

Public Procurement

An overview of regulation in
37 jurisdictions worldwide

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Legislative framework

1 What is the relevant legislation and who enforces it?

Law 12(I)/2006 as amended by Laws 90(I)/2010, 40(I)/2011 and 176(I)/2011 (the Law) is the relevant legislation governing public procurement contracts in the Republic of Cyprus. The Law, which transposes EU Procurement Directives 17/2004 and 18/2004 into Cyprus's legal system, provides for the coordination of procedures for the award of public works contracts, public supply contracts, public service contracts and related matters.

Also relevant are the 2007 Regulations on the coordination of procedures for the award of public works contracts, public supply contracts, public service contracts and related matters (the Regulations) issued under article 89 of the Law. Law 11(I)/2006 as amended by Laws 39(I)/2011, 175(I)/2011 and 112(I)/2012, which provides for the coordination of procurement procedures in the water, energy, transport and postal services sectors, is also of relevance.

An unsuccessful bidder may file a hierarchical recourse with the Tenders Review Authority (TRA) of the Republic. The TRA has the authority, inter alia, to confirm the decision of the awarding authority, or annul the decision of the awarding authority if it finds that it contravenes the applicable legislation. The competence and structure of the TRA and the procedures it is required to follow are governed by Law 104(1)/2010 which implemented Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The provisions of the Law and the Regulations are in full conformity with the text of the relevant directives. The Public Procurement Directorate (PPD) of the Treasury of the Republic of Cyprus has published a Public Procurement Guide in order to facilitate the enforcement and applicability of the Law by contracting authorities and contracting entities in Cyprus. It provides guidelines and best practice examples in order to assist the tasks as laid down by the EU Directives and domestic legislation. It should be noted that the guide does not have any legal effect, nor does it override the provisions of the Law.

3 Are there proposals to change the legislation?

Some minor amendments have been made over the years in order to reflect the various changes made in the EU Procurement Directives from time to time, and further amendments of this type are likely. However, there is nothing on the horizon indicating any major change to the Law.

4 Is there any sector-specific procurement legislation supplementing the general regime?

As noted above, Law 11(I)/2006 provides for the coordination of procurement procedures in the water, energy, transport and postal services sectors. In addition, Cyprus has recently enacted Law 173(I)/2011 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security and related matters, in response to Directive 2009/81/EC of the European Parliament and of the Council. Otherwise there is no sector-specific legislation.

Applicability of procurement law

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Although there have been numerous public procurement cases brought before the TRA and the Supreme Court, this issue has never been raised. Nevertheless, the definition given by the Law is rather straightforward. The Law defines 'contracting authority' to mean the state, regional or local authorities; the bodies governed by public law; and the associations of one or more of these authorities, or one or more of these bodies governed by public law.

A 'body governed by public law' is defined as any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; having a legal personality; and financed, for the most part, by the state, regional or local authorities, or other bodies governed by public law, or having 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.

6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

We are not aware of any pending proceedings on the matter. It is anticipated that insofar as an entity is governed by public law, it will be deemed to fall within the 'contracting authority' definition. An indicative list of bodies and categories of bodies governed by public law that fulfil the criteria in question 4 is given in annex III of the Law.

7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

The Law includes a number of thresholds according to the nature of the contract and the awarding body. For public supplies and services contracts awarded by the central government authorities listed in annex IV of the Law the threshold is €137,000. For certain defence products (those not listed in annex V of the Law) purchased by

central government authorities, the threshold for public contracts is €211,000. This higher threshold also applies to all public contracts awarded by contracting authorities not listed in annex IV and to certain telecommunications services, irrespective of the body procuring them. For public works contracts the threshold is €5.278 million. In compliance with Regulation (EU) 1251/2011 dated 30 November 2011, amending the Procurement Directives and Directive 2009/81/EC (defence and security) to reduce their application thresholds in the award of public contracts, the Public Procurement Directorate has recently published a circular revising the thresholds applying from 1 January 2012 until 31 December 2013 to €130,000, €200,000 and €5 million respectively.

In line with the directive, the calculation of the estimated contract value is based on the total amount payable excluding VAT, as estimated by the contracting authority, taking account of any form of option, any renewals of the contract and any premiums or other payments to candidates or tenderers. The Law prohibits the subdivision of contracts into smaller contracts to circumvent its requirements, and where procurement may be in several lots, the aggregate value must be used.

If the contracting authority is to provide the contractor with goods, services or facilities, the estimated value of the supplies must be included in the contract value. Hire or leasing contracts with a fixed term of less than 12 months are evaluated by taking the aggregate payments under the contract. For contracts lasting longer than 12 months, any estimated residual value must also be included. Where the hire contract is for an indefinite period the value is calculated by taking the monthly value and multiplying it by 48.

8 Does the extension of an existing contract require a new procurement procedure?

Provided that the tender documents contain an extension clause granting the contracting authority the discretion to extend, then there will be no obligation to undertake a new procurement procedure.

9 Does the amendment of an existing contract require a new procurement procedure?

This will depend on the nature or degree of the amendment. If the amendment is substantial then it is likely that a new procurement procedure will have to take place. In the *Presstext* case (C-454/06) the ECJ stated that ‘amendments... during the currency of the contract constitute a new award within the meaning of [the Directive] when they are materially different in character from the original and therefore demonstrate the intention of the parties to renegotiate the essential terms’. There are no hard and fast rules as to what constitutes a material or a non-material amendment; this has to be decided on a case-by-case basis.

10 May an existing contract be transferred to another supplier or provider without a new procurement procedure?

There is no provision in the Law or the Regulations on this issue. However, there is no reason to suppose that a transfer may not occur as long as the tender documents provide for the conditions of such a transfer; such a transfer would not distort competition or in any way breach the principles of equal treatment, non-discrimination and transparency; and the public interest is best served.

11 In which circumstances do privatisations require a procurement procedure?

Both the Law and the Regulations are silent on the matter. Privatisations do not fall within the scope of the legislation.

12 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

There is no regulatory legal framework on PPPs in Cyprus. Experience to date indicates that procurement takes place on an ad hoc basis.

13 What are the rules and requirements for the award of works or services concessions?

As regards public works concessions, both the Community Directive 2004/18 and Cyprus domestic legislation (Law 12(I)/2006) contain specific provisions (title III, chapter I and chapter VII, respectively), requiring a contracting authority to adhere to the principles of equality of treatment, transparency, proportionality and mutual recognition.

As regards service concessions, Community and national law both provide that these rules do not apply to service concessions (Directive 2004/18/EC, article 17, and Law 12(I)/2006, article 16).

14 To which forms of cooperation between public bodies and undertakings does public procurement law not apply and what are the respective requirements?

The Law does not apply when the cooperation is between public bodies. Since the Law adopts the definition of public bodies set out in the second subparagraph of article 1(9) of Directive 2004/18/EC, which requires that public bodies are financed ‘for the most part by the state, regional or local authority’, it does not appear to preclude private participation in public bodies. However, this has not been tested in practice.

The procurement procedures

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

Yes, these principles are well embodied in the Law. Moreover, the principles of proper and good administration require the administrative organs, in the exercise of their discretionary powers, to act according to the principles of justice.

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The Law requires contracting authorities to treat economic operators equally and without discrimination and always in a transparent manner (article 3).

17 How are conflicts of interest dealt with?

Under article 21 of the Regulations, the members of the contracting authority, as well as their advisers or experts who have undertaken to evaluate the tenders, must sign a statement that they will perform their duties diligently and impartially. If, at any time, any of the above has any financial or other interest in the public contract, whether direct or indirect, or has any relationship (including blood relationship) or any conflict with any person who has an obvious financial or other interest in the tender process, they must make full disclosure of the facts. Article 22 deals with specific situations of conflict of interest.

Furthermore, the Public Procurement Guide clearly states that personnel involved with procurement (including members of tender boards and evaluation committees), are required to advise their contracting authority of any interests that might reasonably be expected to influence them and their activities as an employee of the public sector. If it comes to the knowledge of such a person that a contract in which he or she has any pecuniary or other interest,

direct or indirect, has been or is proposed to be entered into, he or she should give written notice to his or her contracting authority through the nominated procurement manager.

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

There is no provision in the Law covering such a situation, and so it is anticipated that such participation will be covered by the general principles of administrative law, such as equal treatment and transparency and non-distortion of competition.

In the *Fabricom* case (Joined Cases C-21/03 and C-34/03, *Fabricom SA v Etat Belge*) the ECJ (having regard to the principles of proportionality and objectivity) found that national laws cannot preclude an undertaking which has been involved in the preparation of a tender procedure from participating in the tender where that undertaking is not given the opportunity to show that the knowledge and experience that it has acquired was not capable of distorting competition.

19 What is the prevailing type of procurement procedure used by contracting authorities?

The procedure to be used will depend on the nature and the complexity of the specific public contract. Statistics published by the Treasury of the Republic of Cyprus show that the prevailing type of procurement is the open procedure.

20 Can related bidders submit separate bids in one procurement procedure? If yes, what requirements must be fulfilled?

The Law does not contain such a provision.

21 Are there special rules or requirements determining the conduct of a negotiated procedure?

The Law provides that contracting authorities must ensure the equal treatment of all tenderers during the negotiation. In particular, they must not provide information in a discriminatory manner which may give some tenderers an advantage over others. Article 32 of the Law provides for the use of negotiated procedure with publication of the contract notice and article 33 without.

22 When and how may the competitive dialogue procedure be used? Is it used in practice in your jurisdiction?

The competitive dialogue is used in cases of particularly complicated contracts, for which the use of the open or the restricted procedure does not allow the award of the contract. A public contract is considered particularly complicated where the contracting authority cannot objectively identify the technical, legal and financial specifications of the contract. The contracting authority will publish a contract notice in which it makes known the needs and requirements and engages with the candidates in a dialogue to explore and define the means that may satisfy the needs and requirements in the best possible manner. During the dialogue, the contracting authority is obliged to ensure equality of treatment among all tenderers. In particular there should be no discrimination in terms of information provision, as this might give some economic operators an advantage over others. In addition, the contracting authority may not reveal to the other participants the solutions proposed, or any other confidential information communicated by a candidate participating in the dialogue, without the candidate's agreement.

The obligation of confidentiality of information and non-disclosure of the solutions proposed by the participants in the competitive dialogue without their consent is protected under the Community Directives (Directive 2004/18/EC, articles 6 and 29(3), and under Law 12(I)/2006, article 31, paragraph 3). If the procedure

selected is the competitive dialogue, the contract may be awarded only to the most economically advantageous tender.

No data are available to indicate whether this type of procedure has so far been used in Cyprus.

23 What are the requirements for the conclusion of a framework agreement?

The Law (article 34) allows contracting authorities to award framework agreements according to the conditions laid down in the Regulations. Article 28 of the Regulations provides the mechanism for the award of such agreements. For the purposes of concluding a framework agreement, contracting authorities will follow the rules of procedure stipulated in title II of the Law. Other than in exceptional circumstances, the duration of a framework agreement may not exceed four years, and the procedures will depend on the number of economic operators (eg, supplier, contractor or service provider) involved in the agreement.

24 May a framework agreement with several suppliers be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

Framework agreements may be concluded with several economic operators, and there must be at least three in number (article 34(7)) who satisfy the selection criteria or at least three admissible tenders that meet the award criteria.

Depending on the contents of the agreement a mini-competition between the economic operators may be required.

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Local legislation does not provide for any conditions under which consortium members may be changed in the course of a procurement procedure. It is anticipated that the members of consortia may change as long as they can fulfil the requirements and conditions set by the tender documents and provided that no distortion of competition will occur as a result of such change.

26 Are unduly burdensome or risky requirements in tender specifications prohibited?

Tender specifications should secure equal access to tenderers and should not result in the creation of unjustified barriers to the opening of public procurement to competition: on the contrary, competition among suppliers should be encouraged in the most efficient and effective way. Technical specifications should be defined in such a way so as to take into account the accessibility criteria for persons with particular requirements. Such technical specifications are mentioned in the tender documents or in the contract notice or in supplementary documents and are in line with EU standards.

27 What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

Public procurement contracts are awarded on the basis of criteria that are specified in articles 59 and 61 of the Law. The contracting authorities must exclude from the competition any tenderers who have been convicted for participating in a criminal organisation, bribery, fraud and money laundering (article 51(1) of the Law). The contracting authorities may only depart from this obligation for imperative public interest reasons.

The contracting authorities may also exclude tenderers who are being wound up, have been convicted of professional misconduct, are under court administration or have not fulfilled their tax or social security obligations.

Update and trends

The focus of public procurement for the next few years is likely to be the energy sector. Following the discovery of substantial gas reserves in Cyprus's offshore exclusive economic zone a number of options are under consideration regarding transportation of any gas extracted. These include pipelines and an onshore gas liquefaction plant. In any case the likely cost is several billion euros. Meanwhile, a procurement process is under way for the provision of natural gas to Cyprus as an interim measure until the island's own reserves can be commercially exploited.

- 28** Are there specific mechanisms to further the participation of small and medium enterprises in the procurement procedure?

Article 21 of the Law provides that it is possible to conclude separate contracts by lots and in this sense it could be argued that the participation of small and medium-sized entities in public procurement procedures is made more accessible. Nevertheless it would be difficult to see this having a major effect on the participation of small and medium-sized enterprises in the procurement procedure.

- 29** What are the requirements for the admissibility of alternative bids?

Article 26 of the Law requires contracting authorities to indicate in the contract notice whether or not variants are allowed. Variants may be accepted only if this is clearly indicated in the notice, and the tender documents clearly state the minimum requirements to be met as well as the manner of submission of such variant bids.

- 30** Must a contracting authority take alternative bids into account?

If the contract notice provides for alternative bids then the contracting authority must consider variants meeting the minimum requirements specified in the tender documents.

- 31** What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders are not allowed to change the tender specifications unless the tender documents allow such changes or alternative bids. This would normally happen in a negotiated procedure. A bid that is not in conformity with the tender documents is likely to be rejected on examination.

- 32** What are the award criteria provided for in the relevant legislation?

The Law restricts contracting authorities to a choice between the most economically advantageous tender and the lowest price. As mentioned in question 22, in the competitive dialogue procedure the contract may only be awarded on the basis of the most economically advantageous tender.

- 33** What constitutes an 'abnormally low' bid?

There is no definition either in the Law or in the regulations as to what constitutes an 'abnormally low bid'. A common sense view is likely to be applied, filtering out bids that are unlikely to be commercially viable, possibly because they have been based on unrealistic parameters, over-optimistic assumptions or false calculations and parameters, making them considerably lower than all other bids.

- 34** What is the required process for dealing with abnormally low bids?

If a tender appears to be abnormally low the contracting authority should not reject it outright, but first seek clarifications from the tenderer about the factors enabling it to submit such a low bid,

inter alia, regarding its economic character, the selected technical solutions or the favourable conditions that the tenderer may have, the originality of the subject matter of the tender, or the possible granting of state aid to the tenderer.

If the contracting authority finds that a tender is abnormally low owing to the granting of state aid the tender may be rejected solely for this reason following consultation with the tenderer, unless the tenderer can demonstrate that the said aid has been lawfully granted.

- 35** How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Further to question 27, the general view is that it would be unfair, disproportionate and in breach of competition to prohibit any person or entity from participating in public procurement competitions for an indefinite period. Depending on the criminal offence for which a bidder has been convicted, he or she may be excluded for a period of three to seven years from the delivery of the criminal court's judgment. There is no provision in the Law on 'self-cleaning'. The disqualification ends with the expiry of the specified period.

Review proceedings and judicial proceedings

- 36** Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The TRA and the Supreme Court of Cyprus are the appropriate bodies. The TRA was initially established under Law 101(I)/2003, which has since been repealed, and has the competences described by Law 104(I)/2010, as amended by Law 174(I)/2011.

The Supreme Court of Cyprus has exclusive jurisdiction to hear any recourse filed against a decision, act or omission of any person, organ or authority exercising executive or administrative authority, and any bidder who is dissatisfied with the TRA's decision may, under article 146 of the Constitution of the Republic of Cyprus, file a recourse to the Supreme Court against the TRA's decision requesting its annulment. It is open for a bidder to apply directly to the Supreme Court without filing a hierarchical recourse to the TRA.

- 37** How long does an administrative review proceeding or judicial proceeding for review take?

The procedure before the TRA is relatively quick, taking six months on average from filing to completion (subject to the circumstances of each case). The procedure before the Supreme Court may take between one and two years on average, subject to the court's caseload and depending on possible interim applications, extensions in filing pleadings and the like.

- 38** What are the admissibility requirements?

There are no specific admissibility requirements that have to be met before challenging a decision of a contracting authority.

According to article 19(1) of Law 104(I)/2010 every person who has or had an interest in a specific public contract and has suffered or might suffer loss through an act or decision of the contracting authority that breaches any provisions of the law, has the right to file a hierarchical recourse. The TRA has the authority to examine summarily and reject a hierarchical recourse without hearing the interested party or the contracting authority if it finds such hierarchical recourse unjustified. Under article 146(1) of the Constitution the Supreme Court has exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, act or omission of any organ, authority, or person exercising any administrative authority is contrary to any of the provisions of the Constitution or

of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

39 What are the deadlines for a review application and an appeal?

A person who decides to file a hierarchical recourse must inform the contracting authority in writing about the alleged breach and of his or her intention to file a hierarchical recourse against the disputed act or decision within five days from receiving knowledge of the act or decision. A hierarchical recourse must be filed within 15 calendar days following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, within 15 calendar days from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate, or 10 calendar days from the day following the date the tenderer or candidate received the decision. The communication of the contracting authority's decision to each tenderer and interested persons or candidates should be accompanied by a summary of the relevant reasons.

A recourse to the Supreme Court must be filed within 75 days from the date that the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse.

40 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

No, but according to article 24 of Law 104(I)/2010 the applicant has the right to file an application for interim measures together with the hierarchical recourse, and the TRA has the authority to stay any further steps in connection with the award of the procurement contract until the full hearing of the hierarchical recourse.

The same remedy is available for an applicant who chooses to challenge the legitimacy of such a decision directly before the Supreme Court. Experience shows that it is easier to obtain such an order in the TRA than in the Supreme Court.

41 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The Law requires contracting authorities to inform unsuccessful bidders in writing as soon as possible and before signing a contract with the successful bidder. The contracting authority must give reasons for the rejection of an unsuccessful bidder's tender within 15 days of being asked to do so. Article 21(3) of Law 104(I)/2010 requires the contracting authority to provide each unsuccessful tenderer or candidate with a summary of the relevant reasons for rejection when communicating its decision.

42 Is access to the procurement file granted to an applicant?

Access to the procurement file is granted to all unsuccessful bidders who may wish to file a hierarchical recourse. Unsuccessful bidders who choose to file a recourse to the Supreme Court directly may request a disclosure order under the Civil Procedure Rules.

43 Is it customary for disadvantaged bidders to file review applications?

It is quite common for interested parties to challenge the award decision either before the TRA or the Supreme Court. According to the latest annual report of the TRA, 130 hierarchical recourses and 72 applications for the issuance of interim measures were submitted to the TRA in 2010, representing an increase of 17 per cent in the filing of hierarchical resources and an increase of 14 per cent in the filing of applications for interim measures compared with 2009.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Law 104(I)/2010 provides that TRA must declare a concluded contract ineffective if the grounds set out in article 27 of the law apply, unless it finds that overriding reasons relating to a general interest require that the effect of the contract should be maintained. Economic interests are not considered to be an overriding reason except in the exceptional circumstances that cancellation would lead to disproportionate consequences.

In practice, unless the successful tenderer has acted fraudulently, the only remedy available to an unsuccessful bidder once the contract has been concluded is damages.

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Review proceedings are available to any person who has or had an interest in the award of a specific public contract and who has suffered or might suffer loss from an act or decision of a contracting authority that breaches any provision of the Law. Hence, a de facto award of a contract that should have been preceded by a procurement procedure is in breach of the Law.

46 If a violation of procurement law is established in an administrative or judicial review proceeding, can disadvantaged bidders claim damages? If yes, please specify the requirements for such claims.

Law 104(I)/2010 provides that the annulment by the TRA of an act or decision of the contracting authority gives an interested person who has suffered loss as a result of the act or decision the right to claim damages against the contracting authority by way of a civil action.



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