the subsidised contracts referred to in Article 23 of this Law.

On the other hand, civil jurisdiction shall be competent to resolve:

(a) Disputes arising between the parties in relation to the effects and termination of private contracts of entities that have the status of contracting authorities, whether or not they are Public Administrations, with the exception of contractual modifications referred to above as the competence of the contentious-administrative order.
(b) Matters relating to the effects and termination of contracts falling outside the scope of LPSC.
(c) The hearing of litigious matters relating to the private financing of public works concession or service concession contracts, except in relation to actions in the exercise of the obligations and administrative powers which are attributed to the granting Administration, and for which the contentious-administrative jurisdiction will be competent.

5.4 What are the limitation periods for applying for remedies?

Pursuant to the LPSC, the time period varies depending on the appeal filed:

(i) For the Special Administrative Appeal on award of public contracts, the parties have 15 business days.
(ii) For the Special Administrative Proceeding of full nullity, the law provides for 30 business days.
(iii) For Ordinary Appeals, a period of one month.
(iv) For Judicial Claims, a period of two months.

5.5 What measures can be taken to shorten limitation periods?

The terms imposed by Spanish law are fixed and there is no possibility of limiting or reducing them in any way.

5.6 What remedies are available after contract signature?

Please, see the answer to question 5.1.

5.7 What is the likely timescale if an application for remedies is made?

On administrative appeals, the appeal will be deemed to have been dismissed if after two months there has been no judgment.

On judicial appeals, it will depend on the region, but it may vary from nine months to 14 months for a first resolution.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

A clear example of Supreme Court rulings on public procurement, which are followed by the lower courts, is, for example, the ruling of the High Court of 5 January 2009, *Telefónica Móviles España, S.A.* against the General State Administration, on the termination of a public contract for the management of a public service for the establishment of a telecommunications network, given the contractor's non-compliance.

5.9 What mitigation measures, if any, are available to contracting authorities?

It is not possible to limit the bidder's contractual liability. Under Spanish law, it is not possible to negotiate the specifications. Therefore, the bidder must assume the risk of the contract with the Public Administration (see, for example, the Judgment of 27 October 2009 (Administrative Chamber, Fourth Section, Appeal 763/2007), except for the provisions of question 6.2 below. This implies a great advantage to contracting bodies in Spain.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

The LPSC regulates the modification of public contracts in Articles 203 to 207, which are included in Chapter I of Title I of Book Two "Public Administration Contracts".

In this regard, the LPSC articulates a series of cases in which it is appropriate to modify the contract with the Administration: (i) in the succession of the person of the contractor; (ii) in the assignment of the contract; (iii) in the revision of prices; and (iv) in the extension of the contract performance period.

Apart from these cases, in accordance with Article 203.1 of the LPSC, they may only be modified: (i) for reasons of public interest; or (ii) during the term of the contract.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

It is not possible to negotiate the terms of the bidding conditions with the contracting body, except for the so-called "Negotiated Procedure", defined as that procedure, when the causes justifying the use of this procedure are met, whereby the award will go to the bidder justifiably chosen by the contracting body, after negotiating the conditions of the contract with one or more candidates. The particular administrative clauses will determine the economic and technical aspects which, if applicable, are to be negotiated with the bidders.

6.3 To what extent are changes permitted post-contract signature?

If provided in the tender specifications, the contract may be modified up to 20%. Modifications of new unit prices and modifications that alter the global nature of the contract may never be foreseen:

(i) When it is unavoidable to add works, supplies or services to those already contracted.
(ii) When the modification responds to a supervening specified in LPSC.
(iii) If the modifications are not substantial, they must be justified by stating the reason for their inclusion in the initial contract.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

Article 214 of the LPSC establishes that in order for the assignment of the contract to take place, the following limits must be respected:

(a) The assignment possibility must be unequivocally provided for in the tender specifications.
(b) The qualities of the contractor must not have been decisive for the award of the contract.
(c) That the assignment of the public contract does not produce an effective restriction of competition in the market.

Without prejudice to the aforementioned requirements, the assignment of the public contract may not be carried out when this entails a substantial alteration of the essential characteristics of the contractor if these constitute an essential element of the contract.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

There are two categories in terms of privatisation:

(i) The business activity of the Administration, which must be developed under a private legal regime respecting the rules of competition.
(ii) The public service activity and the instrumental or supply activity, which can be developed indistinctly through administrative law and private law.

In view of the above, the Spanish Constitution can justify the privatisation process in terms of administrative effectiveness and efficiency and economy of public expenditures, but it also imposes limits to it. Thus, no sovereign functions may be transferred to the private sector and, furthermore, the public presence in health, education and social security services may not disappear.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The private companies with public participation are included in Law 40/2015, of October 1, on the Legal Regime of the Public

Sector ("**LLRPS**"), defining them as those companies that have a majority or controlling shareholder that is a public entity (Article 111 LLRPS).

Therefore, following their hybrid private-public nature, their legal regime is based on the traditional three-step system foreseen for these companies: (i) special administrative rules (LLRPS and the Public Administration Patrimonial Law – "**LPAP**"); (ii) referral to the private legal system; and (iii) exception clause when the administrative budgetary, accounting, personnel, economic-financial control and contracting rules apply (art. 113 LLRPS).

The main legal issues related to these types of entity is the uncertainty as to their applicable standards and potential unfair or inappropriate legislative decisions.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

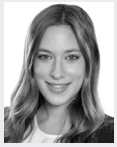
There is no proposal to reform the LPSC. However, the analysis of the new Spanish regulation of public sector contracts requires knowledge of the conditions required by the necessary incorporation of the European Directives, which contain new regulations that have yet to become effective.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

The current regulation is recent, and therefore no project to amend the current regulations applicable is being discussed in Spain.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

There have been no regulatory changes that have had an impact on the Law. However, there has been a growing modernisation of public procurement, as the preparation and award phases, as well as the execution and resolution phases, have been modified for the first time through European regulation. Thus, we will see that the main objective of the new texts is, on the one hand, to simplify, modernise and improve the efficiency of contractual rules and procedures in the European Union, and on the other hand, to improve public procurement in support of common social objectives.



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Mariscal Abogados is a well-known corporate law firm with headquarters in Madrid (Spain), counting with representation offices in Barcelona, Palma de Mallorca, Lisbon and Miami. We currently staff more than 30 people, composed of lawyers, marketing/IT personnel, and administration.

We are acknowledged in the Spanish market for being a law firm with an international vocation, dedicated to business law, advising foreign multinationals for more than 25 years on their investment matters and incorporation into the Spanish market, with a high level of legal knowledge and multidisciplinary and bilingual lawyers in several languages.

Our firm has three departments to serve clients worldwide: English Department, French Department and the German Department. Our team can serve clients in more than five languages.

Our firm boasts a client base that is predominantly international, constituting an impressive 95% of its clientele. This notable statistic underscores the firm's global reach and expertise in serving clients from various countries and cultural backgrounds.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Public procurement in Switzerland is governed by several pieces of legislation, ranging from international treaties to laws at the federal, cantonal and even communal level. Altogether, the federal government, Cantons and municipalities have an annual procurement volume of CHF 35 to 40 billion (which corresponds to around 25% of public expenditure and 8% of GDP).

At the federal level, the revised Federal Act on Public Procurement of 21 June 2019 (**FAPP**), which entered into force on 1 January 2021, is the main source of law. It is supplemented by the Ordinance on Public Procurement of 12 February 2020 (**PPO**) that concretises certain articles of the FAPP.

At the cantonal and communal level, the legal situation is currently fragmented. So far, half of all the Cantons (13) have acceded to the revised Intercantonal Agreement on Public Procurement of 15 November 2019 (**IAPP**), the provisions of which are largely harmonised with those of the FAPP. Furthermore, the Canton of Berne has implemented the new rules through cantonal law without acceding to the revised IAPP because, unlike the revised IAPP, it retained the dual intercantonal complaints system. For all other Cantons, the rules of the previous version of the IAPP together with the cantonal public procurement regulations still apply.

These primary sources of domestic law are based on an array of international treaties. The most important are the World Trade Organization Agreement on Government Procurement, as amended on 30 March 2012 (**GPA 2012**), the Bilateral Agreement between the European Community and Switzerland on Certain Aspects of Public Procurement of 21 June 1999 (**EU-CH AAGP**) and the Convention establishing the European Free Trade Association of 4 January 1960, as amended (**EFTA Agreement**).

Of particular relevance is also the Federal Act on the Internal Market of 6 October 1995 (**FAIM**). The aim of the FAIM is to establish free trade within the Swiss market. From this perspective, it sets certain minimum standards that must be respected in public procurement.

This chapter focuses primarily on the FAPP and the IAPP, since they contain the revised and largely harmonised provisions that regulate public procurement in Switzerland.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The main underlying principles of the regime as set forth in article 2 of the FAPP/IAAP are the following:

- the cost-efficient use of public funds in an economical, ecological and socially sustainable manner;
- transparency of the award procedure;
- equal treatment and non-discrimination of tenderers; and
- the promotion of effective and fair competition among tenderers.

These principles are indeed relevant to the interpretation of the legislation. In particular, the principles of transparency and equal treatment play an important role in the relevant case law and are directly judiciable.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

Article 10 of the FAPP/IAAP contains a number of exceptions for procurements to which their provisions do not apply, or with regard to which the contracting authorities have significant discretion as to whether to apply public procurement rules. Among others, these concern procurements for the protection and maintenance of external or internal security or public order.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Yes. Besides the legislation mentioned in question 1.1, there are a number of areas in Swiss law that may be relevant in a public procurement context.

As regards transparency, the Federal Act on Freedom of Information in the Administration of 17 December 2004, as amended (**FoIA**), contains the principle of freedom of information (article 6 FoIA). Based on the FoIA and this principle, any person has the right to inspect official documents and to obtain information about the content of official documents.

Furthermore, the Swiss laws aimed at protecting effective and fair competition are particularly relevant in a public procurement context. The Federal Cartel Act of 6 October 1995, as amended (**CartA**), *inter alia*, prohibits cartel activities such as bid

rigging and the abuse of a dominant position, with direct fines of up to 10% of a company's cumulative turnover from the last three years. The Federal Act Against Unfair Competition of 19 December 1986, as amended (**AUC**), prohibits unfair competition practices which, among others, may lead to civil damages claims and direct penal sanctions.

Specifically in connection with legal remedies, the applicable procedural rules are of high importance. At the federal level, the Federal Act on Administrative Procedure of 20 December 1968, as amended (**APA**), and the Federal Act on the Swiss Federal Supreme Court dated 17 June 2005, as amended (**FAS**), are particularly noteworthy.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Switzerland has a monist legal system. Hence, the domestic and international law systems are unified. With the ratification of the GPA 2012, the EU-CH AAGP and the EFTA Agreement by Switzerland (see also question 1.1), they entered into force in domestic Swiss law. Provided that the relevant provisions of these international agreements are sufficiently clear to be self-executing, they apply directly and in parallel to the national legislation governing public procurement in Switzerland.

Furthermore, the Swiss authorities and courts use the provisions of the supra-national regimes as an interpretative aid in order to ensure that the national legislation is interpreted in accordance with international agreements.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

Article 4 FAPP/IAPP summarises the different kinds of entities that are covered by the relevant procurement legislation.

In particular, administrative units of the central and decentralised administration are subject to the public procurement provisions at federal, cantonal and communal level (article 4 para. 1 FAPP/IAPP).

Furthermore, certain public- and private-sector companies (e.g., supply of drinking water, public transport, postal services in the reserved services area, etc.) that provide public services, and have exclusive or special rights, are covered as far as procurements in their central sector activities are concerned (only partial submission; article 4 paras 2 and 3 FAPP/IAPP).

At a cantonal and communal level, other service providers of public tasks as well as subsidised work and objects may also have to comply with public procurement provisions (article 4 para. 4 IAPP). According to recent case law of the Swiss Federal Supreme Court (**FSC**), private-law foundations then also qualify as institutions under public law, provided they meet the requirements for the latter.

As can be seen from the list, entities both with and without legal personality are covered. While in certain cases the subjective scope of the public procurement regulations is clear, there are other cases that need to be assessed on a case-by-case basis.

2.2 Which types of contracts are covered?

Swiss public procurement law distinguishes between the following three types of public contracts (article 8 para. 2 FAPP/IAPP):

- contracts relating to construction work, i.e., for building and civil engineering work;
- contracts relating to the supply of movable goods including intellectual property rights (by way of purchase, lease, rental or licence, etc.); and
- contracts relating to services, i.e., for the rendering thereof.

On the cantonal and communal level, construction work is subdivided into main construction and ancillary construction works (article 8 para. 2 *lit.* a IAPP).

In cases of mixed contracts (e.g. with an element of construction work and services), the overall transaction is to be categorised based on the financially predominant element (article 8 para. 3 FAPP/IAPP).

Importantly, a contract is only subject to the public procurement rules if: (i) an entity that is within the subjective scope of the procurement rules (see question 2.1) is the buyer or receiver of the relevant goods, work or services; (ii) the goods, work or services in question are within the objective scope of the procurement rules (no exceptions apply); (iii) it serves the fulfilment of a public task; and (iv) the tenderer receives a remuneration in exchange for its performance (article 8 para. 1 FAPP/IAPP).

2.3 Are there financial thresholds for determining individual contract coverage?

Yes. Both the FAPP as well as the IAPP provide for specific financial thresholds for determining individual contract coverage (see article 16 FAPP/IAPP and annexes 4 and 1 & 2 thereto, respectively). The applicable thresholds depend on the type of contract, the contracting entity and whether the contract is inside or outside the scope of international treaties.

2.4 Are there aggregation and/or anti-avoidance rules?

Yes. Article 15 FAPP/IAPP contains detailed rules on how the value of the contract is to be determined. Importantly, a public contract may not be split up in order to circumvent applicable public procurement provisions.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

Yes. Pursuant to article 9 FAPP/IAPP, the delegation of a public task or the granting of a concession is deemed to be a public contract if it provides the tenderer exclusive or special rights which the tenderer exercises in the public interest and for which the tenderer receives remuneration or compensation either directly or indirectly. Special legal regulations take precedence.

Hence, the granting of a concession is in certain cases deemed *ex lege* a public contract that could be covered by public procurement rules. This noteworthy addition under the revised public procurement rules extends the objective scope of the public procurement regulation in Switzerland (beyond the scope of the GPA 2012).

2.6 Are there special rules for the conclusion of framework agreements?

Yes. The revised law contains, in article 25 FAPP/IAPP, an explicit legal basis for framework agreements, including regulations as to the maximum term of a framework agreement (in principle, five years; see article 25 para. 3 FAPP/IAPP).

2.7 Are there special rules on the division of contracts into lots?

Yes. Under Swiss public procurement law, the contracting entity is, in principle, free to divide the procurement item into lots and award them to one or more tenderers (article 32 para. 2 FAPP/IAPP), provided that such right is not abused in order to avoid the public procurement regulation (article 15 para. 2 FAPP/IAPP; see question 2.4).

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

To the extent provided for by the relevant international agreements, purchasers are obliged to treat suppliers established outside Switzerland like domestic suppliers (non-discrimination; article 6 para. 1 FAPP/IAPP). The same applies if a supplier's country of origin grants reciprocal rights (in the absence of an agreement obliging the country to do so; article 6 para. 2 FAPP/IAPP).

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The FAPP/IAPP provides for a *numerus clausus* in the following award procedures:

- the open procedure, in which any interested bidder may submit a tender (article 18 FAPP/IAPP);
- the selective procedure, in which any interested bidder may apply to participate in the procedure, but only those bidders who meet the qualification criteria in the so-called pre-qualification are permitted to submit a tender (article 19 FAPP/IAPP);
- the invitation procedure, in which the contracting entity invites bidders of its choice to submit tenders without launching a public invitation to tender (article 20 FAPP/IAPP); and
- the direct award procedure, in which the contracting authority awards a public contract directly without an invitation to tender (article 21 FAPP/IAPP).

These award procedures must, in principle, not be intermixed with each other or expanded. They have to be distinguished from award instruments such as design contests, study contracts or the dialogue (see articles 22 and 24 FAPP/IAPP) that may be applied within such procedures in more complex procurements.

3.2 What are the minimum timescales?

When setting the timescales for submitting tenders or requests to participate, the contracting entity shall take account of the complexity of the contract, the probable number of subcontracts and the mode of transmission (article 46 para. 1 FAPP/IAPP).

Within the scope of international treaties, the minimum timescales are (article 46 para. 2 FAPP/IAPP):

- in an open procedure – 40 days from the publication of the invitation to tender for the submission of tenders; and
- in a selective procedure – 25 days from the publication to tender for the submission of requests to participate, and 40 days from the invitation to prepare tenders for the submission of tenders.

Importantly, these minimum timescales may be reduced under certain circumstances as set forth in article 47 FAPP/IAPP. For instance, in cases of proven urgency, the contracting entity may reduce the minimum timescale to 10 days (article 47 para. 1 FAPP/IAPP). The contracting entity may also reduce the minimum timescale in case of electronic procedures (article 47 para. 2 FAPP/IAPP), if it has pre-announced the tender in the prescribed way (article 47 para. 3 FAPP/IAPP) or if it is procuring goods, work or services required on a recurring basis and has given notice of the shortening of the timescale in an earlier invitation to tender (article 47 para. 4 FAPP/IAPP).

Furthermore, the contracting entity may reduce the timescale when purchasing commercial goods, work or services (or a combination thereof), provided it publishes the tender documentation together with an invitation to tender electronically (article 47 para. 5 FAPP/IAPP).

Outside the scope of international treaties, the timescale for submitting tenders is generally at least 20 days. In the case of largely standardised goods, work or services, the timescale may be reduced to no shorter than five days (article 46 para. 4 FAPP/IAPP).

3.3 What are the rules on excluding/short-listing tenderers?

Article 44 FAPP/IAPP provides a non-exhaustive list of reasons for exclusion. Among others, reasons for exclusion include the failure to fulfil the conditions for participation in the procedure or substantial formal errors such as a submission after the deadline or without valid signatures, violation of anti-corruption provisions, failure to pay taxes or social security contributions, failure to execute previous public contracts correctly, competition law violations, bankruptcy, insolvency, etc.

Short-listing is made via the eligibility criteria determined by the contracting entity as part of the evaluation. Tenders that do not meet the eligibility criteria and technical specifications are excluded (article 40 para. 1 FAPP/IAPP). If the evaluation of tenders requires considerable time and effort and the contracting entity announced this in the invitation to tender, it may shortlist them based on the documents submitted, by selecting the three best-ranked tenders for the in-depth evaluation (article 40 para. 2 FAPP/IAPP).

In the selective procedure, only the tenderers selected based on their eligibility (in connection with the so-called pre-qualification) may participate in the tender and submit their tender in a subsequent procedural step (article 19 FAPP/IAPP).

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The tenders must be evaluated based on the award criteria established by the contracting entity. The evaluation must be carried on in an objective, uniform and comprehensible manner (article 40 para. 1 FAPP/IAPP) and the contracting entity must publish the applicable award criteria and their weighting in the invitation to tender or in the tender documentation (article 29 para. 3 FAPP/IAPP). It has a great degree of discretion in establishing the applicable criteria. However, the award criteria must relate to the goods, work or services procured and must not be discriminatory.

Besides the price and quality, the contracting entity may take into account criteria such as appropriateness, timeframes, technical value, economic efficiency, life cycle costs, aesthetics, sustainability, plausibility of the tender, reliability of the price, creativity, customer service, delivery conditions, infrastructure, innovation content, functionality, service readiness, expertise

or efficiency of the methodology (article 29 para. 1 FAPP/IAPP). Outside the scope of international treaties, factors such as apprenticeship places, etc. may also be considered (article 29 para. 2 FAPP/IAPP).

As a rule of thumb, the more complex a procurement project is, the smaller the weighting of the price will be. For standardised goods, work or services, the award may be based exclusively on the lowest total price criterion, according to federal law, only provided that the technical specifications of the goods, work or services procured guarantee high sustainability standards in social, environmental and economic terms (article 29 para. 4 FAPP/IAPP).

The revised public procurement rules seem to provide more room for considering factors other than the price, such as sustainability and quality. Some observers even speak of a paradigm shift in this regard. However, it remains to be seen how the authorities and courts will apply the new rules.

3.5 What are the rules on the evaluation of abnormally low tenders?

Pursuant to article 38 para. 3 FAPP/IAPP, the contracting authority must obtain appropriate information from the tenderer as to whether the participation conditions are met if a tender seems abnormally low in comparison to other tenders. However, the possibility of submitting and awarding such tenders is not *per se* excluded.

3.6 What are the rules on awarding the contract?

According to article 41 FAPP/IAPP, the contract shall be awarded to the most advantageous tender (and no longer to the most economically favourable offer as under the old regulation). In order to determine which offer is the most advantageous tender, the contracting authority must assess the eligible offers based on the award criteria that it published in the tender documentation (see question 3.4).

It remains to be seen in the case law and practice adopted by the authorities and courts whether the new public procurement rules indeed constitute a paradigm shift towards competition based on quality, rather than merely on price.

3.7 What are the rules on debriefing unsuccessful bidders?

The contracting entity is obliged to communicate its award decision to the tenderers by publication on https://www.simap.ch or individual communication (article 51 para. 1 FAPP/IAPP). In the open and selective procedure, the award decision must always be provided additionally via https://www.simap.ch (article 48 para. 1 FAPP/IAPP). Besides instructions on the rights of appeal, it must thereby provide a summary substantiation that includes (article 51 paras 2 and 3 FAPP/IAPP):

- the type of procedure and the name of the successful tenderer;
- the total price of the successful tenderer or, by way of exception, the lowest and highest total prices of the tenders submitted in the award procedure;
- the decisive features and advantages of the successful tender; and
- where applicable, the rationale for using the direct award procedure.

In addition, the contracting entity must provide the unsuccessful bidders with an oral or written debriefing on their request. In such debriefing, the reasons for the (non-)award are disclosed. Importantly, the contracting entity has no obligation to take minutes of the oral debriefing. Furthermore, the tenderers have no right to access the files at this procedural stage.

3.8 What methods are available for joint procurements?

If several contracting entities subject to federal and cantonal law participate in joint procurements, the law of the community whose contracting entity provides the most funds applies (article 5 para. 1 FAPP/IAPP).

In joint procurements that are subject to the federal law with several contracting entities, each with different thresholds (e.g., a federal office and a sector enterprise), the thresholds of the contracting entity apply to the entire procurement project that provides the most funding (article 16 para. 3 FAPP). It is to be noted that the IAPP does not include this provision. Hence, if cantonal law applies, the lowest thresholds apply in joint procurements of any of the participating contracting entities.

3.9 What are the rules on alternative/variant bids?

Bidders are free to propose variants in addition to the goods, work or services described in the invitation to tender. The contracting entity may, however, limit or exclude this possibility in the invitation to tender (article 33 para. 1 FAPP/IAPP).

A variant is any tender that allows the aim of the procurement to be achieved in a different way than the one foreseen by the contracting entity (article 33 para. 2 FAPP/IAPP).

3.10 What are the rules on conflicts of interest?

Persons that may have conflicts of interest are not permitted to participate in the award procedure *ex officio*. Article 13 para. 1 FAPP/IAPP provides for a list of reasons for recusal. Importantly, a recusal request must be submitted immediately after the reason for recusal is known (article 13 para. 2 FAPP/IAPP). Decisions on recusal requests are made by the contracting entity or the panel of experts, excluding the person concerned (article 13 para. 3 FAPP/IAPP). This decision is subject to appeal (article 53 para. 1 *lit.* d FAPP/IAPP).

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Pursuant to article 14 para. 1 FAPP/IAPP, bidders that were involved in the preparation of an award procedure are excluded from such procedure unless the competitive advantage can be offset by appropriate means and if the exclusion does not jeopardise effective competition between bidders.

Appropriate means of offsetting competitive gains include – each on its own or combined): (i) the disclosure of all material information about the preparatory work; (ii) the disclosure of the parties involved in the preparatory work; and (iii) the extension of minimum deadlines (article 14 para. 2 FAPP/IAPP). In this context, market surveys prior to the public invitation to tender shall not be regarded as relevant prior involvement (article 14 para. 3 FAPP/IAPP).

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Article 10 para. 1 FAPP/IAPP provides a list of procurements that are exempt from the public procurement rules. For example, procurements for commercial sale or resale (under competitive conditions), real estate transactions, the granting of subsidies, services provided by work integration organisations, charities and penal institutions, as well as personnel law contracts are excluded.

In addition, the procurement rules do not apply to a number of other scenarios; for instance, for procurements from bidders that have the exclusive right to provide the goods, work or services concerned as well as "in-state", "in-house" and "quasi-in-house" transactions (article 10 paras 3/2 FAPP/IAPP; see question 4.2).

The contracting entity may also not apply public procurements rules if it is necessary for the protection of (i) external or internal security or public order, (ii) human health or life, or flora and fauna, or (iii) intellectual property rights (article 10 paras 4/3 FAPP/IAPP).

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

True "in-house" procurements, i.e. procurements of goods, work or services by dependent organisational units of the contracting entity as sole legal entity, are exempt from the public procurement rules because they are considered competitively neutral (article 10 paras 3/2 *lit.* c FAPP/IAPP). Hence, "make or buy" decisions are, in general, not subject to public procurement law.

The same applies to "quasi-in-house" procurements, i.e., procurements of a contracting authority from another legal entity, provided that: (i) the contracting authority exercises control over the tenderer that is identical to the control over its own units; and (ii) the tenderer provides its goods, work or services, for the most part, for the contracting party (as a rule of thumb, a minimum of 80% thereof; article 10 paras 3/2 *lit.* d FAPP/IAPP). The criteria correspond to those applied by the European Court of Justice in the Teckal matter (case number C-107/98 of 18 November 1999).

Furthermore, so-called "in-state procurements" are also exempt under certain conditions, i.e., procurements by one legal entity from another independent legal entity. Thereby, it is required that the tenderer: (i) is itself subject to procurement law; and (ii) does not provide its goods, work or services in competition with private tenderers (article 10 paras 3/2 *lit.* b FAPP/IAPP).

As can be seen, competitive neutrality is the main reason, as well as the requirement, for any in-house or in-state arrangement to be excluded from public procurement law.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

Yes, remedies are provided for by the legislation. Rulings of the contracting entity may be appealed before the Swiss Federal Administrative Court, or the competent cantonal appellate body, respectively (article 52 FAPP/IAPP).

Article 53 para. 1 FAPP/IAPP contains a conclusive list of decisions that may be appealed:

- the invitation to tender for the contract;
- the decision on the choice of tenderers in the selective procedure;
- the decision to include a tenderer on a list or to remove a tenderer from a list;
- the decision on recusal requests;
- the award;
- the revocation of the award;
- the abandonment of the procedure;
- the exclusion from the procedure; and
- the imposition of a sanction.

Appeals against these rulings must be submitted within the applicable appeal deadlines as soon as they have been rendered. Their unlawfulness cannot be pleaded at a later stage in the procurement procedure. Hence, it will, for instance, no longer be possible to appeal against the drafting of the invitation to tender in case of an unsuccessful award.

Importantly, appeals do not have suspensive effect (article 54 para. 1 FAPP/IAPP). Rather the appellant must request the granting of suspensive effect as a (super-)provisional measure. This is important, as the contracting entity may enter into the contract with the successful bidder without the granting of the suspensive effect, for which the request is a necessary condition. The suspensive effect shall be granted if the appeal appears to be sufficiently justified and there exist no overriding public interests to the contrary (article 54 para. 2 FAPP/IAPP).

It is also of crucial importance to request access to files, which may only be granted upon request in the appeal procedure (but not before), to the extent there are no overriding public or private interests to the contrary (article 57 FAPP/IAPP).

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

It is disputed in the doctrine whether the remedies provided by the public procurement laws are conclusive or whether civil claims based on *culpa in contrahendo* are possible.

As an informal remedy, a complaint to the supervisory authority of the contracting entity may be lodged.

5.3 Before which body or bodies can remedies be sought?

At the federal level, i.e., under the FAPP, the Swiss Federal Administrative Court is the competent body for appeals against rulings of the contracting entity (article 52 para. 1 FAPP). At the cantonal or local level, the competent appellate body is determined in the applicable cantonal legislation.

Last-instance appeals may be lodged with the Swiss Federal Supreme Court, provided the legal matter at stake is of fundamental importance and, cumulatively, the thresholds of the FAS are satisfied.

5.4 What are the limitation periods for applying for remedies?

Under the revised laws, the limitation periods for an appeal to the Swiss Federal Administrative Court or the competent cantonal appellate body are, both at the federal and cantonal/local level, 20 days from the notification of the ruling of the contracting party (article 56 para. 1 FAPP/IAPP). Importantly, legal holidays do not apply (article 56 para. 2 FAPP/IAPP).

The time limit is triggered with the public notification of the ruling via https://www.simap.ch or the earlier individual notification, if any.

An appeal to the Swiss Federal Supreme Court needs to be filed within 30 days. However, it is important to note that during this time, the contracting entity is not prevented from entering into the contract with the successful bidder. Hence, the appeal, together with the request to grant suspensive effect as a (super-) provisional measure, should be lodged as soon as possible.

Notably, many Cantons have not implemented the revised law, which is why a limitation of only 10 days may still apply in certain Cantons or municipalities.

5.5 What measures can be taken to shorten limitation periods?

The appellant may shorten limitation periods by submitting the appeal before the appeal period lapses.

5.6 What remedies are available after contract signature?

Pursuant to article 42 paras 2/1 FAPP/IAPP, a contracting entity must not sign a contract before the time limit for the appeal has expired or the competent cantonal appellate body or the Swiss Federal Administrative Court has refused to grant suspensive effect to such appeal (standstill obligation). Notably, at the federal level, such standstill obligation only exists with regard to contracts within the scope of international treaties. If the contract is entered into nonetheless during the standstill period, if any, the legal consequences are not entirely clear. The unlawfully agreed contract may be null and void or the court may order its termination; this is a matter of debate.

After the lapse of the time limit for appeal or the refusal to grant suspensive effect to such appeal, the contracting entity may enter into the contract validly. In such a scenario, the courts may only determine the extent to which the contested decision violates the applicable law, and any claim for damages (article 58 paras 2 and 3 FAPP/IAPP). However, damages are limited to the necessary expenses incurred by the bidder in connection with preparing and submitting its tender (article 58 para. 4 FAPP/IAPP). This explains why the granting of suspensive effect to the appeal is of crucial importance (see question 5.1).

It should be noted that regarding appeals to the Swiss Federal Supreme Court, the contracting entity may sign the contract validly even within the time limit for such appeal.

5.7 What is the likely timescale if an application for remedies is made?

The timescale very much depends on the complexity of the case, the procedural motions by the parties, and how the court manages the procedure. Hence, no general timescale can be provided. However, normally it is a matter of months rather than weeks.

If the appellant requests provisional measures such as the granting of suspensive effect to the appeal, the courts will normally rule on these measures in a relatively short time (before dealing with the matter on the merits).

5.8 What are the leading examples of cases in which remedies measures have been obtained?

For a successful claim and the obtainment of legal remedies, the granting of suspensive effect to the appeal by the competent cantonal appellate body and the Swiss Federal Administrative Court is essential. Without suspensive effect, the contracting entity may validly enter into the contract and the appellant may only request the determination of unlawfulness and the granting of damages that are limited to the necessary expenses for the preparation and submission of the tender (see question 5.6). Suspensive effect is, however, not granted in all cases or automatically on request. Rather, the courts must conduct a *prima facie* assessment of the case and weigh the interests of the contracting entity/public on the one hand and of the appellant on the other.

In the relevant case law, there are a number of cases in which the courts decided in favour of the contracting entity, be it, for instance, for reasons of traffic safety, public economic interests or the importance of the contract in question for subsequent orders that depend on the timely delivery of the procurement at hand. However, there is also case law in which suspensive effect was requested successfully, even though it led to substantial delay and additional costs.

5.9 What mitigation measures, if any, are available to contracting authorities?

The courts may suspend proceedings with the consent of the parties, in order for the parties to mediate or settle their case.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Swiss public procurement law is based on the principle of stability. Therefore, the project described in the invitation to tender shall remain materially the same during the entire procurement procedure.

However, based on article 39 para. 2 *lit.* b FAPP/IAPP, changes to the goods, work or services procured may be admissible provided that they are objectively and materially necessary. Furthermore, the criteria and specifications may not be adapted in such a way that the nature of the goods, work or services or the potential group of bidders changes as a result. In addition, the tenders may be adjusted if this is the only way to clarify the contract or the tenders, or to make the tenders objectively comparable in line with the award criteria (article 39 para. 2 *lit.* a FAPP/IAPP). A call for price adjustments is only allowed in connection with an adjustment according to article 39 para. 2 FAPP/IAPP (article 39 para. 3 FAPP/IAPP).

Due to the principle of equal treatment, changes to the membership of bidding consortia pre-contract award are only permissible in certain circumstances.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

Negotiations regarding certain details take place on a regular basis. However, in order not to lose time unnecessarily, some contracting entities have started to publish the draft of the procurement contract along with the tender documents.

The detailed negotiations must not deviate significantly from the procurement specified in the award decision. On the other

hand, insignificant changes or changes already announced in the invitation to tender are permitted.

Notably, the award of a contract only includes the authorisation of the contracting entity to enter into the contract with the selected supplier. However, the contracting entity has no obligation to do so.

6.3 To what extent are changes permitted post-contract signature?

Only minor changes post-contract signature are permitted (see question 6.1). Significant changes or the exercise of options are unlawful unless explicitly foreseen in the invitation to tender.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

The contracting entity is only authorised to sign the contract with the supplier to which the contract has been awarded. Hence, the contract cannot be transferred to another entity without a new procurement procedure and a new award.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

No, there are no special rules in relation to privatisations.

If a contracting entity decides to buy certain services rather than providing them itself, i.e., decides to outsource a certain task, the performance of said task would usually be subject to public procurement law.

The same might be the case were a public task to be delegated to a private entity; in particular, if such delegation gave the tenderer exclusive or special rights which the tenderer exercised in the public interest, and for which the tenderer received direct or indirect remuneration or compensation (article 9 FAPP/IAPP).

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

No, there are no special rules in relation to public-private partnerships (**PPPs**). In contrast to neighbouring EU Member States, the concept of PPPs has so far not become broadly established in Switzerland. The application of public procurement law on PPPs has to be determined through a case-by-case analysis based on the nature of the work in question. If the PPP model in question serves the purpose of fulfilling public tasks, the application of public procurement law is likely and should therefore be assessed in depth.

Importantly, certain case law has confirmed that the principle of one-time procurement also applies in a PPP context. Hence, a PPP partner whose contract has been awarded in line with the applicable public procurement law is not, in principle, subject to procurement laws again in relation to its sub-contracting decisions.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Apart from the transition to the revised public procurement laws and the practice to be developed by contracting entities and courts in their application of the revised laws, we are not aware of any proposals to change the law.

While at the federal level, the revised FAPP had already entered into force, at the beginning of 2021, the legal situation at the cantonal level remains fragmented, as so far only half of all the Cantons (13) have adopted the revised IAPP. Furthermore, the Canton of Berne has implemented the new rules through cantonal law without acceding to the revised IAPP because, unlike the revised IAPP, it retained the dual intercantonal complaints system.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

Apart from the transition to the revised public procurement laws and the practice to be developed by contracting entities and courts in their application of the revised laws, we are not aware of any proposals to change the law.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

We are not aware of any relevant regulatory developments, other than those mentioned under question 8.1.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The rules governing federal procurement in the United States are set forth in various statutes, regulations, and decisions that interpret the procurement laws.

The cornerstones of federal procurement are the Competition in Contracting Act of 1984, which enhanced competition in federal procurement and established a variety of acquisition procedures, including competitive negotiation, and the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act of 1995, which simplified the federal procurement process.

Federal procurement is governed primarily by Titles 10 and 41 of the United States Code. The Federal Acquisition Regulation ("FAR") and agency FAR Supplements reflect the regulatory implementation of the governing statutes and provide uniform policies and procedures for most federal agency acquisitions. The FAR is found in Title 48 of the Code of Federal Regulations ("CFR").

The United States is a party to the World Trade Organization ("WTO") Government Procurement Agreement ("GPA"). Three submissions from the United States to the WTO (available at https://www.wto.org) provide an overview of federal procurement policies and procedures. *See* WTO Document No. S/WPGR/W/11/Add.6 to the WTO Working Party on GATS Rules (October 21, 1996); WTO Document No. GPA/23 (July 15, 1998); and WTO Document No. GPA/50 (June 15, 2001).

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The guiding principles for federal acquisition are found in FAR 1.102, which states that the "vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives". The keys to fulfilling that vision are, among other things, maximising the use of commercial products and services, using contractors that have a track record of successful past performance or that demonstrate a current superior ability to perform, promoting competition, minimising administrative costs, and conducting business with integrity, fairness, and openness.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

Procurement in the United States is subject to the federal procurement statutes as implemented by the FAR and, where applicable, agency FAR Supplements and other agency guidance. For example, military procurement, which is primarily carried out by the Department of Defense, is subject to special rules found in the Department of Defense FAR Supplement ("DFARS") and in guidance published by the Principal Director, Defense Pricing and Contracting. *See* https://www.acq.osd.mil/asda/dpc/index.html.

The FAR contains provisions for the procurement of commercial items (FAR Part 12), as well as for special categories of contracting, including major system acquisitions (FAR Part 34), research and development contracting (FAR Part 35), construction contracting (FAR Part 36), service contracting (FAR Part 37), and acquisition of information technology (FAR Part 39). Certain agencies, including, for example, the Department of Defense and the National Aeronautics and Space Administration, can enter into "other transaction" agreements that are not subject to the full panoply of procurement regulations applicable in most federal procurement. *See, e.g.*, 10 U.S.C. §§ 4021, 4022; 51 U.S.C. § 20113(e).

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

In addition to the sophisticated body of federal procurement law that has developed over the years, general contract law and certain criminal laws also apply to parties that contract with the federal government. Of particular note are the various statutes targeting fraud, waste, and abuse of federal funds. For example, under the civil False Claims Act, 31 U.S.C. §§ 3729–3733, contractors may be subject to trebled damages and statutory penalties for submitting false or fraudulent claims to the government. Similarly, contractors must comply with the post-government employment restrictions set forth in the Procurement Integrity Act, 41 U.S.C. §§ 2101–2107, and implementing FAR and Office of Government Ethics regulations. *See* FAR 3.104; 5 CFR § 2635.

Although government records are generally available to the public under the Freedom of Information Act, 5 U.S.C. § 552, there are exemptions prohibiting the release of contractor trade secrets and confidential commercial information.

Federal tax law can also be relevant to federal procurement. For example, there is a 2% excise tax on payments to a foreign person or foreign business entity under a federal procurement contract for goods produced in a country that is not a party to an "international procurement agreement" (e.g., the WTO GPA) or for services provided in a country that is not a party to such an agreement. *See* 26 U.S.C. § 5000C. The Internal Revenue Service has issued regulations and guidance implementing Section 5000C, including certain exemptions. *See* 81 Fed. Reg. 55,133 (August 18, 2016); https://www.irs.gov/pub/irs-pdf/iw14.pdf. *See also* 85 Fed. Reg. 27,098 (May 6, 2020) (FAR rule addressing Section 5000C); 87 Fed. Reg. 65,515 (October 28, 2022) (DFARS rule addressing Section 5000C).

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The procurement regime in the United States is consistent with the WTO GPA. The European Commission rules on government procurement are not applicable to federal procurement.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

All federal "executive agencies" are covered by the FAR. *See* FAR 1.101, 2.101. However, several federal agencies, such as the Federal Aviation Administration, the U.S. Postal Service, various government-sponsored enterprises (e.g., Fannie Mae, Freddie Mac), and certain federal corporations (e.g., the Federal Deposit Insurance Corporation), are not subject to the FAR and promulgate their own acquisition rules and procedures that are generally similar to those contained in the FAR.

The federal agencies covered by the WTO GPA are listed in GPA Appendix I, United States Annex 1 (as updated by WT/LET/950, submitted June 7, 2014). As noted above, some of those agencies may be exempt from certain procurement laws that are otherwise applicable to "executive agency" procurement.

2.2 Which types of contracts are covered?

The FAR and agency FAR Supplements cover all acquisitions by contract of supplies or services (including construction) by and for the use of the federal government.

2.3 Are there financial thresholds for determining individual contract coverage?

FAR Subpart 25.4 concerns "Trade Agreements" and sets forth the rules for applying the WTO GPA to federal procurement, including certain exceptions. Under FAR 25.402, the value of the acquisition is the determining factor with respect to the applicability of the WTO GPA to federal procurement contracts. These values are adjusted approximately every two years. The current threshold values for federal procurements are US$174,000 for contracts for goods and services and US$6,708,000 for construction contracts. *See* 88 Fed. Reg. 85,718 (December 8, 2023).

There are also certain dollar thresholds that trigger specialised treatment or procedures under the FAR. FAR Part 13 includes simplified rules that allow federal agencies to buy products or services under the "simplified acquisition threshold" of US$250,000 (*see* FAR 2.101) more quickly, more economically, and with a focus on small businesses. Under FAR Part 19, contracts under the "simplified acquisition threshold" are generally required to be set aside for small businesses.

2.4 Are there aggregation and/or anti-avoidance rules?

FAR 25.403(b)(3) expressly provides that agencies may "not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO GPA" or a free trade agreement. In addition, federal procurement law strongly discourages agencies from unnecessarily or unjustifiably bundling or aggregating contract requirements in order to preclude small or disadvantaged businesses from participating in procurements as prime contractors.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

Concession contracts are not generally used in federal procurement. One notable exception, however, is the Department of the Interior, which regularly uses concession contracts as described in 36 CFR § 51.3.

2.6 Are there special rules for the conclusion of framework agreements?

FAR Subpart 16.5 sets forth the rules governing framework agreements, which are called "indefinite-delivery/indefinite-quantity" ("IDIQ") contracts in federal procurement. Agencies may also use framework-like "blanket purchase agreements", which are governed by FAR Part 13, or Federal Supply Schedule contracts ("Schedule contracts"), which are governed by FAR Subpart 8.4 and managed by the General Services Administration ("GSA"), to purchase certain goods or services.

2.7 Are there special rules on the division of contracts into lots?

Federal agencies are strongly encouraged to conduct procurements to maximise small business participation. *See* FAR 19.201. Because of the potential impact on small business participation, agencies must make a determination that consolidation or bundling of requirements is necessary and justified. *See* FAR Subpart 7.107.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Purchasers must comply with FAR requirements, regardless of the nationality of the tenderers. FAR Part 25 governs acquisitions of foreign supplies, services, and construction materials, and, in some cases, domestic sources may receive preference over foreign sources. Under FAR 25.403(a), eligible products from WTO GPA countries and countries with trade agreements with the United States are entitled to non-discriminatory treatment.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

There are numerous procedures under the FAR for federal procurement depending upon the nature of the procurement, the type of goods or services being procured, and the procuring agency. Agencies have substantial discretion to choose a particular procurement procedure.

By far the most common type of procurement procedure is negotiated (or competitive proposal) procurement. Under this procedure (*see* FAR Part 15), tenderers submit their best proposals to the procuring agency in response to the agency's solicitation. The procuring agency then evaluates these proposals and makes an award according to the solicitation's evaluation scheme.

Procedures for sealed bidding, which is not often used in federal procurement, are in FAR Part 14. Other types of procurement procedures include: Schedule contracts (*see* FAR Subpart 8.4); acquisition of commercial items or services (*see* FAR Part 12); simplified acquisition procedures for supplies, services, and commercial items that do not exceed the simplified acquisition threshold (*see* FAR Part 13); individual task and delivery order competitions under IDIQ contracts (*see* FAR Subpart 16.5), under which the government places orders for specified requirements; and small business set-asides (*see* FAR Part 19). For "other transaction" agreements, the authorising statutes and agency guidance establish the procedures.

3.2 What are the minimum timescales?

There are no specific minimum timescales for federal procurement. Agencies using the streamlined ordering processes available for task and delivery order contracts may be required to provide "fair notice of the intent to make a purchase" and to provide a "fair opportunity to submit an offer". *See* FAR 16.505(b).

3.3 What are the rules on excluding/short-listing tenderers?

Tenderers may be excluded from a competition at multiple stages of the procurement process. To be eligible for the award of a federal contract, a tenderer must be "presently responsible" as of the date of award, based upon factors set forth in FAR Subpart 9.1. Also, tenderers may be suspended, debarred, or proposed for debarment (i.e., excluded from federal contracting) for a variety of civil or criminal offences or for non-compliance with contract requirements. *See* FAR Subpart 9.4. Excluded tenderers may not be awarded any federal contract or subcontract, absent a "compelling reason" as determined by the Agency Head.

In negotiated procurements, an agency may publish pre-solicitation notices that provide a generalised description of the scope of the acquisition and that allow the agency to advise potential tenderers regarding their potential to be viable competitors. *See* FAR 15.202. An agency may also limit the number of proposals eligible for award by establishing a "competitive range" composed of the most highly rated tenderers. *See* FAR 15.306. Establishing a "competitive range" after an initial evaluation is the most common type of "short-listing" that occurs in federal procurement.

Under FAR Subpart 6.2, a procuring agency may exclude in certain circumstances a particular source from a contract action in order to establish or maintain an alternative source of supply.

3.4 What are the rules on the evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The rules on evaluating tenders vary depending on the nature of the procurement. Specific evaluation rules for negotiated procurements are found in FAR 15.305, for commercial items or services acquisitions in FAR 12.602, and for simplified acquisition procurements in FAR 13.106-2. For other types of procurements, such as sealed bidding (FAR Part 14) or Schedule contracts (FAR Subpart 8.4), the governing FAR rules should be consulted. Small business participation in a tenderer's subcontracting plan may be used as an evaluation factor. *See* FAR 15.305(a).

3.5 What are the rules on the evaluation of abnormally low tenders?

Agencies may consider performance risk in evaluating tenders. Additionally, solicitations may require an evaluation of whether a tenderer's offer is "realistic", i.e., not too low. *See generally* FAR 15.404-1.

3.6 What are the rules on awarding the contract?

In competitive procurements, a designated agency official decides which tenderer or tenderers should be awarded a contract based upon an evaluation of cost/price, technical, past performance, and any other source selection criteria set forth in the agency's solicitation. *See* FAR 15.308. The decision must be documented and must include the agency's rationale for any trade-offs made (e.g., why the additional cost of the awardee's proposal is justified by its technical superiority).

The rules governing sealed bidding are set forth in FAR Subpart 14.4, the rules for Schedule contracts are in FAR Subpart 8.4, and the rules for simplified acquisitions are in FAR Subpart 13.1.

3.7 What are the rules on debriefing unsuccessful bidders?

The rules on debriefing unsuccessful bidders vary depending on the type of procurement and agency involved. For negotiated procurements, the rules are set forth in FAR Subpart 15.5. In procurements other than negotiated procurements, unsuccessful bidders may be entitled only to a "brief explanation" of the basis for the award decision. *See, e.g.*, FAR 8.405-2(d) (Schedule contracts); FAR 13.106-3(d) (simplified acquisition procedures). For individual task and delivery order competitions under multiple-award IDIQ contracts over US$5.5 million, the rules in FAR Subpart 15.5 apply. *See* FAR 16.505(b)(6). Enhanced procedures apply to Department of Defense procurements (*see* DFARS 215.506-70), and other agencies may utilise enhanced procedures.

3.8 What methods are available for joint procurements?

The term "joint procurement" is not usually associated with federal procurement. However, through a process called

"cooperative purchasing", certain state and local government agencies may purchase information technology products, software, and other services, as well as certain alarm and signal systems and law enforcement and security equipment under Schedule contracts. The GSA Acquisition Manual governs this cooperative purchasing process. *See* http://www.gsa.gov/cooperativepurchasing.

3.9 What are the rules on alternative/variant bids?

If an agency intends to award a contract without first engaging tenderers in discussions regarding their proposals, the agency may elect to allow tenderers to submit proposals that deviate from the agency's stated requirements with an explanation as to why the tenderer believes the deviation would result in an advantage to the government. *See* FAR 15.203(a)(2), 15.209(a)(2). The agency may either accept or reject the alternative proposal or revise the requirements in its solicitation accordingly. In procurements for commercial items, tenderers are encouraged to submit alternate proposals. *See* FAR 52.212-1(e).

3.10 What are the rules on conflicts of interest?

Generally speaking, organisational and personal conflicts of interest are prohibited and must be avoided or mitigated, unless the government, in rare circumstances, waives the conflict. The rules governing organisational and personal conflicts of interest are in FAR Subpart 3.1 and FAR Subpart 9.5, and the rules governing contractor employee conflicts of interest are in FAR Subpart 3.11.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Although agencies are encouraged to seek industry input generally in developing a solicitation (*see* FAR 1.102-2(a)(4), 15.201), there are strict rules prohibiting bidders from gaining an unfair competitive advantage by advising an agency on how to prepare solicitations. *See* FAR 9.505.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Under federal procurement law, there are certain activities that are deemed "inherently governmental functions" (e.g., conducting criminal investigations, commanding military forces, or conducting foreign relations), which must be performed by government employees and cannot be performed by contractors. *See* FAR Subpart 7.5; OMB Circular A-76, "Performance of Commercial Activities", 76 Fed. Reg. 56,227 (September 12, 2011).

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

Under FAR Part 8, federal agencies must first use their own inventories and then must satisfy their requirements for supplies and services through a number of government sources, if possible. Agencies may use Schedule contracts and commercial sources (including educational and non-profit sources) to fulfil their commercial items requirements.

If an agency acquires supplies or services through another agency, such "interagency acquisitions" may be governed by the Economy Act and FAR Subpart 17.5.

Finally, specialised government-wide acquisition contracts ("GWACs") assist federal agencies in procuring information technology requirements through individualised task orders. GWACs are IDIQ contracts awarded to multiple tenderers under which agencies issue task order solicitations subject to competitive bidding among the awardees. *See* FAR 2.101.

5 Remedies

5.1 Does the legislation provide for remedies, and if so, what is the general outline of this?

Federal procurement law provides for various enforcement procedures and remedies. Tenderers that submit proposals or that plan to submit proposals in response to a federal agency's solicitation may "protest" the procuring agency's decision with respect to the procurement, and the vast majority of disappointed tenderers file such protests with the Government Accountability Office ("GAO"), which has authority under 31 U.S.C. § 3552 to resolve such protests. The regulations at 21 CFR Part 4 govern the GAO's protest procedures, and only actual or prospective tenderers whose direct economic interest would be affected by the award of a contract may file or participate in a GAO protest. The protesting party additionally must show that, but for the procuring agency's action, the protester would have had a substantial chance of receiving the contract. The GAO has an Electronic Protest Docketing System and filing fee of US$350.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

In addition to protests before the GAO, disappointed tenderers may file a protest with the procuring agency, seeking an independent review at a level above the contracting officer. *See* FAR 33.103. Disappointed tenderers also may file an action seeking injunctive relief in the United States Court of Federal Claims. *See* 28 U.S.C. § 1491.

5.3 Before which body or bodies can remedies be sought?

Parties aggrieved in the procurement process may seek relief by filing a protest with the GAO or the procuring agency, or by filing an action in the Court of Federal Claims. The available fora may be restricted depending on the type of contract, the dollar value, and the agency involved. *See* 10 U.S.C. § 3406(f)(1); 41 U.S.C. § 4106(f)(1); FAR 16.505(a)(10).

5.4 What are the limitation periods for applying for remedies?

For protests brought to the GAO, pre-award protests must be filed prior to the due date for the submission of proposals; post-award protests must be filed within 10 days of the date that the protester knew or should have known of the grounds for protest, or within 10 days of a requested and required debriefing. If a party protests within 10 days of award, or within five days after

a requested and required debriefing, the procuring agency must automatically suspend performance of the awarded contract, pending the outcome of the protest. *See* FAR 33.104. Substantially similar timing rules apply to agency-level protests. *See generally* FAR 33.103.

The Court of Federal Claims follows rules similar to those of the GAO with respect to the limitation period applicable to pre-award protests; but for post-award protests, the court considers the timeliness of such protests in connection with the decision of whether to order injunctive relief. Parties may seek *de novo* review in the Court of Federal Claims of agency procurement decisions following the disposition of a timely GAO protest.

5.5 What measures can be taken to shorten limitation periods?

The limitation periods set out above are generally not subject to being shortened.

5.6 What remedies are available after contract signature?

The GAO, the Court of Federal Claims, and procuring agencies have wide latitude in structuring remedies in response to protests of awarded contracts. For instance, if the GAO determines that an award did not comply with applicable statutes or regulations or solicitation terms, it may recommend that the procuring agency terminate the contract, re-compete the contract, amend the solicitation, or award the contract to the protester. *See* 4 CFR §21.8. The procuring agency may follow the GAO's recommendation, implement more robust corrective action, or cancel the procurement altogether. Only rarely do procuring agencies decline to follow the GAO's recommendations.

5.7 What is the likely timescale if an application for remedies is made?

The GAO is required by statute to decide all protests within 100 days of filing. Under FAR 31.103(g), procuring agencies must use their best efforts to resolve agency-level protests within 35 days of filing. Protest actions at the Court of Federal Claims are not subject to any timetable and usually take many months to resolve.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

The GAO resolves hundreds of protests each year by written decision. Thus, it is difficult to identify current leading examples of GAO bid protest decisions; nevertheless, GAO decisions have precedential value and are often relied on in resolving future bid protests. A discussion of the most common reasons for the GAO sustaining a protest can be found at https://www.gao.gov/assets/870/862404.pdf.

5.9 What mitigation measures, if any, are available to contracting authorities?

If the procuring agency has been required to suspend performance of an awarded contract because a protest has been filed, the agency may "override" the stay of performance upon a finding of either the best interests of the United States or urgent and compelling circumstances which significantly affect the interests of the United States. *See* FAR 33.104(c)(2).

Procuring agencies are authorised to take voluntary corrective action in response to a protest to address issues identified in the protest. The nature, scope, and timing of any voluntary corrective action is within the broad discretion of the procuring agency.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Procuring agencies may change their requirements or the terms and conditions of the procurement prior to award, either before or after receipt of proposals. In negotiated procurements, agencies must amend the solicitation to make such changes. *See* FAR 15.206. Regardless of the type of procurement, however, procuring agencies must provide tenderers with fair notice of their requirements and the criteria that will be used to evaluate tenders.

Pre-award changes to the bidding entity (i.e., through sale or corporate restructuring) may be permitted under certain circumstances. *See Consortium HSG Technischer Service GmbH et al.*, B-292699.6, June 4, 2004, 2004 CPD ¶ 134. Generally, the assignment of proposals "when such transfer is effected by operation of law, or merger, or corporate reorganisation, or sale of an entire business, or sale of an entire portion of a business embraced by a proposal" is permissible. *See Numax Elecs., Inc.*, B-181670, January 16, 1975, 75-1 CPD ¶ 21. A mere change in the corporate name should have no effect on a proposal's acceptability. *See Baker Support Servs., Inc. et al.*, B-256192.3, B-256192.4, September 2, 1994, 95-1 CPD ¶ 75. Where changes may affect the resources available for contract performance, tenderers should disclose that information to the agency before contract award. *See, e.g., Lockheed Martin Integrated Sys., Inc.--Recon.*, B-410189.7, August 10, 2017, 2017 CPD ¶ 258; *Dual, Inc.*, B-280719, November 12, 1998, 98-2 CPD ¶ 133.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

In negotiated procurements, exchanges with offerors and the submission of revised proposals are governed by FAR 15.306 and 15.307. Because agencies may not favour one tenderer over another (*see* FAR 15.306(e)(1)), all tenderers must be permitted an opportunity to submit revised proposals by a common cut-off date.

6.3 To what extent are changes permitted post-contract signature?

Post-contract changes are governed by FAR Part 43 and are made via contract modifications. Depending on the type of change, the modification may be made unilaterally by the contracting officer or may be negotiated by the parties. *See* FAR 43.103.

Disputes concerning contract changes after award are primarily governed by the Contract Disputes Act of 1978, which provides both an administrative and a judicial process for the resolution of all claims (by both contractor and government) relating to an existing contract. *See also* FAR Subpart 33.2. Most contract administration disputes are settled at the procuring agency level by negotiating a request for equitable adjustment

of the contract price and schedule. FAR 33.214 also encourages the use of Alternative Dispute Resolution ("ADR"). However, if a dispute is not settled informally at the agency level, the contractor may file an action at the Court of Federal Claims or at a board of contract appeals.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

The Assignment of Contracts Act, 41 U.S.C. § 6305, prohibits the transfer of a government contract to another entity unless the government consents to the transfer or the transfer occurs "by operation of law" (e.g., through a merger). *See Tuftco Corp. v. U.S.*, 614 F.2d 740, 745 (Ct. Cl. 1980). Formal consent for a transfer of a contract is obtained through the novation process, which is governed by FAR Subpart 42.12. Agencies may not award a contract with the intent to transfer the contract to another entity. *See, e.g., Acepex Mgmt. Corp.*, B-283080 *et al.*, October 4, 1999, 99-2 CPD ¶ 77.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

FAR Subpart 7.5 and OMB Circular A-76 set forth policies and procedures to ensure that government contracts are not issued to private parties for the performance of "inherently governmental" functions.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

In recent years, public-private partnerships ("PPPs") have become more common in the United States, particularly as a mechanism to develop and fund infrastructure projects such as highway and transit systems. PPPs often involve the participation of federal, state, and local government entities. Although there are no federal rules specifically governing PPPs, several states have passed legislation authorising and regulating these types of partnerships.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Federal procurement laws and regulations change constantly. For example, the "Preventing Organizational Conflicts of Interest in Federal Acquisition Act", Pub. L. No. 117-324, requires the adoption of updated regulations governing organisational conflicts of interest ("OCI") for government contractors. The revised regulations have not yet been released.

8.2 If there are any proposals to change the law, what are the details of some of the most significant changes?

The new OCI regulations, when finalised, are expected to provide clearer and more uniform guidance and to strengthen the disclosure obligations of contractors.

8.3 Have there been any regulatory developments which are expected to impact on the law, and if so, what is the timescale for these and what is their likely impact?

A proposed rule requiring government contractors to provide extensive disclosures regarding greenhouse gas emissions and climate-related financial risk and to meet science-based reduction targets (*see* 87 Fed. Reg. 68,312 (November 14, 2022)) remains pending, with no timeline for finalising the rule.

James J. McCullough, as head of Fried Frank's Government Contracts Practice, represents government contractors in all aspects of government contracting, including pre-award bid protest litigation and counselling on contract formation issues, post-award disputes and bid protest litigation, and the representation of government contractors in various civil proceedings.
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