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# Public Procurement Guide

2019

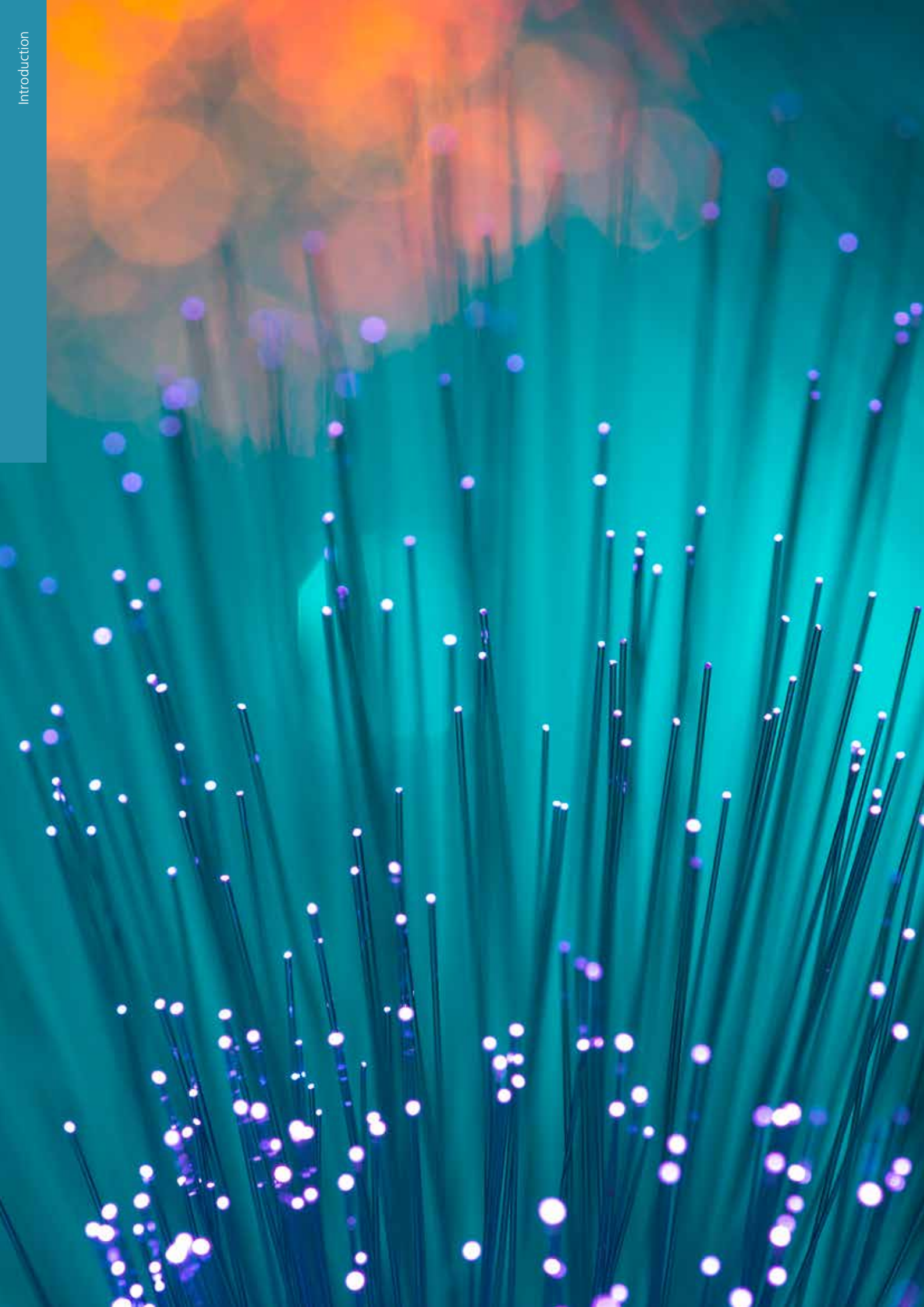


## Contents

- 05 ■ Introduction
- 7 ■ EU Directives
- 12 ■ Austria
- 17 ■ Bulgaria
- 23 ■ China
- 29 ■ Colombia
- 32 ■ Croatia
- 37 ■ Czech Republic
- 42 ■ France
- 48 ■ Germany
- 63 ■ Hungary

68	■	Italy
74	■	Montenegro
78	■	The Netherlands
83	■	Poland
89	■	Portugal
93	■	Serbia
97	■	Slovakia
101	■	Spain
106	■	Switzerland
112	■	Turkey
120	■	Your contacts in CMS





# Introduction

Public procurement is a powerful tool for governments trying to create dynamic, innovative and sustainable markets, economies and societies. According to the European Commission, 'every year, over 250,000 public authorities in the EU spend around 14% of GDP on the purchase of services, works and supplies' and EU countries are not the only ones to recognise this. Knowing the importance of having a reliable system to handle this spending, countries set out minimum harmonised public procurement rules. The CMS Public Procurement Group offers you a comprehensive guide to the most relevant procurement issues in 19 jurisdictions.

In this CMS guide to public procurement we set out the key rules, thresholds, and procedures for contracting authorities and suppliers, indicate whether it is mandatory or voluntary to use e-procurement or e-signatures, and detail the extent to which procurement contracts can be amended after being awarded.

Our public procurement specialists cover the key questions concerning access to and the conduct of public procurement competitions. They also highlight the key similarities and important differences between the national regimes in 19 countries: Austria, Bulgaria, China, Colombia, Croatia, Czech Republic, France, Germany, Hungary, Italy, Montenegro, the Netherlands, Poland, Portugal, Serbia, Slovakia, Spain, Switzerland and Turkey. We expect updates from other jurisdictions where we have public procurement expertise in the coming months.

If you have any questions regarding public procurement or if you need advice regarding any of these jurisdictions, please feel free to contact the local experts who authored the relevant chapters or any of the CMS public procurement experts included on the **CMS Public Procurement Contact Card**.



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# EU Directives

by **Bernt Elsner** and **Ruth Bittner**, CMS Vienna

In December 2011, the European Commission adopted its proposals on public procurement as part of a far-reaching programme aimed at comprehensively modernising public procurement in the European Union.

The programme included revising Directive 2004/17/EC (procurement in the water, energy, transport and postal services sectors – ‘sector area’, Directive 2014/25/EU) and 2004/18/EC (public works, supply and service contracts, Directive 2014/24/EU). Further, it adopted a new directive on concessions (Directive 2014/23/EU), which had previously only been partially regulated at the European level. The directives entered into force on 17 April, 20 days following its publication in the Official Journal of the European Union on 28 March 2014, and have since been amended slightly. Member States had 24 months to implement the provisions of the new rules into national law; the implementation period expired on 18 April 2016.

## 1. Where can one find public procurement notifications for the EU/EEA?

- TED (Tenders Electronic Daily), the online version of the ‘Supplement to the Official Journal of the European Union’; TED contains public procurement notices and can be accessed via [www.ted.europa.eu](http://www.ted.europa.eu).
- SIMAP, the European system of information on public procurement ([www.simap.europa.eu/index\\_en.htm](http://www.simap.europa.eu/index_en.htm)) provides information both for buyers and suppliers, including standard forms and links to the relevant legislation.
- The EU institutions also publish **tender notices**.
- eNotices is an online tool for the preparation and publication of public procurement notices.

## 2. What are the relevant thresholds for the applicability of the Directives?

Awarded by	Supply contracts	Service contracts	Works contracts	Service contracts for social and other specific services
Sub-central authorities	EUR 221,000	EUR 221,000		
Central government authorities	EUR 144,000	EUR 144,000		
Central government authorities operating in the field of defence concerning products other than Annex III	EUR 144,000			
Central government authorities operating in the field of defence concerning products pursuant to Annex III	EUR 144,000			
Any public contractor	EUR 221,000	EUR 221,000	EUR 5.548m	EUR 750,000 (Annex XIV)
Utility Services Sector (Water, energy, transport and postal services)	EUR 443,000	EUR 443,000	EUR 5.548m	EUR 1m (Annex XVII)
Awarded by	Concession contracts			
Any public contractor	EUR 5.548m			

### 3. Under what circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

- Contracting authorities may apply open or restricted procedures (Art 26 (2) Dir 2014/24).
- Contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations:
  - for works, supplies or services fulfilling one or more of the following criteria (Art 26 (4) Dir 2014/24):
    - the needs of the contracting authority cannot be met without adapting readily available solutions;
    - they include design or innovative solutions;
    - the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, complexity or legal and financial make-up of the contract or the risks attached to them;
    - the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference within the meaning of points 2 to 5 of Annex VII;
  - for works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted. In such situations, contracting authorities need not publish a contract notice where they include in the procedure all of, and only, the tenderers that satisfy the criteria for qualitative selection and that, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure (Art 26 (4) (b) Dir 2014/24).
- In the utility services sector the use of the negotiated procedure with prior call for competition is always possible (Art 44 (2) Dir 2014/25).
- In the specific cases and circumstances mentioned below, Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication.
- The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases (Art 32 (2) Dir 2014/24):
  - where no (suitable) tenders or no (suitable) requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission, when it so requests;
  - where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons, when no reasonable alternative or substitute exists, and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement:
    - the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
    - competition is absent for technical reasons;
    - the protection of exclusive rights, including intellectual property rights;
  - if it is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the authority cannot comply with the time limits for the open or restricted procedures or competitive procedures with negotiation. The circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.
- The negotiated procedure without prior publication may be used for public supply contracts (Art 32 (3) Dir 2014/24):
  - when the products involved are manufactured purely for the purpose of research, experimentation, study or development; however, contracts awarded pursuant to this point must not include quantity production to establish commercial viability or to recover research and development costs;
  - for additional deliveries by the original supplier that are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, when a change of supplier would oblige the contracting authority to acquire supplies with different technical characteristics that would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts as well as that of recurrent contracts must not, as a general rule, exceed three years;
  - for supplies quoted and purchased on a commodity market;
  - for the purchase of supplies or services on particularly advantageous terms from either a supplier that is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.



- The negotiated procedure without prior publication may be used for public service contracts, where the contract concerned follows a design contest and is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest; in the latter case, all winners must be invited to participate in the negotiations:
  - in the sector area there are certain modifications and additions to this (Art 50 Dir 2014/25);
  - contracting authorities may apply 'innovation partnerships' as a new procurement process for the procurement of innovative products, services or products that cannot be met by conventional solutions on the market (Art 26 (3) and Art 31 (1) Dir 2014/24; Art 44 (3) and Art 49 (1) Dir 2014/25);
  - dir 2014/23 on the award of concession contracts applies to the award of works or service concessions (as defined in Art 5 (1) Dir 2014/23) to economic operators (Art 1 (2) Dir 2014/23).

#### **4. Which decisions of a contracting authority can be appealed?**

- An appeal is possible against unlawful contract award decisions and discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or any other document related to the contract award procedure (Art 2 (1) (b) Dir 89/665/EEC and Art 2 (1) (b) Dir 92/13/EEC).

#### **5. What are the time limits for appeals? Are further appeals precluded after the expiry of these limits?**

- The period for applying for review must amount to a minimum of ten days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate by fax or electronic means.
- The period for applying for review must amount to a minimum of 15 calendar days if other means of communication have been used.
- For reviews concerning the setting aside of decisions, the contracting authority's decision is to be accompanied by a summary of the relevant reasons. The period must amount to a minimum of ten days following the date of the publication of the decision concerned (Art 2c Dir 89/665/EEC and Art 2c Dir 92/13/EEC).

#### **6. How long is the standstill period?**

- There is a standstill period of at least ten calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned (if fax or electronic means have been used).
- It lasts for at least 15 calendar days if other means of communications have been used.
- It must amount to a minimum of ten calendar days from the day following the date of the receipt of the contract award decision (Art 2a Dir 89/665/EEC and Art 2a of Dir 92/13/EEC).

#### **7. Which review bodies exist?**

- Review bodies have to be established by the Member States. Powers may be conferred on separate bodies responsible for different aspects of the review procedure. These bodies must be entitled to grant interim measures, set aside decisions and award damages.
- Member States may require that the person concerned first seek review with the contracting authority.
- If the review body is not a court, it must still provide written reasons for its decision, with the possibility to appeal to a court according to Art 234 TFEU (Art 2 (9) Dir 89/655/EEC and Art 2 (9) Dir 92/13/EEC).

#### **8. Are there any filing fees for an appeal?**

- Filing fees, if any, are regulated by national laws.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- If Member States require that the bidder concerned first seeks review with the contracting authority, the submission of such an application for review must result in the immediate suspension of the possibility of concluding the contract (Art 1 (5) Dir 89/665/EEC and Art 1 (5) Dir 92/13/EEC). If a body of first instance, independent of the contracting entity, reviews a contract award decision, Member States must ensure that the contracting entity cannot conclude the contract before the review body has made a decision on the application (Art 2 (3) of Directive 89/665 EEC and Art 2 (3) of Directive 92/13/EEC).
- Otherwise, review procedures do not necessarily have an automatic suspensive effect (Art 2 (4) Dir 89/665/EEC and Art 2 (3a) Dir 92/13 EEC).
- Member States must ensure the availability of interim measures for suspending the award of a public contract (Art 2 (1) a Dir 89/665/EEC and Art 2 (1) a Dir 92/13/EEC).

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

- Member States provide for the ineffectiveness of a contract if (i) the contract has been awarded without prior publication of the contract notice, (ii) if certain infringements have deprived a tenderer applying for review, (iii) in case of derogation from the standstill period, for contracts based on a framework agreement or a dynamic purchasing system (Art 2d (1) Dir 89/655 EEC and Art 2d (1) Dir 92/13/EEC as amended by Directive 66/2007/EC).
- Member States may provide that the review body independent of the contracting authority is to decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.
- Alternative penalties must be effective, proportionate and dissuasive. They comprise the imposition of fines on the contracting authority or the shortening the duration of the contract (Art 2e (2) Dir 89/655/EEC and Art 2e (2) Dir 92/13/EEC as amended by Dir 66/2007/EC).
- According to Art 2 (1) (c) Dir 89/665/EEC and Art 2 (1) (d) Dir 91/13/EEC as amended by Dir 66/2007/EC, Member States must ensure that the measures taken concerning the review procedures, include provisions for powers to award damages to persons harmed by an infringement.

## 11. To which extent can procurement contracts be amended after awarding?

- Substantial modifications to the initial contract are not possible (Art 43 Dir 2014/23, Art 72 2014/24, Art 89 2014/25). A modification is considered substantial when it renders the contract materially different in character from the one initially concluded.
- Substantial modifications are especially:
  - any modification that introduces conditions that, 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;
  - any modification that changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the initial contract;
  - any modification that considerably extends or reduces the scope of the contract;
  - a new contractor replacing the contractor initially awarded the contract by the contracting authority except in certain cases of reorganization (Par 1 point d) Art 43 Dir 2014/23, Art 72 Dir 2014/24, Art 89 Dir 2014/25).



- Possible modifications are:
  - modifications provided for in the initial procurement documents in clear, precise and unequivocal review clauses, or options, as long as they do not provide for modifications that would alter the overall nature of the contract;
  - additional works, services or supplies by the original contractor, irrespective of their value, that have become necessary and were not included in the initial procurement, where a change of contractor (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement, and (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority, and (iii) any increase in value does not exceed 50% of the value of the original contract (this does not apply in the sector area). Such modifications have to be published in TED;
  - where the need for modification has been brought about by circumstances that a diligent contracting entity could not foresee, the modification does not alter the overall nature of the contract, and any increase in value does not exceed 50% of the value of the original contract (this does not apply in sector area). Such modifications have to be published in TED;
  - where a new contractor replaces the one initially awarded the contract by the contracting authority as a consequence of:
    - either an unequivocal review clause or option;
    - universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, by another economic operator that fulfils the criteria for qualitative selection initially established and provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the Directive;
    - the contracting entity itself assuming the main contractor's obligations towards its subcontractors, when this possibility is provided for under national legislation;
- If the value of the modification is below both of the following values: the thresholds according to question 2 and 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

- Central purchasing bodies as well as contracting authorities must use e-procurement from 18 October 2018 at the latest.
- E-procurement is not compulsory if (i) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications; (ii) the file formats most suitable for describing the tender applications cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority; (iii) using electronic communication would require specialised office equipment that is not generally available to contracting authorities; (iv) the procurement application requires submitting physical or scale models that cannot be transmitted using electronic means; or (v) using non-electronic communicative means is necessary either because preventing a breach of electronic communication security or providing the high level of protection necessary for particularly sensitive information cannot be properly ensured with electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access.
- Member States must specify the level of security required for the electronic means of communication in the various stages of the specific procurement procedure; that level shall be proportionate to the risks attached and may include an advanced e-signature.

# Austria



by **Bernt Elsner** and **Ruth Bittner**, CMS Vienna

October 2018

## 1. Where can one find public procurement notifications?

- Official Journal of the Viennese Newspaper (Amtsblatt zur Wiener Zeitung – Amtlicher Lieferungsanzeiger) online: **[www.wienerzeitung.at](http://www.wienerzeitung.at)**; **[www.lieferanzeiger.at](http://www.lieferanzeiger.at)**
- The publications of the nine provinces according to the nine local publication media regulations (Publikationsmedienverordnungen):
  - official Journal of the city of Vienna (**Amtsblatt der Stadt Wien**);
  - official News of the province of Lower Austria (**Amtliche Nachrichten Niederösterreich**);
  - official Journal of the state of Burgenland (**Landesamtsblatt für das Burgenland**);
  - official Journal of the state of Upper Austria (**Amtsblatt für Oberösterreich, Linzer Zeitung**);
  - official Journal of the Authorities, Departments and Courts of the state of Salzburg (**Amtsblatt der Behörden, Ämter und Gerichte Salzburgs, Salzburger Landeszeitung**);
  - official Journal of the state of Styria (**Amtsblatt für die Steiermark, Grazer Zeitung**);
  - official Journal of the Authorities, Departments and Courts of the state of Tyrol (**Amtsblatt der Behörden, Ämter und Gerichte Tirols, Bote für Tirol**);
  - official Journal of the state of Carinthia (**Amtsblatt des Landes Kärnten, Kärntner Landeszeitung**);
  - official Journal of the state of Vorarlberg (**Amtsblatt für das Land Vorarlberg**).

**After 01.03.2019 publications must be made public via <https://www.data.gv.at/>**



## 2. What are the current thresholds for the applicability of the Directives?

- Public supply contracts and public service contracts: EUR 221,000 (§ 12 (1) Z 3) BVergG:
  - if the contracting authority is a central purchasing body, or in case of particular supply contracts in the defence sector: EUR 144,000 (§ 12 (1) Z 1 BVergG);
  - for public service contracts listed in Annex XVI: EUR 750,000 (§ 12 (1) Z 2) BVergG.
- Public works contracts and concessions: EUR 5.548m (§ 12 (1) Z 4) BVergG,
- Design contests by central purchasing bodies (prize money): EUR 144,000; in case of the other contracting authorities: EUR 221,000 (§ 12 (2) BVergG).
- Sector area:
  - public supply contracts, public service contracts and design contests for obtaining public supply contracts: EUR 443,000 (§ 185 (1) Z 2 BVergG);
  - public works contracts: EUR 5.548m (§ 185 (1) Z 3 BVergG);
  - design contests: EUR 443,000 (§ 185 (2) BVergG).

If the procurement value exceeds these thresholds, it qualifies as an above-threshold procurement; if not, it constitutes a below-threshold procurement. Above-threshold procurements have to meet stricter legal requirements.

## 3. Under which circumstances can the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue be used?

- The contracting authority is free to choose between the open and the restricted procedure (§ 33 BVergG).
- A negotiated procedure with prior publication can be carried out (§ 34 BVergG):
  - if no tenders or no suitable tenders or no applications have been submitted in response to an open or restricted procedure (in this case choosing a negotiated procedure without prior publication is possible under certain conditions);
  - if the performance does not permit prior overall pricing due to the contract's nature or associated risks;
  - if the needs of the contracting authority cannot be met without adapting readily available solutions;
  - if the contract requires conceptual or innovative solutions; or
  - if the technical specifications cannot be established with sufficient precision.
- A negotiated procedure without prior publication (§§ 35–37 BVergG) is allowed:
  - if the performance can only be provided by a particular contractor for technical or artistic reasons, or in order to protect exclusive rights;
  - if urgent and compelling reasons do not allow the implementation of an open or restricted procedure with prior publication; or
  - under certain conditions recurring procurement of services of the same kind.
- The competitive dialogue (§ 34 BVergG) is applicable under the same conditions as the negotiated procedure with prior publication.
- The innovative procedure (§ 41 BVergG) is applicable if there is need for innovative works, services or supplies, which cannot be met by existing works, services or supplies on the market.

#### 4. Which decisions of a contracting authority can be appealed?

- § 2 Z 15 lit a BVergG – only allows for separately appealable decisions:
  - open procedure: the tender documents, other declarations within the time limit for tenders, the elimination of a tender, the decision of revocation, the contract award decision;
  - restricted procedure: the call for tender documents, the non-authorisation for participation, the invitation to submit a tender, other declarations within the time limit for tenders, the elimination of a tender, the decision of revocation, the contract award decision;
  - negotiated procedure: the call for tender documents, the non-authorisation for participation (only within the negotiated procedure with prior publication); the invitation to submit a tender, other declarations during the negotiation phase/within the time limits for tenders, the elimination of a tender, the decision of revocation, the contract award decision;
  - competitive dialogue: the call for tender documents, the non-authorisation for participation, the invitation for participation, the non-consideration of a solution during the dialogue stage, the conclusion of the dialogue stage, the invitation to submit a tender, the elimination of a tender, the decision of revocation, the contract award decision;
  - innovation partnership: the call for tender documents, the non-authorisation for participation, the invitation to submit a tender, other declarations during the negotiation phase/within the time limits for tenders, the elimination of a tender, the decision of revocation, the contract award decision.

Decisions that cannot be appealed separately may be appealed only in combination with the following separately appealable decision.

#### 5. What are the time limits for appeals? Are further appeals precluded after the expiry of these limits?

- Review of separate appealable decisions:
  - ten days, 15 days respectively in case of postal mail (§ 343 (1) BVergG);
  - ten days in case of direct procurements (§ 343 (2) BVergG).
- Review of call for tender documents, participation documents and design contest documents:
  - up to seven days before expiration of time, if the time limit exceeds 17 days and the procurement documents are available electronically (§ 343 (3) BVergG).
- The failure to observe these time limits leads to preclusion.

#### 6. How long is the standstill period?

- The standstill period starts with the announcement of the contract award decision and expires after ten days, 15 days in case of postal mail (§ 144 (1) BVergG).
- The same periods apply to the contracting authority in case of a revocation (§ 150 (4) BVergG).

#### 7. Which appeal bodies exist?

Depending on whether the contracting authority is attributable to the federal government or a province (Bundesland), the following appeal body is competent:

- At the federal level: the Federal Administrative Court (Bundesverwaltungsgericht) (§ 327 BVergG).
- At the provincial level: the Regional Administrative Courts (Landesverwaltungsgerichte).



## 8. Are there any filing fees for an appeal?

- Overall charges are contingent on the type of procedure used (§ 340 (1) BVergG):
  - up to EUR 12,960 in case of public supply and public service contracts above thresholds;
  - up to EUR 38,892 in case of public works contracts above thresholds.
- The fee for a combined interim injunction amounts to 50% of the respective overall charges.
- The (possibly only partially) successful applicant's fee may be reimbursed; the same applies if the applicant is held harmless (§ 341 BVergG).

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- A review application does not have a suspensive effect under Austrian public procurement law.
- A successful application for an interim injunction prevents a contract from being concluded before a decision has been reached by the Administrative or Regional Administrative Court (§ 350 BVergG).

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC:

- On a federal basis, § 356 (10) BVergG provides the possibility for the imposition of fines by the Federal Administrative Court in case the Court refrains from declaring the contract ineffective: the maximum limit is 20% of the contract value (10% in the case of a below-limit procedure). Alternative sanctions vary among the provinces.
- In case of a 'sufficiently qualified' violation of the BVergG, a tenderer may be entitled to compensation from the contracting authority.
- The application period is in general six months from the applicant becoming aware or having the opportunity to become aware of the award of the contract (respective exceptions to be noted).

## 11. To which extend can procurement contracts be amended after awarding?

- Substantial modifications of contracts are not possible. A modification is considered substantial when it renders the contract materially different in character from the one initially concluded.
- Substantial modifications are especially:
  - any modification that introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of candidates other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants to the procurement procedure;
  - any modification that changes the economic balance of the contract in favour of the contractor in a manner not provided for in the initial contract;
  - any modification that considerably extends or reduces the scope of the contract;
  - a new contractor replacing the contractor initially awarded the contract by the contracting authority except in certain cases of reorganisation.
- Non-substantial modifications are:
  - modifications with a value below the thresholds according to question 2 and below 10% for public service and supply contracts or 15% for public works contracts. This modification may not alter the overall nature of the contract;
  - modifications provided for in the initial procurement documents in clear, precise and unequivocal review clauses, or options, provided that they do not provide for modifications that would alter the overall nature of the contract;
  - replacing the contractor by a new contractor as a consequence of either (i) an unequivocal review clause or option complying with the above-mentioned criteria, or (ii) universal or partial succession into the position of the initial contractor following corporate restructuring, provided that (a) this does not entail other substantial modifications to the contract, (b) this is not aimed at circumventing the law, and (c) the new contractor fulfils the criteria for qualitative selection initially set out by the contracting authority;

- additional works, services or supplies by the original contractor have become necessary and were not included in the initial procurement where (i) a change of contractor cannot be made for economic or technical reasons (e.g., requirements of interchangeability and interoperability with existing equipment, services or installations procured under the initial procurement) and would cause significant inconvenience or substantial duplication of costs for the contracting authority, (ii) any increase in price does not exceed 50% of the value of the original contract; (this does not apply in the sector area). Modifications that exceed the thresholds according to question 2 must be published in TED;
- if the need for modification has arisen from circumstances that a diligent contracting authority could not foresee and (i) the modification does not alter the overall nature of the contract, (ii) any increase in price of each modification (provided that consecutive modifications are not aimed at circumventing the law) does not exceed 50% of the value of the original contract (this does not apply in the sector area). Modifications that exceed the thresholds according to question 2 have to be published in TED.

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

- E-Procurement is mandatory for awarding contracts above the thresholds according to question 2, except for social and other specific services and concessions.
- Exemptions from e-procurement occur:
  - where, due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
  - where file formats suitable for description of the tender applications cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority;
  - where the use of electronic means of communication would require specialised office equipment that is not generally available to procurers;
  - where using non-electronic communicative means is necessary either because preventing a breach of electronic communication security or providing the high level of protection necessary for particularly sensitive information cannot be guaranteed by electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access.
- Requests to participate, offers and projects in design contests have to be signed with an advanced e-signature; tender documents and contract notes, only in certain cases.

# Bulgaria

by **Angel Bangachev** and **Antonia Kehayova**, CMS Bulgaria  
October 2018<sup>1</sup>

## 1. Where can one find public procurement notifications?

On the website of the Bulgarian Public Procurement Agency, which keeps the Public Procurement Register in Bulgaria.

Contracts exceeding certain values should be also published in the *Official Journal of the European Union*. Notices can be found on TED (Tenders Electronic Daily). Public competition (which is a simplified open procedure) and direct negotiations (which is a simplified procedure without a prior call for competition) procedures, as well as applicable procedures with a lower contract value, need not be announced on TED (see below table).

In Bulgaria, all contracting authorities and contracting entities are obliged to have a separate section on their Internet site containing information on all the public procurement procedures they have launched. It is called a buyer's profile and should be easily recognisable on their sites. Hence, public procurement updates can also be found on the Internet site of each particular purchaser.

## 2. What are the relevant thresholds for the applicability of Bulgarian Public Procurement Act (PPA)?<sup>2</sup>

Procedure	Social and Special Services BGN without VAT	Other services and supplies BGN without VAT	Works in BGN without VAT
PPA is applied by classic (public) purchasers	≥ BGN 500,000	≥ BGN 264,033	≥ BGN 5m
PPA is applied by sectorial purchasers	≥ BGN 1m	≥ BGN 817,524	≥ BGN 5m
Public competition or direct negotiations procedures (no TED publications)	n/a	From BGN 70,000 up to the relevant threshold above	BGN 270,000 – 5m
Prior notice or invitation (no TED publication)	n/a	BGN 30,000 – 70,000	BGN 50,000 – 270,000
No PPA procedure	< BGN 70,000	< BGN 30,000	< BGN 50,000

Note: 1 BGN (Bulgarian lev) = approx. EUR 0.5111

<sup>1</sup> An amendment bill is currently pending at the Bulgarian parliament containing several significant changes, which are not reflected in this guide. References to the amendment bill are made further below for the relevant section.

<sup>2</sup> The amendment bill envisages changes to the thresholds.



### 3. Under which circumstances can the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue be used?

The PPA differentiates between classic (public) and sectorial purchasers:

- Contracting authorities, among which are the President, the Prime Minister, Ministers, mayors and other public authorities;
- Contracting entities are the sectorial purchasers operating in the water, energy, transport or postal services.

**Contracting authorities** (i.e. public authorities) may freely choose to apply **open** and **restricted** procedures.

**Contracting authorities** may apply the **competitive procedure with negotiation or the competitive dialogue** for:

- Contracts for which any of the following conditions are present:
  - the needs of the contracting authority cannot be met without adapting readily available solutions;
  - the contract includes innovation or design;
  - the contract may not be awarded without negotiations because of specific circumstances related to
  - the nature, the complexity or the legal and financial make-up of the contract or because of the risks attaching to it;
  - the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical references;
  - the public procurement is for social or other special services (as listed in Annex 2 to the PPA).
- When all tenders submitted in response to an open or restricted procedure were irregular or unacceptable.

A negotiated procedure without prior publication may be used by **contracting authorities**:

- When no suitable tenders have been submitted in an open or restricted procedure, provided that the initial conditions of the contract are not substantially altered;
- When all tenders in a previous open or restricted procedure have exceeded the contracting entity's financial resources; in this case all compliant participants from the previous procedure must be invited to negotiations;
- When the contract can be delivered only by a particular economic operator for any of the following reasons:
  - the aim of the procurement is to create or acquire a unique work of art or artistic performance;
  - competition is absent for technical reasons;
  - protection of exclusive rights, including intellectual property rights.
- When it is strictly necessary due to urgency brought about by extraordinary circumstances (unforeseeable events) for the contracting authority, the time limits, including the shortened ones, laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with;
- In the case of supply contracts (already signed following a public procurement procedure) for additional deliveries by the original supplier intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire supplies with different technical characteristics that would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- For supplies quoted and purchased on a commodity market;
- For bargain supplies or services supplied by an economic operator terminating its economic activity;
- When the service is awarded pursuant to a design contest, in which case the winning contestant(s) shall be invited to negotiations;
- When the repetition of construction or services awarded by the same contracting entity to the primary contractor are required, subject to fulfilment of certain additional conditions; and
- When the goods to be supplied are produced for the purposes of research, experimental, scientific or development activities in quantities that do not allow effective market placement or recovery of the research and development costs.

**Contracting entities** may freely choose between the **open, restricted, negotiated procedure with prior call for competition and the competitive dialogue** procedures.

**Contracting entities** may apply the **negotiated procedure without prior call for competition** in the abovementioned situations, applicable for public authorities, except the last one, and also:

- Where a contract is purely for the purpose of research, experiment, study or development, and the awarded contracts do not cover production in quantities that secure enough market realisation or allow the research and development costs to be recovered;
- Bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices.

With the new Public Procurement Act, some pure e-procedures have been introduced to the Bulgarian legislation – dynamic purchasing systems, electronic auctions and electronic catalogues.

#### **4. Which decisions of a contracting authority can be appealed?**

Generally, any decision of the contracting authorities can be subject to appeal when made during a procedure for:

- A public procurement award, including during the conclusion of a framework agreement, a dynamic purchasing system or qualification systems;
- The conclusion of a framework agreement;
- Setting up a dynamic purchasing system or establishing qualification systems;
- A design contest.

In particular this includes:

- The decision to open a public procurement. In this case, the interested parties may appeal the terms and conditions of the tender stipulated in the instructions to tenderers;
- The decisions for disqualification of tenderers in the restricted and negotiated procedures and the competitive dialogue;
- The contract award decision;
- The decision for termination of a procedure, and
- The decision of a contractor for appointing a subcontractor.

Additionally, any action or inaction of the contracting authority/entity that prevents the tenderer from participating in the procedure may also be appealed.

#### **5. What are the time limits for appeals? Are further appeals precluded after the expiry of these limits?**

The above decisions may be appealed within ten days of the publication/receipt of the relevant decision or ten days from the notification of the relevant action. If the person is not notified or in there is an omission, the decision must be appealed within ten days of the date on which the time limit for the performance of the relevant action expires.

Regarding the decision for opening a public procurement procedure, the contracting entity may amend/ supplement the ITT within 14 days of its publications. The decision may then be appealed within ten days following the expiry of that term.

After the expiry of the above terms the right of appeal is precluded.

#### **6. How long is the standstill period?**

The standstill period starts with the receipt of the award decision by the tenderers and expires 14 days thereafter. No standstill period shall apply if only one tenderer participated in the procedure.

## 7. Which review bodies exist?

The above decisions may be appealed within ten days of the publication/receipt of the relevant decision or ten days from the notification of the relevant action. If the person is not notified or in there is an omission, the decision must be appealed within 10 days of the date on which the time limit for the performance of the relevant action expires.

Regarding the decision for opening a public procurement procedure, the contracting entity may amend/supplement the ITT within 14 days of its publications. The decision may then be appealed within ten days following the expiry of that term.

After the expiry of the above terms the right of appeal is precluded.

## 8. Are there any filing fees for an appeal?

The state fees for filing an appeal before the Competition Protection Commission are approximately:

- EUR 430 for contracts of estimated value of up to EUR 500,000;
- EUR 870 for contracts of estimated value of up to EUR 2.5m and
- EUR 2,230 for contracts of estimated value of more than BGN 2.5m.

Currently, appealing against the Competition Protection Commission's decision before the Supreme Administrative Court is subject to a state fee equal to the half of the above fees.

However, as of 1 January 2019 the state fees for an appeal against the Competition Protection Commission's decision before the Supreme Administrative Court will change and equal the fees for filing an appeal before the Competition Protection Commission.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

An appeal against the contract award decision does have a suspensive effect. The contracting authority/entity may request preliminary enforcement of the award decision. The Competition Protection Commission's ruling on the matter can be appealed, which suspends the preliminary enforcement of the award decision.

Appeals against any of the other decisions taken in the course of the procedures do not have a suspensive effect unless interim measures are requested in the appeal. In such cases the public procurement award procedure is suspended from the time the contracting entity is notified of such a procedure by the Commission on Protection of Competition until the entry into force of:

- A ruling that the request for an interim measure is overruled, or
- The decision on the appeal, if the interim measure has been imposed.

A request for interim measures may not be made when appealing any decision, action or omission of the contracting entity related to certain urgent awarding procedures and specific procedures of sectoral contracting authorities.



## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

The rules of Directive 66/2007/ EC are implemented in the new Public Procurement Act. According to the act, interested parties may request a civil court to rescind a public procurement contract if:

- The contract has been signed without conducting a mandatory public procurement procedure;
- The contracting authority/entity has applied any of the simplified terms and conditions or procedures in breach of the mandatory rules in respect thereof (e.g. illegal implementation of a negotiated procedure without a prior call for competition); or
- If the contract is signed within a standstill period which has deprived the interested party of the opportunity to participate in the procedure.

Claims for rescission of a signed public procurement contract shall be filed with the competent civil courts. The claim is subject to a court fee of 4% of the material interest of the claimant (i.e. the contract value). The claim must be filed within two months after the claimant becomes aware of the signed contract or after publication of a notice of the signed contract, but not later than one year following signing.

If the contract is rescinded, each party must return to the other party whatever it has received or the monetary equivalent of what it has received under the contract.

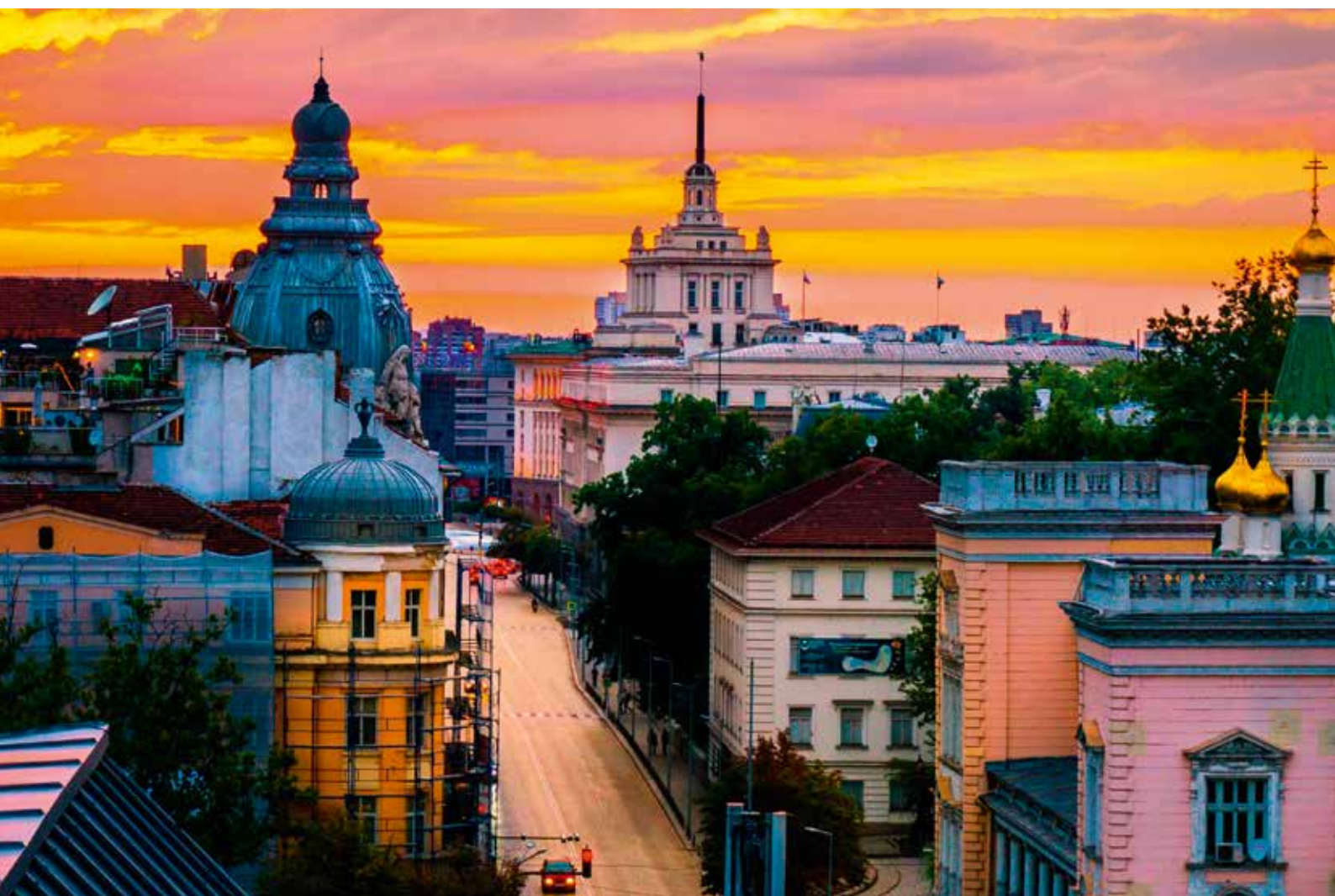
Administrative sanctions may be imposed on the contracting authorities/entities for breaches of public procurement regulations.

## 11. To which extent can procurement contracts be amended after awarding?

- Public procurement contracts and framework agreements may only be modified under the following conditions:
  - the modifications have been provided for in advance in the procurement documents and in the contract in clear, precise and unequivocal clauses, including price revision clauses or options and the scope and nature of possible modifications or options, provided that they do not provide for modifications that would alter the subject matter of the procurement;
  - additional supplies, services or works have become necessary due to unforeseen circumstances, and were not included in the initial procurement;
  - the need for modification has arisen from circumstances that a diligent contracting authority could not foresee and the modification does not alter the subject-matter of the contract or the framework agreement;
  - a new contractor replaces the contractor – several conditions must be fulfilled in this case (inability to perform, universal succession, and others);
  - substantial modifications are not required;
  - the modification is necessary due to unforeseen circumstances and does not alter the overall nature of the procurement or the framework agreement and the value of the modification is below (i) the EU thresholds and (ii) 10% of the initial contract value for services and supplies contracts and 15% for works contracts;
- If the price needs to be increased due to any of the above amendments, the increase may not exceed 50% of the value of the original contract or the framework agreement. Where successive modifications are made, the limit applies to the aggregate value of the modifications. Such consecutive modifications must not be aimed at circumventing this Act.
- In some cases, where the public procurement contract includes an indexation clause or is concluded at determinable prices, the updated price at the moment of the modification will be taken as a reference value.

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

- Currently, only the ESPD must be delivered in electronic form with e-signatures. The remaining documents must be filed on paper originals or certified true copies.
- As of 18 October 2018, the contracting authorities will only use a unified national web-based platform for public procurement procedures. The platform is still under preparation and it remains uncertain whether it will be ready in time.
- At the time of going to press, an amendment bill containing details related to the use of the web-based platform for public procurement procedures is still under discussions in the Bulgarian parliament and the initial draft is subject to change.



# China

by **Ulrike Glueck**, CMS Shanghai

October 2018

## 1. Where can one find public procurement notifications for China?

- Public procurement in the People's Republic of China ('PRC') is governed by the PRC Government Procurement Law ('GPL'). The current GPL was promulgated on 29 June 2002 and took effect on 1 January 2003. The GPL requires that public procurement notifications be publicly announced in the media, as designated by the competent government procurement regulatory authorities, unless commercial secrets are involved (Art 11 GPL). The PRC Ministry of Finance ('MOF') has designated **www.ccgp.gov.cn** as the official media to announce the public procurement notifications in the PRC. The aforementioned website is available only in the Chinese language.
- The GPL provides that contracting authorities have to acquire domestic goods, services and works, except in any of the following circumstances:
  - the goods, services or works are not available in the PRC; or
  - the goods, services or works cannot be acquired under reasonable commercial conditions in the PRC; or
  - the goods, services or works are procured for use outside the PRC; or
  - it is particularly stated otherwise in other laws or administrative regulations.

The term 'domestic goods, services and works' is not defined in the GPL. It needs to be specified further by the implementation regulations of the GPL. In practice, the public procurement notifications specify whether foreign supplies are excluded on a case-by-case basis.

## 2. What are the relevant thresholds for the applicability of the GPL?

- If a procurement meets the following conditions, the procurement is subject to the GPL:
  - the procuring entity is a government authority, a public institution or a social organisation (jointly 'Procuring Entity');
  - the intended procurement is financed by fiscal funds; and
  - the goods, services and/or works to be procured either fall under the Catalogue for Centralised Procurement ('Catalogue') or the budgeted amount of the procurement reaches the statutory thresholds.
- The central government, i.e. the State Council is empowered to determine and publish the state-level Catalogue for government procurements, which are covered by the budget of the central government ('Central Projects'). Every provincial-level government is empowered to determine and publish its respective local Catalogue for government procurements, which are covered by the budget of the provincial government ('Local Projects'). As long as the goods, services and/or works fall under the Catalogue, the procurement is subject to the GPL regardless of whether the budgeted amount of the procurement reaches the statutory thresholds.



- The State Council determines the statutory thresholds for public procurement of Central Projects if they are not mentioned in the state catalogue. According to the state-level Catalogue published by the State Council for the year 2017 – 2018, a procurement is subject to the GPL if the relevant goods, services and/or works are not mentioned in the state-level Catalogue but the budgeted amount of the procurement reaches the following thresholds:

Items	Budgeted Amount
Goods	RMB 1m
Services	RMB 1m
Works	RMB 1.2m

Every provincial government determines the statutory thresholds for the public procurement of Local Projects, if they are listed in the relevant local Catalogue. For example, according to the local-level Catalogue published by the Shanghai People's Government for the year 2019 – 2020, the procurement is subject to the GPL if the goods, services and/or works are not mentioned in the local-level Catalogue but the budgeted amount of the procurement reaches the following thresholds:

Items	Budgeted Amount
Goods	RMB 500,000
Services	RMB 500,000
Works	RMB 1m

### 3. Under what circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, or (iv) competitive dialogue?

Statutory procedures for public procurement under the GPL include (i) open procedures, (ii) restricted procedures, (iii) competitive dialogues, (iv) single source procurements, (v) requests for quotation, and other procedures acknowledged by the MOF (Art 26 GPL).

#### Open procedures

- The government procurement of a State Project is subject to an open procedure if the budgeted amount of the State Project reaches the statutory thresholds stipulated by the State Council. According to the state-level Catalogue published by the State Council for the year 2017 – 2018, the statutory thresholds triggering the open procedures are as follows:

Items	Budgeted Amount
Goods	RMB 2m
Services	RMB 2m
Works	In accordance with the <i>Provisions on Engineering Projects Which Must Be Subject to Bidding</i> promulgated by the National Development and Reform Commission and effective from 1 June 2018

- The government procurement of a Local Project is subject to the open procedures if the budgeted amount of the Local Project reaches the statutory thresholds stipulated by the relevant provincial government. For example, according to the local-level Catalogue published by the Shanghai People's Government for the year 2019 – 2020, the statutory thresholds triggering the open procedures are as below:

Items	Budgeted Amount
Goods	RMB 4m
Services	RMB 4m
Works	In accordance with the <i>Provisions on Engineering Projects Which Must Be Subject to Bidding</i> promulgated by the National Development and Reform Commission and effective from 1 June 2018

### Restricted procedures

- Restricted procedures may be adopted in any of the following circumstances:
  - the number of suppliers is limited due to a technological complexity, special requirements or restrictions of the natural environment; or
  - the costs to be paid for the open procedures are unreasonably disproportionate to the total value of the items to be procured.

### Competitive dialogues

- Competitive dialogues may be adopted in any of the following circumstances:
  - after issuing an invitation to tender (i) no suppliers submitted a tender, (ii) there were no qualified tenders, or (iii) a new invitation to tender was not possible; or
  - the nature of the procured item and complexity of the technology makes the determination of detailed specifications or specific requirement impossible; or
  - the time required to prepare an invitation to tender cannot satisfy the urgent requirement of the end-user of the procured items, for reasons neither foreseeable by the procuring entity, nor resulting from a delay due to the procuring entity; or
  - it is not possible to calculate the total price in advance due to reasons such as the impossibility of determining in advance the time or quantity of an art procurement, patents, know-how or services; or
  - the public procurement of goods and services does not reach the statutory thresholds for open procedures; or
  - the tender has been exempted from the open procedures by the competent public procurement regulatory authority, even though the public procurement of goods and services reaches the statutory thresholds for open procedures; or
  - the public procurement of works does not reaches the statutory thresholds for open procedures or restricted procedures as set out in the PRC Law on Invitation and Submission of Tenders and its implementation regulations.

In addition, subject to the approval of the competent public procurement regulatory authority, the open procedure for public procurement of goods and services can be converted into a competitive dialogue if only two suppliers have submitted tenders or only two suppliers are found to respond substantively to the invitation to tender.

### Single source procurements

- Single source procurements may be adopted in any of the following circumstances:
  - the goods, services or works can only be procured from a sole supplier; or
  - it is impossible to procure the goods, services or works from another supplier due to an unforeseeable urgency; or

- it is necessary to continue to procure from the original supplier in order to ensure consistency of the procurement project or compatibility of the ancillary services with the original procured items, and the total funds do not exceed 10% of the procured amount in the original contract; or
- the public procurement of goods and services does not reach the statutory thresholds for open procedures; or
- the open procedures have been exempted by the competent public procurement regulatory authority, even though the public procurement of goods and services has reached the statutory thresholds for open procedures; or
- the public procurement of works does not reach the statutory thresholds for open procedures or restricted procedures as set out in the PRC Law on Invitation and Submission of Tenders and its implementation regulations.

#### **Requests for quotation**

— Requests for quotation may be adopted in any of the following circumstances:

- the goods to be procured have unified specifications and standards, and the supplies are sufficient and the price variation is small; or
- the public procurement of goods and services does not reach the statutory thresholds for open procedures; or
- the open procedures have been exempted by the competent public procurement regulatory authority, even though the public procurement of goods and services has reached the statutory thresholds for open procedures; or
- the public procurement of works does not reach the statutory thresholds for open procedures or restricted procedures as set out in the PRC Law on Invitation and Submission of Tenders and its implementation regulations.

#### **4. Which decisions of a contracting authority can be appealed?**

A decision can be appealed if the supplier ('Claimant') believes that the procurement documents, procurement procedures, the acceptance of the tender, or the closing of the public procurement violates its rights and interests (Art 52 GPL).

#### **5. What are the time limits for appeals? Are further appeals precluded after the expiry of these limits?**

- The Claimant may submit a written claim to the Procuring Entity or its agent within seven working days starting from the date on which the Claimant first became aware or should have become aware of the alleged violation of its rights and interests (Art 52 GPL).
- The procuring entity or its agent, as the case may be, should reply to the Claimant or other related suppliers within seven working days following the receipt of the written claim from the Claimant (Art 53 GPL).
- If the procuring entity or its agent, as the case may be, fails to reply to the Claimant within the above time limit or the Claimant is not satisfied with the reply, the Claimant is entitled to file a complaint with the competent public procurement regulatory authority within 15 working days, starting from the expiry of the aforementioned time limit (Art 55 GPL).

#### **6. How long is the standstill period?**

No standstill period has been defined by the GPL.



## 7. Which appeal bodies exist?

The Claimant's complaint should be submitted to the competent public procurement regulatory authority. The MOF is the competent authority to deal with complaints concerning state projects. The local financial administrations at the county level or above are the competent authorities to deal with the complaints regarding local projects.

## 8. Are there any filing fees for an appeal?

No filing fees will be charged.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- Filing the complaint with the competent public procurement regulatory authority does not automatically suspend the procurement. However, after the authority has accepted the complaint of the Claimant, it may, at its sole discretion, issue an administrative order to suspend the procurement activities for a period of up to 30 days (Art 57 GPL).
- No interim measures are available to suspend problematic procurement activities under the current PRC Law.

## 10. Ineffectiveness and alternative penalties according to the GPL

- The following illegal activities by the procuring entity and its agents may render the public procurement ineffective if they affect or may affect the tender's acceptance or the closing of the transaction:
  - unauthorised use of other procurement procedures when open procedures should be used;
  - unauthorised raising of procurement standards;
  - appointment of an agent who does not possess the qualifications for carrying out the public procurement;
  - use of unreasonable conditions in order to subject a supplier to unequal or discriminatory treatment;
  - negotiating with tenders during the course of invitation to tender;
  - failure to sign a procurement contract with the winning supplier after the letter of acceptance has been issued;
  - refusal to be supervised or inspected by competent authorities;
  - collusion with suppliers;
  - taking bribes or obtaining other improper benefits during the course of procurement;
  - provision of false information during the course of supervision and inspection carried out by the competent authorities; and/or
  - disclosing the lowest reserve price before opening the tender.
- If any of the above illegal activities affect or may affect the acceptance of the tender or the closing of the transaction, the following legal consequences apply:
  - if the winning supplier has not yet been determined, the procurement activities will be halted, and a new one conducted;
  - if the winning supplier has been determined but the procurement contract has not yet been performed, the procurement contract will be cancelled and a new winning supplier will be selected from the qualified candidates; if there are no such qualified candidates, a new government procurement activity will be conducted;
  - if the procurement contract has been signed but has not yet been performed, the procurement contract will be cancelled and a new winning supplier will be selected from the qualified candidates; if there is no qualified candidate, a new government procurement activity will be conducted;
  - if the procurement contract has been performed, and has resulted in a loss for the procuring entity or other suppliers, the violating party will be liable for compensation. (Art 71 GPL Implementation Regulations).

**11. To which extend can procurement contracts be amended after awarding?**

The Chinese GPL generally prohibits modification of a procurement contract without approval.

However, when the contracting authority would like to procure additional goods, projects and services the same as those under the original public procurement contract during the performance of such contract, the parties are permitted to sign a supplementary contract for such additional procurement, provided that the other terms and conditions are not changed and the price for such additional goods, projects and services does not exceed 10% of the original contract price. (Art 49 GPL).

**12. Is it mandatory or voluntary to use e-procurement or e-signatures?**

The use of e-procurement by the procuring entity is voluntary under PRC law.



by **Daniel Rodríguez, María Lucía Amador** and **Carolina Torres**, CMS Bogotá  
October 2018

## 1. Where can one find public procurement notifications for Colombia?

- All public procurement procedure information – including prior information notices, contract notices that call for competition and tender documents – are accessible online through SECOP I and SECOP II, the public procurement platforms.
- In addition, each contracting authority also publishes notices about public procurement opportunities on their own website.

## 2. What are the relevant thresholds for the applicability of the Colombian Public Procurement Law (mainly Law 80 of 1993, 1150 of 2007, 1474 of 2011 and Decree 1082 of 2016 – hereinafter, the 'PPL')?

- The applicability of PPL is not defined by value thresholds since all public procurement procedures are subject to public procurement laws and regulations. Nevertheless, according to the PPL, the following entities are not subject to the applicability of the PPL: (i) public entities that compete on equal terms with private entities in the procurement and provision of industrial and commercial services and goods, (ii) mixed capital entities in which the state's participation is less than fifty per cent (50%) in its shareholding structure, (iii) public utilities companies, (iii) public education institutions and healthcare providers, and (iv) state-owned financial entities. These entities' procurement procedures are governed by civil and commercial laws.

## 3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

- Open procedure: The Colombian PPL stipulates that all public procurement procedures must follow open tender procedures in procuring works, services, and goods. The contracting authorities may only apply restricted, negotiated, or competitive tender procedures for the reasons and circumstances expressly set-forth in the PPL.
- Restricted procedures: This kind of procedure in which the contracting authority is entitled to preselect bidders is only available for (i) selection based on qualification/merit which is applicable to consultancy contracts and contracts for work that is mostly intellectual and (ii) public-private partnerships.
- Negotiated procedure: Although it is not expressly set out in the PPL, parties to private initiative PPP contracts usually negotiate the terms and conditions to be included in the minutes of the PPP projects to be awarded.
- Competitive dialogue: Not available.

#### 4. Which decisions of a contracting authority can be appealed?

- The PPL does not provide any appeal procedures against the contracting authority. The only remedies available for a party with a legal interest in a tender procedure (i.e. an unsuccessful bidder) are judicial actions against a decision adopted by the contracting authority within the procurement process. Judicial actions can be filed before the Colombian administrative courts in the following situations:
  - in the precontractual stage of the procurement process, the interested party may (A) request the annulment (*acción de nulidad*) of the contract notices that call for competition or (B) request the annulment and the reinstatement of the interested party's rights (*acción de nulidad y restablecimiento del derecho*) regarding (i) the award decision or (ii) the decision that disqualifies a bidder from the process or (iii) the decision to not award the contract at all, even if bids have been submitted (also known as *declaratoria de desierto*);
  - after the procurement procedure has been finalised and the contract executed, the interested party may request the annulment (*acción de nulidad*) of the contract.

#### 5. What are the time limits for appeals? Are further appeals precluded after the expiry of these limits?

- An appeal requesting the annulment or the annulment and reinstatement of rights during the precontractual stage must be filed within four (4) months of the day after the decision to be challenged is duly notified by the contracting authority. Should the party fail to file its appeal within that term, any right to appeal is precluded.
- An appeal requesting the annulment of the contract resulting from the conclusion of the procurement procedure must be filed within two (2) years of the day after the contract comes into force; in any case, it is possible to file the appeal as long as the contract is in force.

#### 6. How long is the standstill period?

- Filing an appeal does not suspend the procurement procedure, unless the plaintiff requests interim measures to this end.

#### 7. Which review bodies exist?

- First phase: Before and during the procurement procedure, the contracting authority will determine the opportunities for interested parties/bidders to submit comments or requests for amendments of the process' draft or final bidding documents.
- Final phase: Any contracting authority decision, as described in Section 4 above, will also be subject to review by the Colombian administrative courts, who will issue a final decision.

#### 8. Are there any filing fees for an appeal?

- Under the PPL there are no applicable fees for filing an appeal.

#### 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- The filing of the appeal does not suspend the procurement process, unless the plaintiff requests precautionary measures to this end.



## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

- Colombia is not a member state of the European Union. Therefore, Directive 66/2007/EC regarding possible ineffectiveness of the awarded contract is not applicable. Regardless, administrative courts may declare the ineffectiveness of awarded contracts under the judicial actions described in Section 4 above and, whenever the plaintiff requests the reinstatement of its rights, order the contracting authority to pay the proven damages caused to the plaintiff.

## 11. Can procurement contracts be amended after signing?

- Yes, it is possible to amend the value of the contract (up to 50% of its initial value) and extend the contract term to fulfill the object of the contract. Although the object of the contract cannot be amended, it can be supplemented with necessary activities to fulfill the initial object.

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

- E-signatures are not required.



# Croatia



by **Marija Mušec** and **Mia Kanceljak**, CMS Zagreb

October 2018

## 1. Where can one find public procurement notifications for Croatia?

— All notifications and related procurement documents are accessible online through a centralized electronic public procurement system operated by the National Gazette – the Electronic Public Procurement Classifieds of the Republic of Croatia (EOJN) available via <https://eojn.nn.hr/Oglasnik/>.

## 2. What are the relevant thresholds for the applicability of the Croatia's Public Procurement Law?

Awarded by	Supply contracts	Services contracts	Works contracts	Design contest
Any contracting authority	≥ approx. EUR 27,000	≥ approx. EUR 27,000	≥ approx. EUR 67,000	≥ approx. EUR 27,000
Procurement in diplomatic missions and consular offices of the Republic of Croatia abroad	≥ approx. EUR 127,000	≥ approx. EUR 127,000	≥ approx. EUR 533,333	≥ approx. EUR 127,000

## 3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

- The contracting authority is free to choose between the open or the restricted procedure.
- Contracting authorities can apply a competitive procedure with negotiation or a competitive dialogue in the following situations:
  - the needs of the contracting authority cannot be met without adapting readily available solutions; or
  - they include design or innovative solutions; or
  - the contract cannot be awarded without prior negotiations because of specific circumstances related to its nature, complexity or legal and financial make-up, or because of the risks attaching to them; or
  - the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European technical assessment, common technical specification or technical reference; or
  - in the previously conducted open or restricted procedure all bids were irregular or inadmissible.



- Contracting authorities may apply a negotiated procedure without prior publication for public works contracts, public supply contracts and public service contracts in the following situations:
  - where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered.
  - where the works, supplies or services can only be supplied by a particular economic operator for any of the following reasons:
    - i. the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
    - ii. competition is absent for technical reasons;
    - iii. the protection of exclusive rights, including intellectual property rights.
  - in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the authority cannot comply with the time limits for the open or restricted procedures or competitive procedures with negotiation. The circumstances invoked to justify extreme urgency cannot in any event be attributable to the contracting authority.
- Contracting authorities may apply the negotiated procedure without prior publication for public supply contracts in the following situations:
  - where the products involved are manufactured purely for the purpose of research, experimentation, study or development; however, contracts awarded pursuant to this point must not include quantity production to establish commercial viability or to recover research and development costs;
  - for additional deliveries by the original supplier that are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting authority to acquire supplies with different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts as well as that of recurrent contracts must not, as a general rule, exceed three years;
  - for supplies quoted and purchased on a commodity market;
  - for supplies or services purchased at particularly advantageous terms, from either a supplier definitively winding up its business activities or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.
- The negotiated procedure without prior publication may be used for public service contracts in the following situations:
  - where the contract concerned follows a design contest and is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest; in the latter case, all winners must be invited to participate in the negotiations;
  - for new services consisting in the repetition of similar services entrusted to the economic operator to which the same contracting authorities awarded an original contract, provided that:
    - such services conform with the basic project for which the original contract was awarded pursuant to a procedure;
    - the original contract was concluded based on procurement procedure;
    - the basic project indicates the extent of possible additional services and the conditions under which they will be awarded;
    - the invitation to tender for the original contract envisaged the option of using this procedure;
    - the total estimated cost of subsequent services is taken into consideration when estimating the tender value of the original contract;
    - this procedure may only be used for three years following the conclusion of the original contract.

- The negotiated procedure without prior publication may be used for public works contracts for new works consisting of the repetition of similar works entrusted to the economic operator the contracting authority awarded an original contract, provided that:
  - such services conform with the basic project for which the original contract was awarded pursuant to a procedure;
  - original contract was concluded based on procurement procedure;
  - the basic project indicates the extent of possible additional services and the conditions under which they will be awarded;
  - the invitation to tender for the original contract envisaged the option of using this procedure;
  - the total estimated cost of subsequent services is taken into consideration when estimating the tender value of the original contract;
  - this procedure may only be used for three years following the conclusion of the original contract.

#### **4. Which decisions of a contracting authority can be appealed?**

An appeal is possible against:

- Provisions of the invitation to tender or procurement documents and their amendments and modifications;
- Failure of the contracting authority to duly respond to a timely request for additional information, explanations or modification of the procurement documents and opening of tenders;
- A contract award decision;
- A decision on annulment of the procurement procedure.

#### **5. What are the time limits for appeals? Are further appeals precluded after the expiry of these limits?**

Appeal must be submitted within ten days of:

- The publication of invitation to tender or procurement documents;
- The publication of amendments and modifications to the invitation to tender or procurement documents;
- The opening of tenders;
- Receiving the contract award decision or decision on annulment of the procurement procedure.

Further appeals are precluded after the expiry of the subject limits.

#### **6. How long is the standstill period?**

The standstill period starts with the receipt of the award decision by the tenderers and expires 15 days after it. No standstill period applies if only one tenderer participated in the procedure and was selected, in case the public procurement contracts concluded are based on a framework agreement and in case of a dynamic purchase system.

#### **7. Which review bodies exist?**

Appeals shall be filed with the State Commission for the Supervision of Public Procurement Procedures (Croatian: *Državna komisija za kontrolu postupaka javne nabave – DKOM*). Its decisions are subject to review by the High Administrative Court in the final instance.



## 8. Are there any filing fees for an appeal?

The fees for filing an appeal before the State Commission for the Supervision of Public Procurement Procedures amount to approx:

- EUR 667 for estimated procurement value up to EUR 100,000;
- EUR 1,334 for estimated procurement value from EUR 100,000 to EUR 200,000;
- EUR 3,334 for estimated procurement value from EUR 200,000 to EUR 1m;
- EUR 6,000 for estimated procurement value from EUR 1m to EUR 3.333333m;
- EUR 9,333 for estimated procurement value from EUR 3.333333m to EUR 8m;
- EUR 13,333 for estimated value procurement exceeding EUR 8m.

The fee for filing an appeal against procurement documentation or if the estimated value of the procurement is unknown at the time of filling the appeal amounts to approx. EUR 667.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

In most cases appeal leads to suspension (e.g. appeal against an award decision, procurement documentation, modification of documentation, decision on inadmissibility of participation, decision rejecting an initial bid, refusal of a decision, decision on selection; notice of voluntary ex ante transparency). In such cases, the contracting authority can request continuation of the procurement procedure / conclusion of the public procurement contract or framework agreement.

Appeals against any other decisions taken in the course of the procedures do not have a suspensive effect unless interim measures are requested and permitted.

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

The State Commission for the Supervision of Public Procurement Procedures will annul a procurement contract or a framework agreement if the contracting authority concluded:

- A public procurement contract or a framework agreement without a prior public procurement procedure;
- A public procurement contract or a framework agreement during a standstill period;
- A public procurement contract or a framework agreement during a suspended appeal procedure;
- A public procurement contract or a framework agreement during an interim measure prohibiting conclusion of the contract;
- A contract based on a framework agreement contrary to the rules on awarding based on a framework agreement;
- A contract has been signed contrary to the rules on awarding in a dynamic purchase system.

The State Commission for the Supervision of Public Procurement Procedures will impose a fine on the contracting authority in the amount of 10% to 20% of the contract value.

## 11. Can procurement contracts be amended after signing?

Contracts and framework agreements may be modified without a new procurement procedure, only in accordance with the following provisions:

- 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 by the original contractor that have become necessary and that were not included in the initial procurement, where a change of contractor (i) cannot be made for economic or technical reasons and (ii) would cause significant inconvenience or substantial cost duplication for the contracting authority;
- The need for modification has been brought about by circumstances that 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 30% of the value of the original contract/framework agreement;
- A new contractor replaces the one to which the contracting authority initially awarded the contract as a consequence of either (i) an unequivocal review clause or option provided for in the initial procurement documents; (ii) universal or partial succession into the position of the initial contractor—following corporate restructuring, including takeover, merger, acquisition or insolvency—of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the law; or (iii) in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors;
- The modifications, irrespective of their value, are not substantial (substantial modifications are defined under the law);
- The value of the modification (i) does not exceed the threshold amounts in Article 4 of the Directive 2014/24, (ii) does not exceed 10% of initial goods or services contract value/15% of initial works contract value, and (iii) does not alter the overall nature of the contract.

## 12. Is the use of e-procurement or e-signatures mandatory or voluntary?

E-procurement in Croatia was fully implemented on 18 April 2018, when the use of e-ESPD became mandatory. Use of e-Certis became mandatory on 18 October 2018. The electronic submission of tenders has been mandatory in Croatia since 1 January 2016. Currently Croatia has one centralised electronic public procurement system operated by the National Gazette – the Electronic Public Procurement Classifieds of the Republic of Croatia (EOJN). Private entities are not allowed to operate e-procurement systems.

Contracting authorities may require tenderers to use e-signatures (e.g. to sign the ESPD) and they are obliged to accept advanced electronic signatures with a qualified certificate. However, bids submitted through EOJN are binding regardless of whether they are signed, so authorities may not reject a bid solely because it lacks an e-signature.

# Czech Republic

by **Tomas Matejovsky** and **Lenka Krutakova**, CMS Prague  
October 2018

## 1. Where can one find public procurement notifications for the Czech Republic?

- Journal of Public Contracts (Věstník veřejných zakázek) administered by the Ministry for Regional Development, accessible **online** (<https://www.vestnikverejnychzakazek.cz/>);
- All Czech public contract notices above the threshold can also be found on Tenders Electronic Daily ([ted.europa.eu](http://ted.europa.eu)).

## 2. What are the relevant thresholds for the applicability of the Directives (Public Procurement Act No. 134/2016 Coll. – the 'PPA')?

<b>Awarded by:</b>	<b>Central purchasing body</b>	<b>Municipality and entity using over CZK 200m or more than 50% of monetary funds from public sources (or EU)</b>
<b>Type of a public contract:</b>		
Public supply and service contracts	CZK 3.873m (approx. EUR 155,000)	CZK 5.944m (approx. EUR 238,000)
Public works contracts and services concessions	CZK 149.224m (approx. EUR 5.969m)	CZK 149.224m (approx. EUR 5.969m)
Public supply and service contracts for defence and utilities	CZK 11.915m (approx. EUR 477,000)	CZK 11.915m (approx. EUR 477,000)
Public service contracts for social or other specific services	CZK 20.172m (approx. EUR 807,000)	CZK 20.172m (approx. EUR 807,000)
Public service contracts for social or other specific public services	CZK 26.897m (approx. EUR 1.076m)	CZK 26.897m (approx. EUR 1.076m)

The PPA states also the national thresholds – CZK 2m (approx. EUR 80,000) for the public supply and service contracts and CZK 6m (approx. EUR 240,000) for public works contracts. Minor public contracts, whose estimated value does not exceed these national thresholds, do not have to be awarded in the awarding procedure according to the PPA; however, the principles of transparency, non-discrimination and equal treatment must still be fulfilled.

### 3. Under what circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

- A contracting authority is free to choose between the **open** and the **restricted procedure** (Sec. 55 PPA).
- **A negotiated procedure with publication** can be carried out (Sec. 60 PPA):
  - if the needs of the contracting authority cannot be met without adapting solutions that are readily available on the market;
  - if the performance of the public contract includes a proposal for a solution or an innovative solution;
  - if the public contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial conditions connected with the subject-matter of the contract; or
  - if technical specifications cannot be specified by reference to technical documents.
- **A negotiated procedure without publication** can be carried out especially if (Sec. 63 PPA):
  - no tenders, no suitable tenders, no requests to participate or no suitable requests to participate were submitted in response to an open or restricted procedure;
  - the performance can only be carried out by a particular contractor for unique artistic or technical reasons, or to protect exclusive rights, including intellectual property rights; or
  - urgent, compelling and unforeseeable reasons do not allow an open or restricted procedure or a negotiated procedure with publication to be implemented.
- **A competitive dialogue** can be used under the same conditions as for the negotiated procedure with publication (Sec. 68 PPA).

### 4. Which decisions of a contracting authority can be appealed?

It is possible to submit objections against any decision or action of the contracting entity (Sec. 241 PPA).

### 5. Is the use of e-procurement or e-signatures mandatory or voluntary?

- **Review by the contracting authority: Objections to the contracting authority (preliminary dispute settlement) must be submitted:**
  - within 15 days of the complainant learning about the alleged infringement (general rule);
  - within 15 days of a contracting authority action being published or delivered to a complainant;
  - before the deadline for submission of the requests for participation or bids in case of objections against tender documents;
  - within 30 days of the publication of a voluntary tender notice stating the contracting authority's intention to conclude a contract without a tender procedure.



- **Review before a body responsible for review of the tender procedures: the proposal (written petition) must be submitted to the Office for the Protection of Competition (the 'Office'):**
  - **within 10 days** of the delivery of a decision that the contracting authority has rejected the submitted objections;
  - **within 25 days** of the objection being delivered to the contracting authority in case the contracting authority failed to respond to the objections.
  - a petition to impose a ban on the performance of a public contract must be submitted to the Office at the earlier of the following two dates:
    - **1 month** after publishing the notice that a contracting authority concluded a public contract without an awarding procedure;
    - **6 months** after the public contract (without any publication of a notice) was concluded.
- **Judicial review: Administrative court action**
  - an action must be filed to the administrative court (Regional Court in Brno) **within 2 months** of receiving the Office's final decision.

Failure to observe these time limits leads to preclusion.

## 6. How long is the standstill period? No. 134/2016 Coll. – the 'PPA'?

- The contracting authority may not conclude a contract with a bidder (Sec. 246 PPA):
  - prior to the deadline for filing objections against a decision to exclude a participant, against a decision selecting the winning bidder (**15 days**), or against a voluntary notice expressing the intention to conclude a contract (**30 days**);
  - prior to the delivery of the decision on the objections to the complainant, where such objections have been filed;
  - prior to the deadline for filing a petition to launch proceedings to review the contracting authority's actions, where the contracting authority has rejected the filed objections;
  - within a period of **60 days** after the Office begins proceedings reviewing the actions of the contracting authority.

## 7. Which review bodies exist?

- The Office for the Protection of Competition.
- The Administrative Court and the Supreme Administrative Court.

## 8. Are there any filing fees for an appeal?

- There is no fee for submitting objections to the contracting authority.
- For the proceedings before the Office the petitioner must pay a deposit (to be repaid if the petition is successful) of (Sec. 255 PPA):
  - 1% of the tender price quoted by the petitioner for the entire period of performance of the public contract when submitting the petition to the Office (subject to a minimum payment of CZK 50,000 (approx. EUR 2,000) capped at CZK 10m (approx. EUR 400,000));
  - CZK 100,000 (approx. EUR 4,000) if it is not possible to determine the petitioner's tender price;
  - CZK 200,000 (approx. EUR 8,000) for a petition to impose a prohibition on the performance of contract.
- There is a CZK 10,000 fee for submitting a suggestion to the Office to start an ex officio proceeding (the fee is non-refundable).
- At the administrative court proceedings, a court fee of CZK 3,000 (approx. EUR 120) applies.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- A petition to the Office suspends the conclusion of the contract for the period of 60 days; it is necessary to apply for interim measure if it takes the Office longer to reach a decision.
- An appeal to the administrative court does not have a suspensive effect and it is always necessary to apply for interim measures.

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

- Unlawful contract award without prior publication of a tender notice may result in a petition to the Office to prevent the performance of the contract. As stated above, the petition must be made at the earlier of (a) one month after the publication of the contract award notice; and (b) six months after entering into the contract. If the Office imposes a ban on the performance of a public contract, the PPA states that the contract is void.
- To protect against the risk of an ineffective challenge to the lawful direct award of a contract, a contracting authority can publish a voluntary ex-ante transparency notice. The purpose of such notice is to notify the market of an intention and justification for a direct award. Provided the contracting authority then observes a 30-day standstill period before entering into the contract, a petition to the Office to prevent the performance of the contract cannot be successful.

## 11. To which extent can procurement contracts be amended after awarding?

Following the Directives, the Czech PPA implements the case law of the CJEU (C-454/06 Pressetext) and allows concluded contracts to be amended where the modification is not considered fundamental or substantial. The contracting authority may implement non-fundamental modifications by a simple agreement with the current supplier without having to carry out a new procurement procedure. This also applies to additional works, services or supplies under the conditions below.

The PPA defines as fundamental, changes to the obligations arising from the existing contract that would:

- Allow other bidders to participate during the original procurement procedure;
- Change the economic balance of the contractual obligation in favour of the selected bidder, or
- Lead to a substantial extension to the scope of the performance of the public contract.

The PPA does not consider the following amendments to be fundamental:

- Changes stipulated in the original contract and the tender documents;
- De minimis changes below the threshold for public contracts (10 – 15% of the value of the original public contract);
- Additional works, services or supplies which are necessary or were not foreseeable, a change of the supplier is not possible, and whose value will not exceed 50% of the original contract;
- Substitution of one or more items in the list of construction works under certain conditions.

A change of supplier is considered a fundamental change; however, the PPA allows such a change under specific circumstances (such as anticipation of such change in the contract and tender documents or legal succession).

The contracting authority is always obliged to act effectively and efficiently when amending the public contracts after awarding. Any changes to the existing contract are, of course, possible if the above conditions are met and, at the same time, if the supplier agrees with such amendments.

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

In compliance with the Directives, the PPA pushes for mandatory e-procurement. The entire communication between the contracting authority and tenderers must be in electronic form from 18 October 2018, unless the PPA expressly states the contrary. Amongst other things, bidders have to submit their bids and requests for participation electronically. However, the contract itself can be still concluded in a paper form.

During the tender procedure, the contracting authority cannot generally ask for the originals of any documents, apart from those specified in the Public Procurement Act. This means that, as a rule, the contracting authority must accept plain copies of all documents. In other words, the contracting authority cannot require bidders to submit their bids or supporting documents with e-signatures.

Before the execution of a public contract, originals or certified copies must be submitted in electronic form. If a self-declaration (or other signed document) is to be submitted as an original, it must bear a certified e-signature or have a special electronic conversion clause attached (in which case, the document would be regarded as a certified photocopy).

Interested parties need e-signatures to communicate with the Czech Competition Office in review procedures.

An e-signature is unnecessary if the parties communicate through a data box (an electronic storage site for delivering official documents and communicating with public authority bodies). Data boxes are deemed to provide certification equal to certified e-signatures.





# France



by **Kawthar Ben Khelil** and **François Tenailleau**, CMS Paris

October 2018

## 1. Where can one find public procurement notifications for France?

- Public procurement notifications can be found in the online version of the *Bulletin Officiel des Annonces des Marchés Publics* (BOAMP). Where the value of the contract exceeds European public procurement directives' thresholds, contract notices may also be found in the Official Journal of the European Union.
- Contract notices can also be published in newspapers authorised to publish legal announcements.
- Other media can also be used, especially for contracts with limited value, such as specialised publications (e.g., *Le Moniteur des Travaux publics*), local papers or specific websites.

## 2. What are the relevant thresholds for the applicability of French Public Procurement Law?

(Order n° 2015-899 of 23 July 2015, decree n° 2016-360 of 25 March 2016 and decree n° 2015-1904 of 30 December 2015)

The decree of 25 March 2016 provides for intermediary thresholds in addition to those resulting from European directives. Nevertheless, the fundamental principles of public procurement, such as equal access to public procurement and transparency, must be observed regardless of the value of the contract (even below EUR 25,000 excluding VAT).

- Contracts below EUR 25,000 excluding VAT may be concluded without prior publication (decree of 25 March 2016, art. 30-I-8°). The contracting authority must nevertheless choose a relevant offer, make good use of public money and refrain from systematically contracting with the same economic operator when the contracting authority's needs may be met by several other operators.
- Generally speaking, for contracts whose estimated value is below the European thresholds, the conditions for the publication and competition processes can be freely determined by the contracting authority (*procédure adaptée*), provided they are adapted to the object and specificities of the contract, the number and location of the economic operators likely to be interested in the contract, and the circumstances of the contract to be concluded (decree of 25 March 2016, art. 27).
- Contracting authorities may also resort to the procedure referred to as '*adaptée*' for contracts for social and other specific services, regardless of their value (decree of 25 March 2016, art. 28).



- For contracts worth between EUR 90,000 excluding VAT and the thresholds mentioned below, when the contracting authority is the French State, a public national institution that does not have an industrial and commercial nature (*établissement public de l'Etat autre qu'à caractère industriel et commercial*), a public local entity, institution or grouping (*collectivité territoriale, établissement public local or groupement de collectivités territoriales*), a contract notice has to be published either in the BOAMP or in a newspaper authorized to publish legal announcements. The contracting authority shall appreciate whether, according to the nature or amount of the products, services or works concerned, a notice in a specialized newspaper corresponding to the economic sector involved or in the *Official Journal of the European Union* is in addition necessary to guarantee appropriate information reaches any reasonably vigilant economic operators that might be interested in the contract (decree of 25 March 2016, art. 34-I-1°-b).

Contracting authorities involved	Supply contracts	Services contracts	Works contracts
Central government authorities and central public institutions	EUR 144,000	EUR 144,000	EUR 5.548m
Local government authorities and local public institutions, public health institutions (hospitals)	EUR 221,000	EUR 221,000	EUR 5.548m
Utility services sector (water, energy, transport and postal services)	EUR 443,000	EUR 443,000	EUR 5.548m

- For contracts whose values exceed the European thresholds, a contract notice also has to be published in the *Official Journal of the European Union*.

### 3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure without prior publication, (iv) competitive procedure with negotiation, (v) competitive dialogue?

- The contracting authority is free to choose among the open and the restricted procedure (*appel d'offres ouvert or appel d'offres restreint*) (order of 23 July 2015, art. 42; decree of 25 March 2016, art. 66).
- Contracting authorities may use a negotiated procedure without prior publication of a contract notice (*marché public négocié sans publicité ni mise en concurrence préalables*), in the specific cases and circumstances referred to in article 30 of the decree of 25 March 2016:
  - insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, the time limits for the open procedure, restricted procedure, negotiated procedure with prior publication or competitive dialogue cannot be complied with;
  - where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to (i) an open procedure or a restricted procedure carried out by a contracting authority, (ii) a tender procedure carried out by a contracting entity, or (iii) a tender procedure related to (a) a contract whose value is below the European thresholds or (b) related to social or other specific services or legal services involving the representation of the contracting authority in judicial proceedings, provided the initial conditions of the public contract are not substantially altered;
  - where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance; (ii) for technical reasons; (iii) the protection of exclusive rights, including intellectual property rights;

- regarding public supply contracts, (i) for additional deliveries by the original supplier intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics that would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts as well as that of recurrent contracts must not, as a general rule, exceed three years; (ii) for supplies quoted and purchased on a commodity market;
  - for the purchase of supplies or services on particularly advantageous terms, from either a supplier definitively winding up its business activities, or, subject to the 3° of article 45 of order dated 23 July 2015, a supplier under a procedure set forth by Book VI of the French commercial code (except those referred to in Title I), or a similar procedure under the national laws of another State;
  - for public service contracts, where the contract concerned follows a design contest and is to be awarded to the winner or one of the winners of the design contest; where there are several winners in the design contest, all must be invited to participate in the negotiations;
  - for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to whom the same contracting authority awarded the original contract after publication and putting into competition; the possible use of this procedure for similar works or services must be provided for in the original contract and the total estimated cost of the subsequent works or services must be taken into consideration when the original contract is concluded; this procedure may only be used during the three years following the conclusion of the original contract;
  - for public procurement valued below EUR 25,000;
  - below EUR 90,000, for supplies of non-school books concluded by contracting authorities referred to in 1° and 2° of article 3 of Act n° 81-766 of 10 August 1981, for their own needs or the enrichment of library collections for the public;
  - for public procurement whose value is below the European thresholds, and competition is impossible or obviously useless according to its object or the lack of competition in the relevant sector;
  - regarding contracting authorities seeking public supply contracts, where the products involved are manufactured purely for the purpose of research, experimentation, testing, or development and not with the aim of ensuring profitability or recovering research and development costs;
  - regarding contracting entities, where (i) the contract is concluded for the purpose of research, experimentation, testing, or development and not with the aim of ensuring profitability or recovering research and development costs; (ii) it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than the normal market price.
- Contracting authorities may apply a competitive procedure with negotiation (*procédure concurrentielle avec négociation*) or competitive dialogue (*dialogue compétitif*) in the specific cases and circumstances referred to in article 25-II of the decree of 25 March 2016:
- the needs of the contracting authority cannot be met without adapting readily available solutions;
  - the needs of the contracting authority include innovative solutions;
  - the public contract contains design services;
  - the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up of the contract or because of the risks attached to it;
  - the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European technical assessment, common technical specification or technical reference;
  - where all tenders submitted in response to an open or restricted procedure were irregular or unacceptable within the meaning of article 59 of the decree of 25 March 2016, provided the initial conditions of the public contract are not substantially altered. The contracting authority is not held to publish a contract notice where it only includes in the procedure the tenderers which, during the prior open or restricted procedure, submitted tenders in accordance with the formal and deadline requirements of the procurement procedure.
- In the utility services sectors, the use of the negotiated procedure with prior publication (*procédure négociée avec mise en concurrence préalable*) by contracting entities is always possible (decree of 25 March 2016, art. 26).

#### 4. Which decisions of a contracting authority can be appealed?

An appeal is possible against the tendering procedure and the contract awarded itself.

#### 5. What are the time limits for appeals? Are further appeals precluded after the expiry of these limits?

- The applicable time limit depends on the type of appeal filed by the claimant:
  - interlocutory procedure before the execution of the contract (*référé précontractuel*) regarding breaches of freedom of access to public procurement or equal treatment: before the conclusion of the contract (i.e. usually before the standstill period expires);
  - interlocutory procedure after the execution of the contract (*référé contractuel*) for a limited number of breaches (i.e. to sanction the contracting authority when it has made it impossible for the economic operator to file a *référé précontractuel*: see § 10 below): either (i) 31 days after the publication or notification of the award of the contract or (ii) six months from the day following the date of execution of the contract if neither the contract award notice has been published nor the award of the contract has been notified (Article R. 551-7 of the Code de justice administrative (French Code of Administrative Justice – the ‘CJA’, concerning contracts of a public nature);
  - appeal challenging the validity of the contract where serious breaches committed by the contracting authority may lead to the cancellation of the contract (review procedure which has been opened by French administrative case law concerning contracts of a public nature only: see CE, Ass., 4 April 2014, *Département de Tarn-et-Garonne*, n° 358994): this review allows interested parties to contest the validity of the contract within two months from the day the contracting authority complied with the appropriate publication measures.
- The failure to observe these time limits leads to preclusion.

#### 6. How long is the standstill period?

Regarding procedures with respect to public contracts whose value is estimated to be not less than European thresholds, the standstill period lasts at least 11 days from the day when the announcement of the contract award decision is sent to the unsuccessful tenderers where electronic means are used to inform all the tenderers concerned.

- When the notification has not been made by electronic means, the standstill is 16 days.
- No standstill period is required for (i) public contracts that are awarded to the only economic operator that participated in the tender procedure, (ii) the award of contracts based on a framework agreement or specific contracts based on a dynamic purchasing system.

(Decree of 25 March 2016, art. 101).

#### 7. Which review bodies exist?

- Concerning interlocutory procedures (*référé précontractuel*, *référé contractuel*), the review body is the President (or another judge they have appointed within their court) of the locally competent administrative court of first instance (concerning contracts of an administrative nature)<sup>1</sup>, or the locally competent<sup>2</sup> judicial court of first instance (regarding contracts of a private nature). Thereafter, an appeal may be filed with the *Conseil d’Etat* (the highest French administrative court) concerning contracts of a public nature, or before the *Cour de cassation* (the highest French judicial court) regarding contracts of a private nature.
- The appeal challenging the validity of the contract (referred to as ‘Tarn-et-Garonne review’) must be introduced before the administrative court of first instance. A review may be filed before the administrative court of appeal. Eventually, the *Conseil d’Etat* will have jurisdiction to review decisions rendered by the administrative courts of appeal.

<sup>1</sup> This generally depends on the location of the contracting authority’s headquarters or the location where the works should be executed, the supply of products be delivered or services be rendered.

<sup>2</sup> A list of judicial courts of first instance specialised in interlocutory procedures has been set forth by decree.

## 8. Are there any filing fees for an appeal?

— There are currently no fees per se<sup>3</sup> for a judicial appeal before the administrative or judicial courts.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- If an appeal is filed before the conclusion of the contract (*référé précontractuel*), it shall necessarily have an automatic suspensive effect (as the contracting authority may not sign the contract) starting from when the appeal is notified to the contracting authority until the decision has been made by the judge.
- Others reviews do not have any suspensive effect by themselves, but it is still possible to apply for interim measures to this end; the judge may even spontaneously decide to suspend the performance of the contract when the contract is of a public nature (e.g., within the framework of an interlocutory procedure filed after the signing of the contract (*référé contractuel*), the judge may order that the performance of the contract be suspended until a decision has been reached, unless they consider that, given all the interests likely to be affected and in particular the public interest, the negative consequences of this measure could prevail over its advantages).

## 10. Ineffectiveness and alternative penalties according to Dir 2007/66/EC

- A public contract is considered ineffective:
  - when no publication measure required for the conclusion of the contract has been observed;
  - if the contract has been awarded without publication in the *Official Journal of the European Union* although it was required;
  - when the applicable competition conditions have not been observed in the awarding procedure of a contract based on a framework agreement or based on a dynamic purchasing system;
  - if the contract has been signed before the expiry of the standstill period or during the period of suspension running from the notification of an interlocutory procedure filed before the conclusion of the contract (*référé précontractuel*) when, in addition, two conditions are fulfilled: (i) the infringement has deprived the tenderer of the possibility to apply for a review of the tendering procedure before the conclusion of the contract, and (ii) the alleged violation of publication and competition obligations has affected the chances of the tenderer applying for review to obtain the contract.

(CJA, art. L. 551-18 concerning contracts of a public nature).

- If the ineffectiveness encounters reasons relating to a public interest, the judge can impose alternative penalties. They must be effective, proportionate and dissuasive. Such alternative penalties may consist in (i) the early termination of the contract and/or (ii) the shortening of the duration of the contract, and/or (iii) fines imposed on the contracting authority (which will not exceed 20% of the value of the contract (CJA, art. L. 551-19, L. 551-20, L. 551-22, regarding contracts of a public nature).

## 11. To which extent can procurement contracts be amended after awarding?

- Cases where existing public contracts may be amended during their term without a new tender procedure being required are set out in article 139 of the decree of 25 March 2016 more precisely than previously.
- In substance, public contracts may be amended, in particular when:
  - the modifications, regardless of their value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, or options, provided that they do not provide for modifications that would alter the overall nature of the contract;
  - additional works, services or supplies by the original contractor have become necessary and were not included in the initial procurement where (i) a change of contractor (a) cannot be made for economic or technical reasons (e.g., requirements of interchangeability and interoperability with existing equipment, services or installations procured under the initial procurement) and (b) would cause significant inconvenience or substantial duplication of costs for the contracting authority, (ii) any increase in price shall not exceed 50% of the value of the original contract;



- the need for modification has arisen from circumstances that a diligent contracting authority could not foresee and (i) the modification does not alter the overall nature of the contract, (ii) any increase in price of each modification (provided that consecutive modifications are not aimed at circumventing the rules of the Ordinance) does not exceed 50% of the value of the original contract;
- a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either (i) an unequivocal review clause or option complying with the above-mentioned criteria, or (ii) universal or partial succession into the position of the initial contractor following corporate restructuring, provided that (i) this does not entail other substantial modifications to the contract, (ii) this is not aimed at circumventing the rules of the Ordinance, and (iii) the new contractor fulfils the criteria for qualitative selection initially set out by the contracting authority;
- the modifications are not substantial, regardless of their amount, this being specified that indications to assess whether a modification is substantial are provided by the decree;
- the amount of the modifications is below (i) the EU thresholds and (ii) 10% of the initial contract value for public supply and service contracts or 15% for public works contracts.

A reading grid of these provisions should be provided by European and French case law in the future.

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

- The use of e-procurement has been mandatory since 1 October 2018 for all contracting authorities or entities involved in public contracts whose value exceeds EUR 25,000 (excluding VAT).
  - in particular, all contracting authorities and entities must offer unrestricted and full direct access – by electronic means and free of charge – to the essential data of any procurement procedure for public contracts whose value exceeds EUR 25,000 (excluding VAT), unless the disclosure of such information would disturb public order (decree of 25 March 2016, art. 107);
  - however, it is up to the relevant contracting authority or entity to decide whether it wishes to impose the use of e-procurement throughout the duration of the contract for all communication – such as amendments to the contract, service orders or purchase orders. In this case, it must be specifically provided for in the procurement contract.
- Exemptions from the obligation to use e-procurement are in the specific cases and circumstances referred to in article 41/II of the decree of 25 March 2016, notably:
  - for procurement contracts for social and other specific contracts;
  - where, due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
  - where the applications supporting file formats suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority;
  - where the use of electronic means of communication would require specialised office equipment that is not generally available to procurers;
  - where the use of communication means other than electronic is necessary either due to a security breach of the electronic means or to protect information so sensitive that it requires a level of security that cannot be guaranteed by electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access within the meaning of article 42 / IV of the decree.
- Under the current rules the use of e-signature is optional for tenderers.
  - it is up to the relevant contracting authority to decide whether it wishes to compel economic operators – in the contract notice or the tender rules within the framework of the relevant tender procedure – to sign bids electronically (decree of 25 March 2016, art. 102);
  - in the event that the contracting authority decides an e-signature is necessary, an advanced e-signature pursuant to Regulation (EU) No 910/2014 is required. However, e-signatures previously certified in compliance with the *French Règlement Général de Sécurité* (RGS) may still be used after 1 October 2018, provided they have not yet expired.

# Germany



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The procurement directives 2014/23/EU, 2014/24/EU, and 2014/25/EU were transposed into German law on 18 April 2016.

## 1. Where can one find public procurement notifications for Germany?

- Besides TED, public procurement notices are published in various media such as daily newspapers, official announcements, professional journals and internet portals.
- 'Bund.de – Verwaltung Online' is the gateway to the services and online information of the German Federal Administration and other public agencies. The web portal contains procurement notices and can be accessed via **[www.bund.de](http://www.bund.de)**.
- In addition, there are several other national internet portals, where public tenders are published, such as: **[www.vergabe24.de](http://www.vergabe24.de)**; **[www.evergabe-online.de](http://www.evergabe-online.de)**; **[www.dtad.de](http://www.dtad.de)**; **[www.dtv.de](http://www.dtv.de)**.
- The federal states (Bundesländer) have different internet platforms, which contain public procurement notices. Especially noteworthy are the following:
  - Baden-Wuerttemberg: **[www.lzbn.de/ausschreibungen](http://www.lzbn.de/ausschreibungen)**
  - Bavaria: **[www.vergabe.bayern.de](http://www.vergabe.bayern.de)**; **[www.auftraege.bayern.de](http://www.auftraege.bayern.de)**
  - Berlin: **[www.vergabeplattform.berlin.de](http://www.vergabeplattform.berlin.de)**
  - Brandenburg: **[vergabemarktplatz.brandenburg.de](http://vergabemarktplatz.brandenburg.de)**
  - Bremen: **[www.vergabe.bremen.de](http://www.vergabe.bremen.de)**
  - Hamburg: **[www.hamburg.de/wirtschaft/ausschreibungen-wirtschaft/](http://www.hamburg.de/wirtschaft/ausschreibungen-wirtschaft/)**
  - Hesse: **[www.had.de](http://www.had.de)**
  - Lower Saxony: **<https://vergabe.niedersachsen.de/>**
  - North Rhine-Westphalia: **[www.evergabe.nrw.de](http://www.evergabe.nrw.de)**
  - Rhineland-Palatinate: **[www.vergabe.rlp.de](http://www.vergabe.rlp.de)**; **[www.rlp.vergabekommunal.de](http://www.rlp.vergabekommunal.de)**
  - Saarland: **<https://vergabe.saarland/>**
  - Saxony: **[www.sachsen-vergabe.de](http://www.sachsen-vergabe.de)**
  - Saxony-Anhalt: **[www.evergabe.sachsen-anhalt.de](http://www.evergabe.sachsen-anhalt.de)**
  - Schleswig-Holstein: **[www.e-vergabe-sh.de](http://www.e-vergabe-sh.de)**
  - Thuringia: **[www.portal.thueringen.de](http://www.portal.thueringen.de)**
- Several municipalities have also started publishing tender notices on their websites.

## 2. What are the relevant thresholds for the applicability of German procurement law?

— Above the EU thresholds, the following national regulations apply:

All services/supplies	Act Against Restraints on Competition ( <i>Gesetz gegen Wettbewerbsbeschränkungen</i> – GWB), Section 4 – Award of Public Contracts (§§ 97 et seq.)
All services/supplies except services/supplies within the transport, water and energy sectors or concessions	Regulations on the Award of Public Contracts ( <i>Verordnung über die Vergabe öffentlicher Aufträge</i> – VgV)
Construction services	Section 2 of the Regulations on Contract Awards for Construction Services ( <i>Vergabe- und Vertragsordnung für Bauleistungen</i> – VOB/A-EU)
Services/supplies within the transport, water and energy sectors	Regulations on Contract Awards in the Transport, Water and Energy Sectors ( <i>Sektorenverordnung</i> – SektVO)
Concessions	Regulations on the Award of Concession Contracts ( <i>Konzessionsvergabeordnung</i> – KonzVgV)
Services/supplies within the defence and security sector	Regulations on Contract Awards in the Defence and Security Sector (VSVgV)
Construction services within the defence and security sector	Section 3 of the Regulations on Contract Awards for Construction Services ( <i>Vergabe- und Vertragsordnung für Bauleistungen</i> – VOB/A-VS)

— Below the EU thresholds, the following national regulations apply:

Construction services	Section 1 of VOB/A
Supplies and services	Regulations on the Award of Public Supply and Service Contracts below the EU-thresholds ( <i>Unterschwelvenvergabeordnung</i> – UVgO) or Section 1 of VOL/A

— For the permissibility of directly awarding contracts and applying the restricted procedure, the following thresholds apply at the national and state level (in EUR):

Supplies and Services		
Federation (Bund)/Federal state (Bundesland)	Direct Award	Restricted Tender Procedure
Federation	not defined	not defined
Baden-Wuerttemberg (state)	EUR 50,000	EUR 100,000
Bavaria (local communities)	EUR 50,000	EUR 100,000
Bavaria (state)	EUR 50,000	not defined
Supplies and Services		
Berlin	EUR 10,000	EUR 100,000
Brandenburg (local communities)	EUR 100,000	EUR 100,000
Brandenburg (state)	EUR 20,000	EUR 20,000
Bremen	EUR 50,000	EUR 100,000
Hamburg	EUR 50,000	EUR 100,000
Hesse	EUR 50,000 to EUR 100,000	EUR 207,000
Mecklenburg-Western Pomerania	EUR 100,000	EUR 100,000
Lower Saxony	EUR 25,000	EUR 50,000
North Rhine-Westphalia (local communities)	EUR 100,000	EUR 100,000
North Rhine-Westphalia (state)	EUR 15,000	EUR 50,000 to EUR 100,000
Rhineland-Palatinate	EUR 20,000	EUR 40,000
Saarland	EUR 10,000 to EUR 15,000	EUR 50,000 to EUR 100,000
Saxony	EUR 25,000	not defined
Saxony-Anhalt	EUR 25,000	EUR 50,000
Schleswig-Holstein	EUR 100,000	EUR 100,000
Thuringia	EUR 20,000	EUR 50,000



Construction Services		
Federation (Bund)/Federal state (Bundesland)	Direct Award	Restricted Tender Procedure
Federation	EUR 10,000	a. Extension work, landscape construction, road equipment: up to EUR 50,000
b. Remaining work up to EUR 100,000	EUR 50,000	EUR 100,000
c. Underground construction engineering, traffic route construction and civil engineering up to EUR 150,000	EUR 50,000	EUR 100,000
Baden-Wuerttemberg (local communities)	EUR 20,000	EUR 50,000 to EUR 150,000
Baden-Wuerttemberg (state)	EUR 10,000	EUR 50,000 to EUR 150,000
Bavaria (local communities)	EUR 50,000	EUR 125,000 to EUR 500,000
Bavaria (state)	EUR 10,000	EUR 50,000 to EUR 150,000
Berlin	EUR 20,000 to EUR 50,000	EUR 200,000 to EUR 500,000
Brandenburg (local communities)	EUR 100,000	EUR 1m
Brandenburg (state)	EUR 20,000	EUR 200,000
Bremen	EUR 50,000	EUR 500,000
Hamburg	EUR 100,000	EUR 1m
Hesse	EUR 100,000 per technical lot	EUR 100,000 to EUR 1m per technical lot
Mecklenburg-Western Pomerania	EUR 200,000	EUR 1m
Lower Saxony	EUR 25,000	EUR 50,000 to EUR 150,000
North Rhine-Westphalia (local communities)	EUR 100,000	EUR 1m
North Rhine-Westphalia (state)	not defined	EUR 50,000 to EUR 150,000
Rhineland-Palatinate	EUR 10,000	EUR 50,000 to EUR 150,000

Saarland	EUR 10,000	EUR 50,000 to EUR 150,000
Saxony	EUR 25,000	EUR 50,000 to EUR 150,000
Saxony-Anhalt	EUR 10,000	EUR 50,000 to EUR 150,000
Schleswig-Holstein	EUR 100,000	EUR 1m
Thuringia	EUR 50,000	EUR 150,000

- Additional information can be found in the following fact sheet provided by the Contract Advisory Centre Hesse: [https://www.absthessen.de/pdf/Wertgrenzen\\_Bund\\_%20Bundesländer\\_2017.pdf](https://www.absthessen.de/pdf/Wertgrenzen_Bund_%20Bundesländer_2017.pdf)
- Federal states have also enacted state laws providing for additional procurement rules, which are in part applicable only in relation to contracts exceeding specific thresholds.
- In 2018 and 2019 the Regulations on the Award of Public Supply and Service Contracts below the EU-thresholds (*Unterschwelvenvergabeordnung – UVgO*) are gradually being introduced by federal states and at a local level. The thresholds and procedures may deviate.

**3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure (competitive procedure with negotiation/negotiated procedure without prior publication), (iv) competitive dialogue, (v) innovation partnership?**

- Above the EU thresholds
- Above the EU thresholds and depending on the relevant German regulations (see Question 2) the circumstances for the applicability of the different procedures are the following:

**Section 2 VOB/A**

**(Applicable for construction services, see Question 2)**

Open procedure (*Offenes Verfahren*):

- The contracting authority may choose the open procedure or the restricted procedure with a prior call for competition.

(§ 3a EU (1) VOB/A).

Restricted procedure with a prior call for competition (*nicht offenes Verfahren mit Teilnahmewettbewerb*):

- The contracting authority may choose the open procedure or the restricted procedure with a prior call for competition.

(§ 3a EU (1) VOB/A).

Negotiated procedure with a prior call for competition (*Verhandlungsverfahren mit Teilnahmewettbewerb*) is permissible:

- If the needs of the contracting authority cannot be met without adapting readily available solutions.
- If the contract includes design or innovative solutions.
- If the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial makeup of the contract or because of the risks attaching to them.
- If the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference within the meaning of points 2 to 5, Annex VII of Directive 2014/24/EU.
- If an open or a restricted procedure has been annulled because only irregular or unacceptable tenders were submitted.

(§ 3a EU (2) VOB/A).

Negotiated procedure without a call for competition (*Verhandlungsverfahren ohne Teilnahmewettbewerb*) is permissible:

- If in response to an open or restricted procedure:
  - only irregular or unacceptable tenders were submitted, and
  - the negotiated procedure includes all of, and only, the tenderers from the prior procedure that have the professional qualification and the capability and were not excluded due to § 6e EU VOB/A.
- If in response to an open or restricted procedure:
  - no tenders or requests to participate were submitted, or
  - only tenders or requests to participate were submitted from tenderers that do not have the professional qualification or the capability, or which were excluded due to § 6e EU VOB/A, or
  - only tenders were submitted that do not satisfy the conditions of the procurement documents.
- Provided that the initial procurement documents are not substantially altered.
- If the works, supplies or services can be supplied only by a particular economic operator because:
  - the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance, or
  - competition is absent for technical reasons, or
  - the protection of exclusive rights, including intellectual property rights.
- Provided that no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.
- If it is strictly necessary for reasons of extreme urgency brought about by events unforeseeable by the contracting authority which prevent the authority from complying with the time limits for the open or restricted procedures or competitive procedures with negotiation; or
- If similar works are repeated and the works are entrusted to the economic operator by the same contracting authority that awarded the original contract, provided that those works are conform with a basic project for which the original contract was awarded pursuant to a procedure in accordance with § 3a EU VOB/A.

(§ 3a EU (3) VOB/A).

Competitive dialogue (*Wettbewerblicher Dialog*) is permissible:

- In all cases where a negotiated procedure with a prior call for competition may be applied.

(§ 3a EU (4) VOB/A).

Innovation partnership (*Innovationspartnerschaft*) is permissible:

- If the aim is the development of innovative works as well as the subsequent purchase of the resulting works, provided that the needs of the contracting authority cannot be satisfied by readily available works on the market.

(§ 3a EU (5) VOB/A).

**VgV**

**(Applicable for all services/supplies except services/supplies within the transport, water and energy sectors or concessions, see Question 2)**

Open and Restricted procedure (*Offenes und nicht offenes Verfahren*):

- The contracting authority may choose the open procedure or the restricted procedure with a prior call for competition.

(§ 14 (2) VgV).

Negotiated procedure with a prior call for competition (*Verhandlungsverfahren mit Teilnahmewettbewerb*) is permissible:

- If the needs of the contracting authority cannot be met without adapting readily available solutions.
- If the contract includes design or innovative solutions.
- If the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial makeup of the contract or because of the risks attaching to them.
- If the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference within the meaning of points 2 to 5 Annex 1 of VgV.
- If an open or a restricted procedure has been annulled because only irregular or unacceptable tenders were submitted.

(§ 14 (3) VgV).

Negotiated procedure without a call for competition (*Verhandlungsverfahren ohne Teilnahmewettbewerb*) is permissible:

- If, in response to an open or restricted procedure, no or no suitable tenders, or no suitable requests to participate were submitted, provided that the initial conditions of the contract are not substantially altered.
- If the contract can be supplied only by a particular economic operator because:
  - a unique work of art or a unique artistic performance will be created or acquired, provided that no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement, or
  - competition is absent for technical reasons, provided that no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement, or
  - of the protection of exclusive rights, including industrial property rights.
- If it is strictly necessary for reasons of extreme urgency brought about by events unforeseeable by the contracting authority which prevent the authority from complying with the time limits for the open or restricted procedures or competitive procedures with negotiation.
- If the products involved are manufactured purely for the purpose of research, experimentation, study or development; however, contracts awarded pursuant to this point must not include quantity production to establish commercial viability or to recover research and development costs.
- If additional deliveries are purchased by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations and a change of supplier would oblige the contracting authority to acquire supplies with different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts as well as that of recurrent contracts shall not, as a general rule, exceed three years.
- If the supplies are quoted and purchased on a commodity market.
- If there are particularly advantageous terms for the purchase of supplies or services, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.



- If the contract concerned follows a design contest in the meaning of § 69 VgV and the contract is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest; in the latter case, all winners must be invited to participate in the negotiations.
- If similar services are to be repeated and the services are entrusted to the economic operator by the same contracting authority that awarded the original contract, provided that those works conform with a basic project for which the original contract was awarded pursuant to a procurement procedure but not within a negotiated procedure without a call for competition.

(§ 14 (4), (5) VgV).

Competitive dialogue (Wettbewerblicher Dialog) is permissible:

- In all cases where a negotiated procedure with a prior call for competition may be applied.

(§ 14 (3) VgV).

Social and other specific services (in the meaning of § 130 GWB):

- The contracting authority may choose the open procedure or the restricted procedure with a prior call for competition as well as the negotiated procedure with a prior call for competition, the competitive dialogue and the innovation partnership. Negotiated procedure without a call for competition may only be applied under the circumstances set out in § 14 (4) VgV.

(§ 65 (1) VgV).

Architectural and engineering services:

- Competitive procedure with a prior call for competition or competitive dialogue may be applied as a matter of course.

(§ 74 VgV).

## **SektVO**

**(Applicable for services/supplies within the transport, water and energy sectors, see Question 2)**

- The contracting authority may choose the open procedure, the restricted procedure and the negotiated procedure with a prior call for competition.

(§ 13 (1) SektVO).

- The negotiated procedure without a call for competition is permissible:
  - if no or no suitable tenders, or no or no suitable requests to participate were submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not substantially altered;
  - if the contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek those ends, in particular;
  - if the contract can only be supplied by a particular economic operator because:
    - a unique work of art or a unique artistic performance will be created or acquired, provided that no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
    - competition is absent for technical reasons, provided that no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
    - of the protection of exclusive rights, including intellectual property rights.
  - if it is strictly necessary for reasons of extreme urgency brought about by events unforeseeable by the contracting authority which prevent the authority from complying with the time limits for the open or restricted procedures, or negotiated procedures with prior call for competition. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting entity;

- in case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, and a change of supplier would oblige the contracting entity to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- if new works or services consisting in the repetition of similar works or services are assigned to the contractor to which the same contracting authorities awarded an earlier contract, provided that such works or services conform to a basic project which was awarded in a procurement procedure but not within a comparative procedure with negotiation without a call for competition;
- if the supplies are quoted and purchased on a commodity market;
- for bargain purchases, if it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
- if the purchase of supplies or services can be made under particularly advantageous conditions from either a supplier which is definitively winding up its business activities or the liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;
- if the service contract concerned follows a design contest in the meaning of § 60 SektVO and is to be awarded, under the rules provided for in the design contest, to the winner or to one of the winners of that contest; in the latter case, all the winners shall be invited to participate in the negotiations.

(§ 13 (2) SektVO).

The competitive dialogue can be applied if it happens in accordance with the conditions set up in the SektVO for that kind of procedure.

(§§ 13 (1), § 17 SektVO).

The innovation partnership can be chosen if the aim is the development of an innovative service as well as the subsequent purchase of the resulting service, provided that the needs of the contracting authority cannot be satisfied by works readily available on the market.

(§§ 13 (1), 18 (1) SektVO).

### **KonzVgV**

**(applicable for concessions, see Question 2)**

— No specified procurement procedures have to be chosen. The contracting authority can arrange the award procedure freely but in accordance with the KonzVgV.

(§ 12 (1) KonzVgV).

### **VSVgV**

**(Applicable for contracts involving defence and security aspects, see Question 2)**

— In general, contracts are awarded in a restricted procedure with a prior call for competition or in a negotiated procedure with a prior call for competition.

(§ 11 (1) VSVgV).

— In justified exceptional cases – the concrete conditions are not set out in detail – the contracting authority may award contracts in a negotiated procedure without a call for competition or in a competitive dialogue.

(§ 11 (1) VSVgV).

— Below the EU thresholds

— Below the EU thresholds and depending on the corresponding German regulations (see Question 2) the conditions under which the different procedures are applicable are as follows:

## Section 1 VOB/A

### (Applicable for construction services, see Question 2)

#### Open procedure (*Öffentliche Ausschreibung*)

- The contracting authority has to choose the open procedure as far as the peculiarity of the contract or specific circumstances do not justify another procedure.

(§ 3a (1) Section 1 VOB/A).

#### Restricted procedure (*beschränkte Ausschreibung*) is permissible:

- If the contract value does not exceed the following thresholds:
  - extension work, landscape construction, road equipment: up to EUR 50,000;
  - underground construction engineering, traffic route construction and civil engineering: up to EUR 150,000;
  - remaining work: up to EUR 100,000.
- If the award did not have an acceptable result; or
- If an open procedure is inappropriate for other reasons.

(§ 3a (2) Section 1 VOB/A).

#### Restricted procedure with a prior call for competition (*beschränkte Ausschreibung mit Teilnahmewettbewerb*) is permissible:

- If the contractual performance can be adequately provided only by a limited number of companies.
- If the preparation of the offer involves disproportionate efforts.

(§ 3a (3) Section 1 VOB/A).

#### There are no regulations regarding a negotiated procedure in Section 1; instead, a direct award (*Freihändige Vergabe*) is permissible:

- If the open procedure or the restricted procedure is inexpedient, in particular if:
  - the services can be supplied for specific reasons only by a particular economic operator;
  - the services are necessary for reasons of urgency;
  - the services cannot be defined so clearly and exhaustively that sufficiently comparable tenders can be expected;
  - an open or restricted procedure has been annulled and an acceptable result is not to be expected within a new procedure;
  - it is necessary due to reasons of secrecy; or
  - a small service cannot be separated from a larger one without any disadvantage.
- However, the principles of competition are applicable and, if relevant for the European market, a negotiated procedure with a prior call for competition is required.
- If the contract value does not exceed the threshold of EUR 10,000 (excluding VAT).

(§ 3a (4) Section 1 VOB/A).

## Section 1 VOL/A

### (Applicable for supplies and services, see Question 2)

#### Open procedure (*Öffentliche Ausschreibung*)

- The contracting authority has to choose the open procedure if another procedure is not permissible.

(§ 3 (2) VOL/A).

Restricted procedure with a prior call for competition (*beschränkte Ausschreibung mit Teilnahmewettbewerb*) is permissible:

- If the service can be adequately provided only by a limited number of companies.
- If the open procedure is inexpedient for other reasons.

(§ 3 (3) VOL/A).

Restricted procedure without a call for competition (*beschränkte Ausschreibung ohne Teilnahmewettbewerb*) is permissible:

- If an open procedure has not yielded an economically advantageous result.
- If an open procedure involves disproportionate efforts for the contracting authority or the tenderers.

(§ 3 (4) VOL/A).

There are no regulations regarding a negotiated procedure in Section 1; instead, a direct award (*Freihändige Vergabe*) is permissible:

- If a public or restricted procedure has been annulled and a repetition holds no prospect of an economically advantageous result.
- If subsequent to development services, contracts of adequate scope and for adequate periods must be awarded to enterprises involved in the development.
- If the supplies of goods or the provision of services are needed for the performance of specialist scientific-technical tasks in research, development and studies that are not intended for the purpose of maintaining the general operations and infrastructure of a contracting authority agency.
- For repeat contracts of minor value following on an existing contract when no higher price is expected than for the initial performance and the repeat contracts altogether do not exceed 20% of the value of the initial contract.
- If replacement or accessory parts for machinery and equipment are to be obtained from the initial supplier and these parts cannot be procured at adequate quality or on economically advantageous terms and conditions from other enterprises.
- If necessary for reasons of secrecy.
- If due to circumstances that could not have been foreseen by the contracting authorities, the service is of special urgency and the reasons for such urgency cannot be ascribed to the conduct of the contracting authorities.
- If the type and scope of services cannot be described clearly and exhaustively enough to be able to expect adequately comparable tenders.
- If it is permissible under executive regulations of a federal minister or a federal state minister.
- If contracts are to be awarded solely to workshops for disabled persons.
- If contracts are to be awarded solely to penal establishments.
- If the services can be supplied for specific reasons only by a particular economic operator.

However, the principles of competition are applicable and if relevant for the European market a negotiated procedure with a prior call for competition is required.

- If the contract value does not exceed the threshold of EUR 500 (excluding VAT).

(§ 3 (5, 6) VOL/A).

A direct purchase (*Direktkauf*) is permissible:

- If the contract value does not exceed the threshold of EUR 500 (excluding VAT).

(§ 3 (6) Section 1 VOL/A).



#### 4. Which decisions of a contracting authority may be appealed?

- In theory, an appeal may be lodged against any decision of the public contracting authority taken during the preparatory phase or during an award procedure which infringes or is likely to infringe the rights of the tenderer.
- In fact, decisions below the EU thresholds are rarely successfully challenged. An appeal against a decision above the EU thresholds can be successful if the many legal peculiarities, such as short mandatory time limits and formal requirements, are met. In any case, it is strongly recommended to consult a lawyer specialised in public procurement law at an early stage.

#### 5. What are the time limits for appeals? Are further appeals precluded after the expiry of these limits?

A specific legal framework for appeals in award procedures exists only above the EU thresholds. The procedure can be divided into three stages. Each stage has its own time limits. In general, the time limits are quite short. It should be noted that the procedures and deadlines may vary. The following instructions can be used as a general guideline. Failure to comply with a time limit leads to exclusion: the procedure becomes inadmissible and the specific infringement cannot be challenged.

- Stage 1: Raising an objection (*Rüge*) against the contracting authority.
- If the appellant becomes aware of an infringement before initiating a review procedure (*Nachprüfungsverfahren*), the infringement must be the subject of an objection within ten days. If the infringement is apparent from the contract notice or the procurement documents, the objection must be lodged before the time limit for the submission of a tender expires as specified in the contract notice. Please note: The criterion of unreasonable delay is no longer relevant due to changes in the law.
- Stage 2: Review procedure (*Nachprüfungsverfahren*).
- If the contracting authority fails to comply with the objection, the time limit for initiating a review procedure before the Public Procurement Chamber (*Vergabekammer*) is 15 calendar days from the date of receipt of the decision.
- Stage 3: Immediate complaint (*Sofortige Beschwerde*).

If the review procedure before the Public Procurement Chamber (*Vergabekammer*) has been unsuccessful, an immediate appeal (*Sofortige Beschwerde*) may be lodged with the Higher Regional Court (*Oberlandesgericht*) within two weeks from the date of service (*Zustellung*) of the decision.

#### 6. How long is the standstill period?

Above EU threshold:

- The standstill period amounts to 15 calendar days from the day after the contracting authority dispatches the contract award decision in writing to the unsuccessful tenderers and candidates; the standstill period is reduced to ten calendar days if fax or electronic means are used (§ 134 (2) GWB).
- There is no standstill period in cases in which negotiation procedures are justified without previous notification on grounds of extreme urgency (§ 134 (3) GWB).

Below EU threshold:

- On a national level, there is no mandatory standstill period.
- On a state level, some states stipulate standstill periods ranging from seven to ten days prior to the conclusion of the contract (see § 12 (1) Procurement Act Mecklenburg-Western Pomerania, § 8 (1) Procurement Act Saxony, § 19 (1) Procurement act Saxony-Anhalt and § 19 (1) Procurement Act Thuringia).

## 7. Which review bodies exist?

Above EU threshold:

- Authority of first instance:
  - review procedure (*Nachprüfungsverfahren*) is carried out by public procurement tribunals (*Vergabekammern*);
  - if the contract is attributable to the Federation, the review is undertaken by the national public procurement tribunals (*Vergabekammern des Bundes*) at the Federal Cartel Office (*Bundeskartellamt*) (§§ 156 (1), 158 (1) GWB);
  - other contracts are reviewed by the competent state public procurement tribunals (*Vergabekammern der Länder*) in the form of administrative bodies.
- Authority of second instance: immediate complaints (*Sofortige Beschwerde*) go to the award division (*Vergabesenat*) of the court of appeal (*Oberlandesgericht*), which has jurisdiction over the seat of the public procurement tribunal (§ 171 (3) GWB);
- An overview of procurement tribunals and award divisions is available at the following link: **[www.bundesanzeiger-verlag.de](http://www.bundesanzeiger-verlag.de)**.

Below EU threshold:

- On a national level, there are no specific public procurement tribunals or other dedicated review bodies.
- On a state level, some states have established review bodies, including Hesse, Saxony, Saxony-Anhalt and Thuringia (see § 20 Procurement Act Hesse, § 8 (2) Procurement Act Saxony, § 19 (2) and (3) Procurement Act Saxony-Anhalt, § 19 (2) and (3) Procurement Act Thuringia).
- Apart from that, competitors may also bring actions before ordinary civil courts to prevent the contracting authority from entering into contracts. To secure their rights, they may seek interim legal protection under §§ 935 et seq. German Code of Civil Procedure (*Zivilprozessordnung*). Administrative courts may also be competent to hear specific matters such as certain concessions which are classified as public law contracts.

Review by the competent supervisory authority (*Aufsichtsbehörde*), including legal, functional and disciplinary supervision (see § 155 GWB).

## 8. Are there any filing fees for an appeal?

- Authority of first instance (*Vergabekammer*): the procedural fee is between EUR 2,500 and EUR 50,000; in exceptional cases, e.g. those of significant economic interest, up to EUR 100,000 (§ 182 (2) GWB). In general, the assessment of fees depends on administrative efforts and economic interest. Every party has to bear this procedural fee if it loses the case.
- Authority of second instance (*Vergabesenate*) and ordinary civil courts: fees depend on the value in dispute (*Streitwert*); the general German law on court fees (*Gerichtskostengesetz*) is applicable.
- Besides the procedural fees, the unsuccessful party has to bear the legal defence costs incurred by the successful party. The legal defence costs also depend on the value in dispute (*Streitwert*); the general German law on lawyers' fees (*Rechtsanwaltsvergütungsgesetz*) is applicable.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

Above EU threshold:

- As soon as the contracting authority receives written information from the review body about the initiation of a review procedure, the possibility of awarding the contract is suspended until the review procedures are complete (§ 169 (1) GWB).
- On application by the tenderer, further interim measures can be ordered by the review body if other rights of the tenderer have been jeopardised during the award procedure (§ 169 (3) GWB).

Below EU threshold:

- On a state level, only the Procurement Acts of Thuringia, Saxony and Saxony-Anhalt contain regulations providing for a suspension. The contracting authority may conclude the contract only if the review body does not – upon application of the tenderer – object to the award procedure within a certain time limit (see § 19 (2) Procurement Act Thuringia, § 8 (2) Procurement Act Saxony, § 19 (2) Procurement Act Saxony-Anhalt).

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EG

- Upon application, a contract with a value above the EU thresholds can be declared ineffective ab initio by the review body if the contracting authority has violated § 134 GWB (standstill period) or has awarded a public contract directly to a company without inviting other companies to participate in the award procedure and without this being expressly permissible according to the law (§ 135 (1) GWB). The application must be filed within 30 calendar days after receipt of knowledge of the infringement or 30 calendar days after publication of the notice of the award in the Official Journal of the European Union or at the latest within six months after the conclusion of the contract (§ 135 (2) GWB).
- There are no alternative penalties according to Dir 66/2007/EC under German Public Procurement Law.
- Under certain conditions, a tenderer may be entitled to claim compensation from the contracting authority according to § 181 GWB or the general rules of German civil law.

## 11. To which extent can procurement contracts be amended after awarding?

Above EU thresholds:

- Procurement contracts can be amended after awarding insofar as the modification is not considered to be substantial. § 132 GWB enumerates an exhaustive list of cases in which modifications are in conformity with public procurement law such as review clauses provided for in the initial procurement documents, additional services if the contractor cannot reasonably be changed, unforeseeable circumstances, replacement of contractor in case of succession, or low value of the modification (10% supplies and services, 15% works). The list follows closely the wording of the EU directives such as Art. 72 Dir 2014/24/EU.

Below EU thresholds:

- The Regulations on the Award of Public Supply and Service Contracts below the EU thresholds adopt and modify the regime applicable above the EU thresholds. The threshold for a modification to be considered as low value is increased to 20% with respect to supplies and services (§ 47 UVgO).

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

Above EU thresholds:

- Following a phase-in period, e-procurement became mandatory for all contracting authorities, except the defence and security sector, on 18 October 2018. Justified exceptions may apply. The contracting authority may demand the use of e-signatures or e-seals on a case-by-case basis.

Below EU thresholds:

- The Regulations on the Award of Public Supply and Service Contracts below the EU thresholds provides for a phase-in period until 1 January 2020. The contracting authority may demand the use of e-signatures or e-seals on a case-by-case basis. Since 18 October 2018, the contracting authority has been permitted to rely solely on e-procurement for works contracts. Please note that the introduction of the regulations including e-procurement is subject to the competence of each federal state and may differ.





# Hungary



By **Veronika Kovács** and **Tamás Tercsák**, CMS Budapest

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## 1. Where can one find public procurement notifications for Hungary?

- Public Procurement Bulletin, the Official Journal of the Public Procurement Authority; available online under **[www.kozbeszerzes.hu](http://www.kozbeszerzes.hu)** – This also contains the notifications sent to TED as a matter of information.
- Electronic Public Procurement System, the central IT system supporting the conclusion of public procurement procedures operated by the Cabinet Office of the Prime Minister, available under **<https://ekr.gov.hu/portal/kezdolap>**. The public procurement notifications may be searched after registering on the system.
- A contracting authority may publish its notification in any way it prefers (e.g. on its webpage) provided that it does not contain data differing from the version sent for publication to TED or the Public Procurement Bulletin.

## 2. What are the relevant thresholds for the applicability of Hungarian law?

The relevant thresholds for public procurements by contracting authorities other than public service providers are:

- For supply contracts: HUF 15m (approx. EUR 46,200);
- For services contracts: HUF 15m (approx. EUR 46,200);
- For public works contracts: HUF 25m (approx. EUR 76,900);
- For works concession: HUF 100m (approx. EUR 307,700);
- For services concession: HUF 30m (approx. EUR 92,300).

The relevant thresholds for public procurements by public service providers as contracting authorities are:

- For supply contracts: HUF 50m (approx. EUR 153,800);
- For services contracts: HUF 50m (approx. EUR 153,800);
- For public works contracts: HUF 100m (approx. EUR 307,700);
- For works concession: HUF 200m (approx. EUR 615,400);
- For services concession: HUF 100m (approx. EUR 307,700).

### 3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

- The contracting authority is free to choose among the **open and the restricted procedure** – Section 49(1)-(2) of Act CXLI of 2015 on public procurements ('PPA'). These are referred to as 'general procedures' for which no special circumstances are required.
- There are two types of negotiated procedures. A negotiated procedure may be launched (i) with or (ii) in exceptional cases without prior publication of a contract notice. The applicability of these procedures may depend on the existence of certain special circumstances set out in the PPA as follows:
- **A negotiated procedure with prior publication of a contract notice and competitive dialogue** can be carried out (Section 85(2) of the PPA):
  - if the needs of the contracting authority cannot be met without adapting on the market readily available solutions;
  - if the object of the procurement includes design or innovative solutions;
  - the best offer cannot be identified without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up of the contract or because of the risks attached to it;
  - the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference within the meaning of specific other legislation; or
  - where a previous open or restricted procedure was declared unsuccessful because only unacceptable tenders had been submitted, or the procedure was declared unsuccessful as all tenders submitted exceeded the funds at the contracting authority's disposal.
- **A negotiated procedure without prior publication** of a contract notice can be carried out (Section 98(2)-(5) of the PPA):
  - if an open or restricted procedure or has failed and the conditions of the procurement are substantially the same;
  - if open or restricted procedure has been unsuccessful because no tenders or requests for participation have been submitted or only unsuitable bids were submitted, provided that the conditions of the procurement did not change substantially;
  - if technical or artistic reasons or exclusive rights apply;
  - if extreme urgency applies and the time limit for other procedures cannot be adhered to;
  - for public works and public service contracts if new works or services are ordered that are similar to or the same as the ones already ordered from the winner of a previous public procurement, provided that the new works or services are in harmony with the previous base project awarded in an open or restricted procedure;
  - in case of a supply contract:
    - goods are procured exclusively for R&D, experimental or educational purposes;
    - it is not technically feasible to change the supplier of previously procured goods;
    - if the goods are listed and procured from the stock market;
    - if the goods are procured in the course of liquidation or a winding-up judicial enforcement procedure under particularly advantageous conditions;
- in case of a services contract:
  - if the procurement takes place after the award of a design contract and the contract must be concluded with its winner or one of its prize winners.
- **Negotiated procedures without prior publication** of contract notice can also be carried out below the EU public procurement thresholds (Section 114(9) of the PPA) if it is possible to procure supplies taking advantage of a particularly advantageous opportunity available to all interested persons for a very short period of time at a price considerably lower than the normal market prices, and where such an opportunity would not otherwise be available in the procedure.

#### 4. Which decisions of a contracting authority can be appealed?

- All contracting authority decisions (e.g. the call for tender, the decision of revocation, the contract award decision, etc.) can be appealed; it is not specific to a certain type of procedure. However, there is a distinction with respect to time limits between (i) decisions on the conclusion of the award procedure and (ii) all other contracting authority decisions (see below).

#### 5. What time limits exist for appeals? Are further appeals precluded after these limits?

- The appeal must be filed within 15 days of the petitioner becoming aware of the infringing decision of the contracting authority, or within ten days for unlawful decisions adopted after the conclusion of the award procedure (subjective time limit) (Section 148(3) of the PPA).
- After 90 days following the date of the infringement no petition may be lodged (objective time limit). Further appeals are precluded after the expiration of the 90-day period (Section 148(3) of the PPA).
- If in procedures under the EU threshold, the contracting authority decides upon the application of its own procedural rules as prescribed by Section 115 of the PPA, the appeal regarding the decisions on the conclusion of the award procedure may be filed within five days (Section 148(4) of the PPA).

#### 6. How long is the standstill period?

- Generally, the standstill period is ten days (if the contracting authority's own procedural rules are used in compliance with Section 115, five days) from the date of dispatch of the written report on the evaluation process. (Section 131(6) of the PPA).
- The contract may be concluded before the standstill period expires in the cases listed in Section 131(8) of the PPA.

#### 7. Which review bodies exist?

In case of breach of public procurement rules:

- The Public Procurement Dispute Board of Hungary is the administrative review body (in Hungarian: *Közbeszerzési Döntőbizottság*);
- The judicial review body is the Administrative and Labour Court.

For other contractual breaches, competency resides with the ordinary Hungarian courts.

#### 8. Are there any filing fees for an appeal?

Yes. The basis of the filing fee is calculated as follows:

- In case of procurements above the EU threshold, the basis of the filing fee amounts to 0.5% of the estimated value of the procurement, but not less than HUF 200,000 (approx. EUR 615) and shall not more than HUF 25m (approx. EUR 76,900).
- In case of procurements below the EU threshold, the basis of the filing fee is 1% of the estimated value of the procurement, but not less than HUF 200,000 (approx. EUR 615) and not more than HUF 6m (approx. EUR 18,500).

The actual filing fee is subject to the number of requests contained within the appeal. In case of one to three requests, the actual fee is equivalent to the basis of the filing fee (100%). The fee increases gradually until 16 requests. In case of 16 or more requests in the appeal, the actual fee amounts to 200% of the basis of the filing fee.

It is possible to reimburse the filing fee (if the decision is favourable to the applicant), or part of it (in the ratio of winning) but HUF 300,000 (approx. EUR 925) remains with the Public Procurement Dispute Board and shall be borne in compliance with the general rules of administrative proceedings.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- A review application itself does not have a suspensive effect.
- The Public Procurement Dispute Board may impose interim measures upon request or ex officio and it may order the suspension of the public procurement procedure (Section 156(1)-(2) of the PPA). In case of public interest of extreme importance, the Public Procurement Dispute Board may authorise the conclusion of the contract despite the ongoing review procedure.

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

- A contract shall be deemed ineffective (null and void) if: (i) it was concluded by the unlawful omission of a public procurement procedure; (ii) the contracting authority concluded a procurement procedure without prior publication of a contract notice, where the conditions of such a procedure were not satisfied; (iii) the parties entered into the contract in breach of the provisions relating to the standstill period. The ineffectiveness of the contract is decided by a review procedure before the Public Procurement Dispute Board.
- As part of this procedure, the Public Procurement Dispute Board may impose a fine for certain unlawful acts of the contracting authority or the economic operator (Section 165(2)-(7b) of the PPA).

## 11. To which extent can procurement contracts be amended after awarding?

- The Hungarian PPA enlists the exclusive legal grounds for the modification of public procurement contracts (Section 141(2)-(6) of the PPA). These provisions of the PPA have retroactive effect, i.e. they can be used as legal grounds for the modification of public procurement contracts that were concluded before the effective date of the PPA.
- Public procurement contracts may be amended if:
  - the modification does not alter the overall nature of the contract, is in line with the nature of the initial contract and the amount of the modification (in case of several modifications, their net total value) is below (i) the EU thresholds, if the initial contract price reached the EU thresholds and (ii) 10% of the initial contract value for service and supply contracts and for works and service concessions and below 15% of the initial contract value for works contracts;
  - the modification has been provided for in the contract, which was known to all tenderers in advance, in clear, precise and unequivocal review clauses, including options, provided that they do not provide for modifications that would alter the overall nature of the contract;
  - additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor (i) cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the contracting authority; (ii) any increase in price (or in case of several modifications, their net total value) shall not exceed 50% of the value of the original contract;
  - the need for modification has arisen from circumstances that a diligent contracting authority could not foresee and (i) the modification does not alter the overall nature of the contract and (ii) any increase in price shall not exceed 50% of the value of the original contract;
  - the modification is not considered to be substantial. A modification to a contract is considered substantial if it renders.



## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

- Since 15 April 2018 all public procurement procedures must be mandatorily concluded through the centralised Electronic Public Procurement System (abbreviation in Hungarian: EKR, available at: <https://ekr.gov.hu/portal/kezdolap>) operated by the Cabinet of the Prime Minister through a fully state owned company (NEKSZT Kft.). Exceptions apply for very limited cases.
- The Electronic Public Procurement System enables the use of e-signatures. However, the contracting authority may not require bidders to use e-signatures during the procedure and almost all documentation can be submitted without them. The use of e-signatures may only be prescribed by the contracting authorities when asking bidders to supply documents that directly serve as basis of enforcing claims, especially for statements of guarantee (bank guarantee) and statements of suretyship. In this case, a qualified e-signature and time stamp must be used.



# Italy



By **Pietro Cavasola**, **Marco Iannacci** and **Tiziana Masone**, CMS Rome

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As a preliminary remark, please note that the public procurement system in Italy is regulated by:

- The Code of Public Contracts (Legislative decree n. 50/2016) – hereinafter the 'Code';
- ANAC (the authority for supervising public contracts) Guidelines;
- Ministerial Decrees (mainly Ministry of Transport Decrees);
- The Code of the Administrative Process (Legislative decree n. 104/2010) – hereinafter 'the Administrative Process Code' or 'CPA'.

## 1. Where can one find public procurement notifications for Italy?

- TED (Tenders electronic daily), the online version of the 'Supplement to the Official journal of the European Union';
- SIMAP (The European system of information on public procurement);
- The Official Journal of the European Union;
- The Official Journal of the Italian Republic (supplement for public contracts);
- The official journals of the Italian regions; (supplements for public contracts);
- The official website of the Ministry of Transport;
- The official website of ANAC (the authority for supervising public contracts);
- Various media (such as national and local newspapers, and internet portals);
- The relevant contracting authority websites; and
- Bulletin Board of Municipalities (for call for tenders valued below EUR 500,000).

(Articles 72-73 of the Code and the Ministry of Transport Decree dated 2 December 2016.)

## 2. What are the relevant thresholds for the applicability of Italian law?

The Code identifies the following thresholds for the applicability of the ITALIAN Public Procurement Law:

### Ordinary area:

- Supply contracts – service contracts:
  - EUR 144,000 for public supply and service contracts awarded by central government authorities (i.e. Ministries, Consip; Presidency of the Council of Ministries);
  - EUR 221,000 for public supply and service contracts awarded by a contracting authority other than central government authorities;
  - EUR 750,000 for public supply and service contracts of 'social services'.
- Work contracts and works concessions: EUR 5.548m.

**Sectoral area** (water resources, energy, transport and postal services sectors)

— Supply contracts – service contracts:

- EUR 443,000;
- EUR 1,000,00 for public supply and service contracts for social services.

— Work contracts: EUR 5.548m.

— Public contracts valued **below the above mentioned European thresholds** are awarded according to the rules set out in article 36 of the Code and ANAC Guidelines, no. 4, dated 26 October 2016 and amended 1 March 2018.

— Public contracts for works, services and supplies valued **below EUR 40,000** are freely awarded by the Italian contracting authorities.

(Article 35, 36 of the Code and ANAC Guidelines, no. 4.)

### **3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?**

The contracting authorities are free to choose between the **open** (art. 60 of the Code) and the **restricted** procedure (art. 61 of the Code).

The contracting authorities may apply a negotiated procedure (without or with a publication of contract notice or a competitive dialogue) under certain circumstances expressly provided for by articles 59, 62, 63 and 64 of the Code.

**Negotiated procedure without prior publication of a contract notice** (art. 63 of the Code) may be used:

— For public works contracts, public supply contracts and public service contracts:

- when no tenders, no suitable tenders or no applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission if it so requests;
- when the contract may only be awarded to a particular economic operator for one of the following reasons:
  - the procurement aims to create or obtain a unique work of art;
  - there is no competition for technical reasons;
  - exclusive rights, including intellectual property rights, need to be protected;
- insofar as is strictly necessary when, for reasons of extreme urgency brought about by unforeseeable events, the contracting authority does not have time to conduct the open, restricted or negotiated procedure with publication of a contract notice. In any event, the circumstances invoked to justify extreme urgency must not be attributable to the contracting authority in question.
- for public supply contracts:
  - when the products involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;
  - for additional deliveries from the original supplier intended either as a partial replacement of normal supplies or installations, or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics, which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years;
  - for supplies quoted and purchased on a commodity market;
  - for the purchase of supplies on particularly advantageous terms, from either a supplier that is definitively winding up its business activities, or receivers and other bodies responsible for insolvency proceedings.

- for public service contracts:
  - when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates; in the latter case, all successful candidates must be invited to participate in the negotiations.
- for public works contracts and public service contracts:
  - for new works or services consisting in the repetition of similar works or services already entrusted to the economic operator to whom the same contracting authority awarded an original contract, provided that such works or services conform with the basic project for which the original contract was awarded according to an open or restricted procedure.

This procedure may only be used for three years following the conclusion of the original contract and the overall estimated value of the works or services must be taken into consideration for the whole value of the contract with respect to the European thresholds.

The contracting authority, if feasible, will make a selection of at least five economic operators, inviting them to submit an offer.

**Negotiated procedure in the special sectors** (water, energy, transport and postal services sectors):

- In the abovementioned sectors the negotiated procedure with prior contract notice is always possible (art. 125 of the Code).

**Competitive dialogue** (art. 59, para. 2 and art. 64 of the Code).

- The Contracting Authorities may make use of competitive dialogue if one or more of the following conditions occur:
  - the objectives pursued by the contracting authority with the procurement procedure cannot be achieved without relying on immediately available remedies;
  - the objectives pursued by the contracting authority involve the development of innovative solutions;
  - the contract cannot be awarded without prior negotiation due to specific circumstances related to the nature, complexity or financial and legal make-up of the contract or because of the risks related to it;
  - the technical specifications cannot be established with sufficient precision by the Contracting Entity; or
  - following an open or restricted procedure for the award of works, supply or service contracts, only irregular or ineligible tenders have been submitted (in this case the competitive dialogue shall reproduce in substance the original contractual conditions).
- The Contracting Entity must state the specific reasons underlying the decision to make use of competitive dialogue.
- Negotiated procedure with prior publication of a contract notice (art. 59 para. 2 and art. 62 of the Code):
  - allowed under the same circumstances as those set out above regarding the competitive dialogue.

#### 4. Which decisions of a contracting authority can be appealed?

An appeal is possible against:

- Unlawful contract award decisions;
- Discriminatory technical, economic or financial specifications in the call for tender and/or invitation to tender if such specifications are able to exclude a prospective tenderer from taking part; and
- Unlawful disqualification from the call for tender procedure.



## 5. What time limits exist for appeals? Are further appeals precluded after these limits?

The time limit for appeal is **30 days** respectively after:

- The contracting authority publishes notice of the contract award decision;
- The contracting authority publishes the call for tender or the bidder receives an invitation letter;
- The bidder receives notice that they are disqualified from the tender procedure; or
- The contracting entity publishes the notice of disqualification from the award procedure (or the list of those admitted to the tendering procedure) on their website after the entity has assessed whether each bid meets the subjective, economic/financial and technical-professional requirements.

Should the contracting authority fail to comply with the publication rules on the call for tender or to notify the award decision, the time limit for appeal is **six months** starting from the day after the conclusion of the contract.

Further appeals are precluded after the abovementioned time limits expire.

(Art. 120 of the Administrative Process Code.)

## 6. How long is the standstill period?

As a general rule, the standstill period is **35 days** from when the contracting authority announces the contract award decision.

If an appeal before the competent administrative court with a request for interim measures is filed against the award decision by the unsuccessful tenderer, the contract cannot be signed for a further **20-day** period, or else until the court rules on the request for interim measures.

(See art. 32 of the Code.)

## 7. Which review bodies exist?

Concerning the appeals against the above-mentioned decisions the review bodies are:

- The Regional Administrative Courts (TAR), in the first instance;
- The Council of State, for appealing against decisions made by the Regional Administrative Courts.
- The Administrative Courts can grant 'interim measures' and compensation for damages arising from the unlawful decision of a contracting authority.

With regard to claims related to the execution of the procurement contract, the competent bodies are:

- The Civil Court, in the first instance;
- The 'Court of Appeal', in the second instance;
- The 'Court of Cassation', in the third instance (only for jurisdictional issues, i.e. in order to rule which Judge (Administrative or Civil) has jurisdiction over the matter).

## 8. Are there any filing fees for an appeal?

Standard court fees (so called '*Contributo unificato*') are due whenever an appeal is lodged, the amount of which depends on the value of the claim, ranging between a minimum of EUR 2,000 to a maximum of EUR 6,000.

The value of the fee is increased for appeals before the superior courts (Council of State, Court of Appeal and Court of Cassation).

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

No, the appeal does not have an automatic suspensive effect, instead the bidder must expressly request the administrative court grant an interim measure (i.e. suspension of the awarding decision, suspension of decision of disqualification from the call for tender procedure, suspension of the first instance administrative court decision).

(Art. 55 and 98 of CPA.).

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

An administrative judge may rule on the ineffectiveness of a contract:

- If the contract was awarded without prior publication of the contract notice in the Official Journal of the European Union or in the Official Journal of the Italian Republic (supplement for public contracts) if the publication of a contract notice is provided for by the Code;
- If the contract was awarded by means of a negotiated procedure without prior contract notice when the conditions set out in the Code were not met;
- If the standstill period was derogated thereby jeopardising the unsuccessful tenderer's ability to appeal.

The administrative judge, having assessed all relevant aspects and, in particular, the public interest in the maintenance of the contract, will decide whether the contract should be considered ineffective or whether alternative penalties should be imposed (see art. 121 CPA).

Alternative penalties set forth by the administrative judges must be effective, proportionate and dissuasive.

They may alternatively or jointly:

- Fine the contracting authority between 0.5% and 5% of the contract value (i.e. the awarding contract price);
- Shorten the remaining duration of the contract, where possible, by between 10% and 50% (see art. 123 CPA).

## 11. To which extend can procurement contracts be amended after awarding?

Art. 106 of the Code lays down specific regulations for *'amendments of the contracts during their period of validity'*.

The contractual object can be modified / be subject to variation (without a new tender procedure being launched) in the following cases:

- Objective modifications already set out in the original contract (art. 106 para. 1(a));
- 'Additional' works, services, supplies (art. 106 para. 1(b)): If a change of the contractor (i) is unworkable due to economic or technical reasons or (ii) would cause significant inconvenience or a substantial duplication of costs for the contracting authority;
- Modifications due to 'intervened, unforeseen and unforeseeable circumstances' for the contracting authority (art. 106 para 1(c)):
  - if the need for modification has arisen from circumstances unforeseen and unforeseeable circumstances for the contracting authority. In these cases, any change to the subject matter of the contract is called 'variance during execution'. These circumstances may also include new legal or regulatory provisions, or new measures being adopted by authorities or entities responsible for protecting material interests;
    - the change does not affect the general nature of the contract;
    - any price increase resulting from the variance does not exceed 50% of the initial contract value.
- Change to the original contracting party (art. 106 comma 1(d)).
- The initial contractor is replaced by a new one that fulfils the criteria for qualitative selection as initially established, provided that this does not entail substantial modifications to the contract.
- The contractor may be changed in case of death or corporate restructuring operations (including takeover, merger, demerger, acquisition or insolvency).

- Non-substantial modifications (art 106 para 1 (e)).  
Any change to the subject matter of the contract is deemed to be substantial and, therefore, is NOT permitted '*... whenever it significantly affects the essential elements of the contract as originally agreed*' and, in any event, whenever:
  - the change introduces terms which, if specified in the initial tender procedure, would have allowed the admission of bidders other than those initially selected or else would have entailed the acceptance of a bid different from the one initially accepted, or else involved other participants in the tender procedure;
  - the modification alters the economic balance of the contract or framework agreement in favour of the awarded bidder in a way not envisaged in the initial contract;
  - the change considerably extends the scope of the contract.
- Minor changes:(art. 106, para. 2).  
According to art. 106, para 2 of the Code '*... in addition to the provisions of para 1, contracts can be likewise amended without launching a new tender procedure if the value of the amendment is below the following thresholds:*'
- If the amount of the modifications is below (i) the EU thresholds and (ii) 10% of the initial value of the contract for services and supplies for ordinary and special sectors, provided that the amendment does not alter the overall nature of the contract or of the framework agreement.

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

The Code implements the EU procurement directives that state, **with effect from 18 October 2018**, contracting authorities must use exclusively electronic means to communicate with economic operators.

This obligation currently only applies to tendering procedures managed by central purchasing bodies.





# Montenegro



By **Srđan Janković** and **Tamara Samardžija**, CMS Podgorica  
October 2018

## 1. Where can one find public procurement notifications for Montenegro?

- Internet Portal for public procurement announcements: <http://portal.ujn.gov.me/delta2015/login.jsp?locale=en&>
- Internet sites of respective contracting authorities.

## 2. Which are the relevant thresholds for the applicability of the Montenegro Public Procurement Act?

The Public Procurement Act ('Official Gazette of Montenegro', nos. 42/11, 57/14, 28/15 and 42/17) (hereinafter the 'PPA') is applicable to public procurement contracts if their value equals or exceeds the following thresholds:

- for supply contracts: EUR 25,000;
- for services contracts: EUR 25,000;
- for public works contracts: EUR 30,000.

For procurements whose value is below these thresholds ('low-value public procurements'), the contracting authority need not apply the PPA. The procedures for low-value public procurement are determined by the relevant contracting authority's internal acts and by respecting PPA principles.

## 3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

The contracting authority is free to choose among the open and the restricted procedure.

- A negotiated procedure can be carried out with or without an announcement of a public call for offers (art. 24 and 25 of the PPA).
- A negotiated procedure with prior publication may be used (art. 24 of the PPA):
  - if none of the offers received in the open procedure or in the second phase of restrictive procedure is acceptable, provided that the originally defined public procurement object and the contents of the tender documents have not been altered;
  - in exceptional cases where, due to the nature of the goods or services or due to associated risks, it is not possible to predict the value of the procurement; and
  - for the purposes of research, testing or development, without making of any profit or compensation for the expenses incurred.



- A negotiated procedure without the announcement of a public call may be used (art. 25 of the PPA):
  - for procurement of goods, services or works:
    - when no offers were submitted in two previously conducted open or restrictive public procurement procedures, provided that the initial requirements of the tender documentation have not been altered, in which case the contracting authority must include in the negotiated procedure all the tenderers who submitted their bids in the open or restricted procedure;
    - when due to technical or artistic reasons, i.e. for reasons related to protection of exclusive rights (patents and the like), the contract can only be carried by a specific economic operator.
  - for the procurement of goods when:
    - the products involved are manufactured purely for the purpose of research, experimentation, study or development (but not for the development of goods in mass production where the expenses of the research and development may be recoverable);
    - in cases when the contracting authority has to procure additional deliveries from the original contractor for the purpose of the partial replacement of common goods, installations or the extension of the existing goods or installations, where the change of the tenderer would oblige the contracting authority to purchase material with different technical characteristics that would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of the additional procurements may not exceed 15% of the amount of the basic contract;
    - in case of the public procurement of goods traded in commodity markets;
    - goods which are procured under particularly favorable terms from a tenderer winding-up its business activities (liquidation or bankruptcy), or from a bankruptcy administrator or liquidator upon a prior agreement with the creditors.
  - in case of services that are part of the extension of the services performed under a design contest in which the contract is awarded to the successful candidate or to one of the successful candidates, under the condition that all successful candidates are invited to participate in the negotiations.
  - in case of public works contracts and public service contracts:
    - for additional works or services not included in the signed public procurement contract but which, due to unforeseen circumstances, have become necessary for the performance of the agreed works or services, on condition that the award is made to the economic operator performing such works or services;
    - when such additional works or services cannot be technically or economically separated from the signed public procurement contract without serious inconvenience to the contracting authorities, or when such works or services, although separable from the performance of the signed public procurement contract, are strictly necessary for its completion;
    - the aggregate value of contracts awarded for additional works or services does not exceed 15% of the amount of the original contract;
    - in case of new services consisting in the repetition of similar services already entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such services are in conformity with a basic project for which the original contract was awarded according to an open or restricted procedure. The length of the additional procurements may not exceed three years after the day on which the basic contract is completed, and their value may not exceed 15% of the amount of the basic contract;
    - the design contest is a procedure that enables a contracting authority to procure a plan or design selected by an independent jury. The PPA specifies the use of the design contest procedure in the fields of urban planning, architecture, construction design, engineering, science, culture, design or data processing (art. 28 of the PPA). The design contest procedure could take place as an individual public procurement for services or as the part of another public procurement for services. The contract derived from a design contest must be concluded with the winner or one of the winners of the contest.

#### 4. Which decisions of a contracting authority can be appealed?

An appeal can be submitted any time during the entire procurement procedure, against any decision reached by the contracting authority, unless the PPA stipulates otherwise (art. 120 of the PPA).

#### 5. Which time limits exist for appeals? Are further appeals precluded after these limits?

- For infringement relating to the tender documentation (i.e. the content of tender documents, manner of publication or delivery of tender documents, amendments and clarification of tender documents, failure to provide clarification of tender documents):
  - at least ten (10) days before the deadline for submitting bids.
- For infringement related to decisions on: (i) selecting the most favorable bidder; (ii) terminating the public procurement procedure; and (iii) cancelling the public procurement procedure:
  - ten (10) days from the receipt of the respective decision.

#### 6. How long is the standstill period?

The contracting authority may only conclude the procurement contract after deadlines prescribed for submitting appeals or, if the appeal is filed, upon rejection of the appeal (art. 124 of the PPA).

#### 7. Which are the review bodies?

The State Commission for the Control of Public Procurements (*'Državna komisija za kontrolu postupaka javnih nabavki'*) (hereinafter the 'Commission') decides on appeals filed against contracting authority decisions on the award of a contract. Appealing against a Commission decision involves initiating an administrative dispute before the Administrative Court.

#### 8. Are there filing fees for an appeal?

Yes. The filing fee is 1% of the estimated value of the public procurement, but is capped at EUR 20,000.

#### 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

The appeal has an immediate suspensive effect. It prevents the contracting authority from undertaking any further activities until a decision on the appeal has been reached (art. 124 of the PPA). As an exception to this rule, upon a request of the contracting authority, the State Commission can approve the continuation of the procedure for awarding the public procurement in the following cases (art. 124 of the PPA):

- Where the delay caused by a suspension would result in significant damage to the contracting authority's ability to carry out its business activities when such damage is disproportional to the value of the public procurement;
- Where the delay caused by the suspension would significantly jeopardize Montenegrin interests;
- In the negotiated procedure without the announcement of a public call, where this procedure follows a design contest (art. 25 para. 1 under point 1, item 3 of the PPA).

#### 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

Montenegro is not yet an EU member state, therefore none of the EU directives apply directly to Montenegrin citizens and entities. However, it appears that the PPA is not harmonized with the EU directive 66/2007/EC.

#### 11. Can procurement contracts be amended after signing?

The modification of public procurement contracts during their term is not regulated under the PPA. Strictly speaking, the modification of procurement contracts during their term would not be allowed.

#### 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

The use of e-procurement or e-signatures is voluntary under the PPA.





# The Netherlands

By **Petra Heemskerk**, CMS Amsterdam

October 2018

## 1. Where can one find public procurement notifications for the Netherlands?

- Online service: [www.TenderNed.nl](http://www.TenderNed.nl) (mandatory, article 4.13 Procurement Act (*Aanbestedingswet 2012*));
- Online service: [www.aanbestedingskalender.nl](http://www.aanbestedingskalender.nl) (optional).

## 2. What are the relevant thresholds for the applicability of the Procurement Act (*Aanbestedingswet 2012*) for the period 2018 – 2019?

Contracting authority	Deliveries and services	Works Contracts	Concessions	Social and other specific services
Central government	EUR 144,000	EUR 5.548m	EUR 5.548m	EUR 750,000
Decentralised government and public law institutions	EUR 221,000	EUR 5.548m	EUR 5.548m	EUR 750,000
Special-sector company	EUR 443,000	EUR 5.548m	EUR 5.548m	EUR 1m

All amounts mentioned above are in EUR.

It should be noted, however, that even below these thresholds some tendering obligations are still applicable.

The Proportionality Guide (*gids proportionaliteit*) (which the government is, in principal, obliged to obey) makes clear that a service assignment with a value of more than EUR 20,000 should be awarded by the central government following a competition in a multiple private tender procedure (*meervoudig onderhands*) and assignments with a value of EUR 100,000 or more after a national-wide public tender procedure (*national openbaar*). For other tender agencies, the thresholds are between EUR 70,000 and EUR 175,000, respectively. Furthermore, if an interest is expressed by other Member States, some kind of tender obligation may exist.

Pursuant to Art. 2.24 of the Procurement Act (*Aanbestedingswet 2012*), some contracts are excluded from the Procurement Act (*Aanbestedingswet 2012*). For example, services for arbitration and services related to research.



### 3. Under what circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

Pursuant to section 2.2.1 of the Procurement Act (*Aanbestedingswet 2012*), the contracting authority is free to choose among the open procedure (Art. 2.26 Procurement Act), the restricted procedure (Art. 2.27 Procurement Act), competitive dialogue (Art. 2.28 Procurement Act) and two types of negotiated procedures: the competition procedure with negotiation and prior notification (Art. 2.30 Procurement Act) and the negotiated procedure without prior notification (Art. 2.32 Procurement Act).

- The open procedure (Art. 2.26 Procurement Act (*Aanbestedingswet 2012*)) and the restricted procedure (Art. 2.27 Procurement Act (*Aanbestedingswet 2012*)) can always be applied. Contracting authorities are free to choose the open and the restricted procedure. The choice between public and non-public procurement is generally based on: the type of product, the number of suppliers, the requirements to suppliers, the scope of the specifications, the offer costs and the sensitivity of information laid down in the contract.
- The competitive dialogue (Art. 2.28 of the Procurement Act (*Aanbestedingswet 2012*)) can be followed in the following instances:
  - With regards to works, supplies or services which meet one or more of the following criteria (Art. 2.28, para. 1 of the Public Procurement Act (*Aanbestedingswet*)):
    - it has proved impossible to meet the needs of the contracting authority without modifying easily available solutions;
    - it includes design or innovative solutions;
    - the contract concerned cannot be awarded without prior negotiation due to specific circumstances related to its nature, complexity or legal and financial conditions or because of the associated risks;
    - the technical specifications cannot be determined sufficiently precisely by the contracting authority on the basis of a standard, European technical assessments, a common technical specification or a technical reference framework within the meaning of points 2 to 5 of Annex VII to Directive 2014/24. / EU;
  - For works, supplies or services when only irregular or unacceptable tenders have been submitted in a public or restricted procedure.
- The competition procedure with negotiation (with prior notification) (Art. 2.30 Procurement Act (*Aanbestedingswet 2012*)) can be followed in the same instances as the competitive dialogue as laid down in article 2.28 of the Public Procurement Act (see above).
- The negotiated procedure (without prior notification) can be carried out (article 2.32 – 2.36 of the Procurement act (*Aanbestedingswet 2012*)):
  - if no tenders, no suitable tenders or no applications have been submitted in response to an open or restricted procedure, and the contract is not substantially modified, and a report of the original tender procedure has to be sent to the European Commission at the latter's behest;
  - if the performance can only be provided by a particular contractor for technical or artistic reasons, or due to the protection of exclusive rights;
  - if urgent and compelling reasons (which were not foreseeable and not caused by the contracting authority) do not allow the implementation of an open or restricted procedure with prior publication.

#### 4. Which decisions of a contracting authority can be appealed?

- All decisions concerning a procurement procedure that conflict with the Procurement Act (*Aanbestedingswet 2012*). For example:
  - the decision not to organise a public procurement procedure (Art. 4.15 of the Procurement Act (*Aanbestedingswet 2012*));
  - the decision in a specific tender procedure (open procedure/restricted procedure/negotiated procedure etc.) to award a public contract (Art. 1.4 of the Procurement Act (*Aanbestedingswet 2012*));
  - the choice of the contracting authority allowing specific undertakings to participate in a restricted procedure (Art. 1.4 of the Procurement Act (*Aanbestedingswet 2012*));
  - disproportionate provisions in the tender documents (Art. 1.10, 1.13, 1.16 of the Procurement Act (*Aanbestedingswet 2012*));
  - the contract award decision (Art. 2.127 of the Procurement Act (*Aanbestedingswet 2012*));
  - the retirement of a tender (Art. 2.132 of the Procurement Act (*Aanbestedingswet 2012*)).

#### 5. What time limits exist for appeals? Are further appeals precluded after the expiry of these limits?

- the decision not to apply a public procurement procedure:
  - six months after signing the agreement, if the contract is awarded without a prior publication notice published in the Official Journal of the European Union (Art. 4.15 (2b) of the Procurement Act (*Aanbestedingswet 2012*));
  - 30 days after signing the agreement, if the contract is awarded with a prior publication notice published by the Commission (Art. 4.15 (2a) of the Procurement Act (*Aanbestedingswet 2012*));
  - the contract award decision: 20 days after the contract award decision (Art. 2.127 (3) of the Procurement Act (*Aanbestedingswet 2012*));
  - the time limits for other decisions such as the decision to apply a specific tender procedure or disproportionate provisions are dependent on the provisions in the tender documents. However, economic operators must appeal against such decisions as soon as possible. If they wait until the contract award decision, there is a fair chance that this will lead to their appeal being precluded.

#### 6. How long is the standstill period?

- The standstill period starts with the announcement of the contract award decision and expires after 20 days (Art. 2.127 (3) of the Procurement Act (*Aanbestedingswet 2012*));
- The standstill period does not apply to (national, restricted) procedures in which a prior publication notice is not mandatory (Art. 2.127 (4a) of the Procurement Act (*Aanbestedingswet 2012*)).

#### 7. Which review bodies exist?

- The district court;
- CBB ('College van Beroep voor het bedrijfsleven') (in case of public transport contracts);
- The Complaints Board of the contracting authority itself (not binding); and
- The Commission of Procurement experts ('de Commissie van Aanbestedingsexperts') (not binding).

#### 8. Are there any filing fees for an appeal?

- The filing fees in preliminary relief proceedings amount to EUR 608 (*Wet griffierechten burgerlijke zaken*, Art. 3).
- There is a possibility that the winning applicant may be reimbursed the (entire) fee.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- An application for an interim injunction at the district court is necessary and has a suspensive effect. A party that does not agree with the contract award decision needs to bring preliminary relief proceedings at the district court during the standstill period, subject to a limitation of actions. It should be noted, however, that if a party does not agree with the court's judgment in the first instance and decides to appeal against it, this appeal does not have a suspensive effect.

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

- Annulment of the contract (Art. 4.15 of the Procurement Act (*Aanbestedingswet 2012*));
- Shortening (by the national court) of the duration of the contract (Art. 4.19 of the Procurement Act (*Aanbestedingswet 2012*));
- Administrative penalties imposed by the ACM ('*Autoriteit Consument en Markt*'), with a maximum limit of 15% of the contract value (Art. 4.21 of the Procurement Act (*Aanbestedingswet 2012*)).

## 11. To which extend can procurement contracts be amended after awarding?

Chapter 2.5 of the Procurement Act (*Aanbestedingswet*) deals with the amendment of a procurement contract after awarding. Art. 2.163g articulates that the basic premise of amendment is that a procurement contract can only be amended insofar the amendment does not constitute a material change (*wezenlijke wijziging*). Consequently, Art. 2.163a stipulates that there exists an exhaustive list of permitted changes, the non-substantial amendment (*niet wezenlijke wijzigingen*) which are set out in Art. 2.163a – 2.163f of the Procurement Act (*Aanbestedingswet 2012*). Thus, a procurement contract can be amended to the extent that the amendment is non-substantial (*niet wezenlijke wijziging*).

Permitted changes, which are not considered substantial, are:

- When **three cumulative requirements** are met: 1) the amendments are below the relevant thresholds, 2) the changes are less than 10% of the contract value for works or services and concessions and 15% for works contracts, and 3) the general nature of the contract is not changed (Art. 2.163b Procurement Act).
- If there is a **contractual revision clause**. This clause must be drafted in clear, precise and unambiguous terms. Three cumulative criteria need to have been met: 1) the wording will have to indicate precisely what part of the assignment will change, and what the change entails; 2) the revision clause must be written clearly; and 3) the general nature of the assignment may not change (Art. 2.163c Procurement Act).
- In case of **additional work**. This occurs when four cumulative requirements are met: 1) the necessity (and therefore not the wish) must arise during the execution of the assignment; 2) the additional work must not be foreseen in the original tender documents.; 3) a replacement of the contractor is not possible for economic or technical reasons, and would lead to significant inconvenience or significant cost increases for the contracting authority; and 4) the amount that accompanies the change may not exceed 50% of the original order value (Article 2.163d Procurement Act).
- In case of **unforeseen circumstances**. Here three requirements must be met: 1) modification is necessary (circumstances which the contracting authority could not foresee when tendering, and which must be external); 2) the general nature of the contract may not be changed; and 3) the amount that accompanies the change may not exceed 50% of the original order value (Art. 2.163e Procurement Act).
- **Substitution of the contractor**. The substitution must be a result of four cumulative conditions: 1) as a result of restructuring; 2) the legal successor must meet the original eligibility requirements; 3) the legal successor must actually take the place of the original contractor (he must take over the mutual rights and obligations); and 4) the legal succession must not have the purpose of circumventing a tendering obligation. (Art. 2.163f Procurement Act).

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

Pursuant to Art. 2.52 Procurement Act 2012 (*Aanbestedingswet*) it is mandatory to completely carry out European procurement procedures through e-procurement. The activities covered by this obligation range from the pre-award phase (e.g. publication of contract notices, invitation to submit a tender, submission of procurement documents, and additional information, as well as submission of tenders), to the post-award phase (i.e. publication of contract award notices). None of these e-procurement obligations apply to national procurement procedures. In exceptional cases, the contracting authority may offer tenderers the option of using non-electronic means. It concerns the following situations: no publicly available funds due to the specialised nature the procurement; required applications not freely available; specialised office equipment needed; and for submission documents submission of physical or scale models. Furthermore, when wishing to prevent the security of those electronic means being breached; and protection of the sensitive nature of the information.

The use of e-signatures has been mandatory since 1 July 2017. However, the type of e-signature requested in a procurement procedure is at the discretion of the contracting authority. All forms of e-signing are permitted under Dutch law, as long as the type of e-signature conforms with the eIDAS Regulation (910/2014) and is made explicit in the tender documents beforehand in order to avoid ambiguity.





# Poland

by **Malgorzata Urbańska**, **Magdalena Wyszyńska** and **Agnieszka Starzyńska**, CMS Warsaw  
December 2018

## 1. Where can one find public procurement notifications for Poland?

- Information about public tenders in Poland may be found in the online version of the Supplement to the Official Journal of the European Union – TED (Tenders Electronic Daily) at **[www.ted.europa.eu](http://www.ted.europa.eu)**. The website publishes notices of the initiation of tender proceedings for public contracts with a value equal to or above the applicable EU thresholds.
- Notices initiating tender proceedings for public contracts with a value below the applicable EU thresholds are published in the Public Procurement Bulletin (*Biuletyn Zamówień Publicznych*) at **[www.bzp.uzp.gov.pl](http://www.bzp.uzp.gov.pl)**. The website is only available in Polish.
- A contracting authority must also publish a contract notice on a website and in a publicly accessible place at its registered office. Contracting authorities may additionally place notices in Polish newspapers with nationwide coverage.

## 2. What are the relevant thresholds for the applicability of the Public Procurement Law (PPL)?

Thresholds for the application of the PPL:

Application of the PPL rules (PPL is not applicable below these thresholds)	Supply contracts	Service contracts	Construction works contracts
Basic threshold applicable to public contracts	EUR 30,000	EUR 30,000	EUR 30,000
Utility contracts (Coal and other solid fuel exploration and extraction, crude oil and gas extraction, water, energy, transport, postal services)	EUR 443,000	EUR 443,000	EUR 5.548m

Thresholds for contracts, which require notification to the Publications Office of the EU ('EU thresholds'):

<b>Contracts awarded</b>	<b>Supply contracts</b>	<b>Service contracts</b>	<b>Construction works contracts</b>
<b>By the public finance sector (with certain exceptions)</b>	EUR 144,000	EUR 144,000	EUR 5.548m
<b>By entities other than mentioned above, excluding contracts listed in rows below</b>	EUR 221,000	EUR 221,000	EUR 5.548m
<b>In the utilities sector (Coal and other solid fuel exploration and extraction, crude oil and gas extraction, water, energy, transport, postal services)</b>	EUR 443,000	EUR 443,000	EUR 5.548m
<b>In the field of defence and security</b>	EUR 443,000	EUR 443,000	EUR 5.548m
<b>For social services and other specific services in sectors other than the utilities sector</b>	-	EUR 750,000	-
<b>For social services and other specific services in the utilities sector</b>	-	EUR 1m	-

### **3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?**

- The contracting authorities are free to choose among the open and restricted procedure.
- The contracting authorities may choose to award contracts through the negotiated procedure with prior public announcement or the competitive dialogue if at least one of the circumstances listed below has occurred:
  - during the previous contract award procedure under open or restricted tendering all tenders were rejected for one of the reasons listed in the PPL or the contracting authority cancelled the procedure because the price of the most advantageous tender or the tender with the lowest price cost more than the contracting authority intended to allocate to finance the contract and the original conditions of the contract have not been substantially modified;
  - the contract value is below the EU thresholds;
  - solutions available on the market are unable to meet, without adaptation, the needs of the contracting authority;

- the construction works, supplies, or services include design or innovative solutions;
  - the contract cannot be awarded without prior negotiations because of specific circumstances related to its nature or complexity or the legal or financial make-up, or because of the related risk;
  - where the contracting authority is unable to describe the subject of the contract in a sufficiently precise manner by reference to a specific standard, a European Technical Assessment, a common technical specification or a technical reference.
- The contracting authorities may award contracts through the negotiated procedure without prior publication of a contract notice if at least one of the following circumstances applies:
- in a previous contract award procedure under open or restricted tendering no request to participate in the procedure was submitted, no tenders were submitted or all tenders were rejected due to their non-compliance with the terms of reference drawn-up by the contracting authority, or all tenderers were excluded from the procedure and the original conditions of the contract were not substantially modified;
  - a design contest was held whose prize was an invitation to negotiations without prior publication of a contract notice for at least two authors of the selected designs;
  - the subject of a supply contract are products manufactured exclusively for the purpose of research, experimentation, study, or development, which are not used by the contracting authority for the purpose of mass production aimed at establishing market viability or recovering research and development costs;
  - for urgent reasons brought about by events beyond the control of and unforeseeable by the contracting entity, the time limits for the open tender, restricted tender or negotiated procedure with publication of a contract notice cannot be complied with.
- The contracting authorities may award contracts through the negotiated procedure with only one participant ('single-source procurement') if, in particular, at least one of the following is met:
- the supplies, services, or construction works can be provided only by one particular contractor for:
    - (i) technical reasons of an objective nature or (ii) reasons relating to the protection of exclusive rights arising from separate regulations - where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
  - the supplies, services, or construction works can be provided only by one particular contractor where the contract to be awarded concerns creative or artistic activity;
  - a design contest was held and the prize in that contest was an invitation to negotiations through the single-source procurement procedure of the author of the selected design;
  - for urgent reasons brought about by events beyond the control of and unforeseeable by the contracting entity, the contract must be executed immediately and the time limits for other contract award procedures cannot be complied with;
  - in a previous contract award procedure under open or a restricted tendering (i) no request to participate in the procedure or no tenders were submitted or (ii) all tenders were rejected due to their non-compliance with the description of the subject of the contract, or (iii) all tenderers were excluded from the procedure, and the original conditions of the contract were not substantially modified.
- Slightly different rules apply to procurement procedures in the utilities sector and in the field of defence and security.

#### **4. Which decisions of a contracting authority can be appealed?**

- An appeal can be brought against any contracting authority action that, has been performed in the course of the contract award procedure if it does not comply with the PPL, or against any failure to act if the contracting authority is bound to perform certain actions under the PPL.
- If the contract value is below the EU thresholds, the appeal is only admissible against:
- the selection of the negotiated procedure without prior publication of a contract notice, single-source procurement procedure or request for quotations procedure;
  - the determination of the conditions of participation in the procedure;
  - the exclusion of the appellant from a contract award procedure;
  - the rejection of the appellant's tender;
  - the description of the subject of the contract; and
  - the selection of the most advantageous tender.

## 5. What time limits exist for appeals? Are further appeals precluded after the expiry of these limits?

- If the contract value is equal to or above the EU thresholds, the time limit for lodging an appeal is usually ten days with effect from the day following the date on which the contracting authority's decision was sent by means of electronic communication, 15 days respectively if sent by post.
- If the contract value is below the EU thresholds, the time limit for lodging an appeal is usually five days with effect from the day following the date on which the contracting authority's decision was sent by means of electronic communication, ten days respectively if sent by post.
- An appeal against the contract notice, and if the procedure is conducted using an open procedure also against the terms of reference, can be brought within:
  - ten days from the date of publication of the contract notice in the Official Journal of the EU or publication of the terms of reference on the website – if the contract value is equal to or above the EU thresholds;
  - five days from the date of publication of the contract notice in the Public Procurement Bulletin or publication of the terms of reference on the website if the contract value is below the EU thresholds.
- An appeal against actions other than those referred to above should be filed:
  - if the contract value is equal to or above the EU thresholds – within ten days from the day when the circumstances on the grounds of which an appeal is filed were discovered or could have been discovered with due diligence;
  - if the contract value is below the EU thresholds – within five days from the day when the circumstances on the grounds of which an appeal is filed were discovered or could have been discovered with due diligence.
- Further appeals are precluded after the above time limits have lapsed.
- The first instance judgment by the National Appeal Chamber (NAC) can be further appealed to the competent Regional Court within seven days of receiving the judgment.

## 6. How long is the standstill period?

There is a standstill period of:

- No less than ten days from the day on which the information on the selection of the best tender was sent, if the information was sent by means of electronic communication, or 15 days, if sent by post, where the contract value is equal to or above the EU thresholds;
- No less than five days from the day on which the information on the selection of the best tender was sent, if the information was sent by electronic communication means, or ten days, if sent by post, where the contract value is below the EU thresholds.

In some exceptional situations indicated in the PPL, the standstill period does not apply (e.g. if there was only one tender submitted in an open tender procedure).

## 7. Which review bodies exist?

The review body is the National Appeal Chamber (NAC).

Its decisions can be further appealed to the competent Regional Court.

## 8. Are there any filing fees for an appeal?

The amount of an appeal registration fee depends on the value and type of contract.

- In case of supply and service contracts:
  - PLN 7,500 (approx. EUR 1,750) if the contract value is below the EU thresholds;
  - PLN 15,000 (approx. EUR 3,500) if the contract value is equal to or above the EU thresholds.
- In case of contracts for social services and other specific services, if the contract value is equal to or above the EU thresholds – PLN 15,000 (approx. EUR 3,500).



- In case of construction works contracts:
  - PLN 10,000 (approx. EUR 2,300) if the contract value is below the EU thresholds;
  - PLN 20,000 (approx. EUR 4,650) if the contract value is equal to or above the EU thresholds.
- A further appeal against the NAC's decision is subject to a fee, which amounts to five times the fee paid to the NAC.

#### **9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?**

Once an appeal is filed, the contracting authority cannot sign the contract before the NAC has rendered its judgment. Only exceptionally, the NAC may repeal the prohibition to conclude a contract (on the contracting authority's request).

There is no similar effect when filing a further appeal with a common court against the NAC's decision.

#### **10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC**

A procurement contract may be rendered void (by a constitutive court judgment) if the contracting authority:

- Used the negotiated procedure without publication or single-source procurement in breach of the provisions of the PPL;
- Failed to place the contract notice in the Public Procurement Bulletin or submit it to the Publications Office of the EU;
- Concluded the contract in breach of the standstill period, if this prevented the NAC from examining the appeal before the conclusion of a contract;
- Prevented contractors who were not admitted to participate in a dynamic purchasing system from submitting requests to participate in that procedure or prevented the contractors who were admitted to participate in a dynamic purchasing system from submitting tenders in a contract award procedure conducted within the framework of that system;
- Has made it impossible for contractors with which a framework agreement has been concluded to submit tenders in a competitive procedure for the award of a contract under a framework agreement, provided that not all contract conditions are specified in the framework agreement;
- Applied the request-for-quotation in breach of the provisions of the PPL;
- Concluded an in-house procurement contract in the single-source procurement procedure before the lapse of a 14-day stand-still period starting from the day following the publication of the information about the intention to conclude the contract.

If one of the aforementioned situations occurs and a public procurement contract has already been concluded, when examining an appeal, the NAC may:

- Invalidate the contract;
- Invalidate the contract with regard to the unfulfilled obligations and impose a financial penalty in justified cases, in particular when return of benefits provided for under the contract is impossible; or
- Impose a financial penalty or shorten the duration of the contract if it is in the public interest, in particular in the field of defence and security, that the contract is upheld.

The financial penalty which the NAC may impose on the contracting authority can amount up to 10% of the contractor's remuneration provided for in the contract, taking into account the type and scope of the violation.

When stating a violation of a standstill clause that was not connected with the violation of any other provision of the PPL, the NAC may impose on the contracting authority a financial penalty in the amount of up to 5% of the contractor's remuneration provided for in the contract, taking into account all important circumstances relating to the award of the contract.

Additionally, the President of the Public Procurement Office (PPO) may apply to the court for the invalidation of the contract if any actions or omissions on the part of the contracting authority, in breach of the provisions of the PPL, had or might have had an influence on the outcome of the tender.

### 11. To which extend can procurement contracts be amended after awarding?

The parties cannot amend an awarded public procurement contract unless at least one of the following circumstances listed in the PPL applies:

- Modifications have been provided for in the contract notice or in the terms of reference in the form of unequivocal contractual provisions stating the scope, nature and conditions of introducing such modifications;
- Modifications concern the provision of additional supplies, services, or construction works by the contractor that has provided them so far, provided that those supplies, services, or construction works have become essential and all of the further conditions stipulated in the PPL are fulfilled;
- The need to modify the contract has been brought about by circumstances which a diligent contracting authority could not foresee and the value of a modification does not exceed 50% of the value of the procurement;
- A new economic operator is to replace the one to which the contracting authority has awarded the contract in the specific circumstances indicated in the PPL;
- Modifications, irrespective of their value, are not substantial in the meaning of the PPL;
- The total value of the modifications is lower than the EU thresholds and lower than 10% of the initial contract value for service and supply contracts or lower than 15% of the initial contract value for construction works contracts.

In relation to some of the above-mentioned circumstances, the PPL also limits the acceptable purpose or scope of amendments.

### 12. Is there a mandatory or voluntary use of e-procurement or e-signatures?

The mandatory use of e-procurement came into force on 18 October 2018 and applies only if the contract value is equal to or above the EU thresholds. Since this date, all communication between the contracting authority and tenderers must be electronic and tenders, requests to participate in the procedure and ESPDs will require e-signatures to be valid. Other declarations and documents regarding: (i) the conditions of participation in the procedure, (ii) the selection criteria, (iii) the characteristics of supplies, services, or construction works offered and (iv) the grounds for the exclusion may be submitted as original electronic documents or electronic copies certified with the qualified electronic signature.

# Portugal

by **Gonalo Guerra Tavares** and **Ant3nio Magalh3es e Menezes**, CMS Lisbon  
October 2018

## 1. Where can one find public procurement notifications for Portugal?

- Portuguese Electronic Official Journal (Di3rio da Rep3blica Eletr3nico): **[www.dre.pt](http://www.dre.pt)**.
- BASE – the Portuguese public procurement portal: **[www.base.gov.pt](http://www.base.gov.pt)**.
- Supplement to the Official Journal of the European Union – TED (Tenders Electronic Daily): **[www.ted.europa.eu](http://www.ted.europa.eu)**. (for public contracts with a value equal to or above the applicable EU thresholds).

## 2. What are the relevant thresholds for the applicability of the Public Contracts Code?

Awarded by	Supply contracts	Services contracts	Public Works contracts
Entities mentioned in article 7 of the PCC, operating in the water, energy, transport and postal services' sectors <sup>1</sup>	EUR 443,000	EUR 443,000	EUR 5.548m
Private entities that are more than 50% financed by contracting authorities (pursuant to article 2 of the PCC)	–	EUR 221,000	EUR 5.548m

- The Public Contracts Code also establishes that contracting authorities may choose the direct award procedure (one entity) and the prior consultation procedure (at least 3 tenderers) in the event that the contract value is below the following amounts:

<sup>1</sup> According to article 12 of the PCC, entities mentioned in article 2(2) ('bodies governed by public law') are also submitted to the rules applicable to entities listed in article 7 when operating in the utilities sector. In the opposite sense, the contracting authorities mentioned in article 2(1) ('contracting authorities') of the PCC are submitted to the general rules when operating in the utilities sector.

	<b>Direct award</b>	<b>Prior consultation</b>
<b>Public works contracts</b>	EUR 30,000	EUR 150,000
<b>Supply or services contracts</b>	EUR 20,000	EUR 75,000
<b>For any other contracts with the exception of public works concessions, public services concession and company contracts</b>	EUR 50,000	EUR 100,000

### **3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?**

— (i) (ii) The contracting authority is free to choose among the open and the restricted procedure. Open or restricted procedures may be used irrespective of contract values. The PCC establishes that the contracting authorities may choose an open or restricted procedure without prior notice on the Official Journal of the European Union in the event that the contract value is below the following amounts:

<b>Public works contracts</b>	EUR 5,548,000	EUR 150,000
<b>Supply or services contracts</b>	EUR 221,000	EUR 75,000
<b>Supply or services contracts awarded by the State</b>	EUR 144,000	EUR 100,000

— (iii) (iv) The negotiated procedure and competitive dialogue can be used by contracting authorities in the cases mentioned in article 29 of the PPC, as follows:

- their needs cannot be met without the adaptation of easily available solutions;
- the goods or services include the design of innovative solutions;
- the contract may not be awarded without negotiations due to specific circumstances relating to its nature, complexity, legal and financial arrangements or due to the risks associated with it;
- the technical specifications the technical specifications cannot be established with sufficient precision by the contracting authority by reference to a standard, European technical approval, common technical specifications or technical reference.

— The contracting authority is also free to choose among the open procedure, the restricted procedure and the negotiated procedure for public works concessions, public services concessions and company contracts (article 31 of the PCC).

### **4. Which decisions of a contracting authority can be appealed?**

— The PCC provides for interested parties to present an administrative appeal for any of the decisions made during a public tender procedure. It is also possible to directly appeal from the specification documents.



## 5. Which time limits exist for appeals? Are further appeals precluded after these limits?

- The administrative appeal must be filed within five business days from the notification of the relevant act.
- The failure to observe the time limits leads to preclusion.
- Interested parties can also appeal to the Administrative Court any acts related to public works, public works concessions, public services concessions, public supply contracts and service contracts, as well as those related to the proceedings specifications. These are urgent proceedings and should be filed within one month of the notification of the relevant act.

## 6. How long is the standstill period?

- The standstill period starts with the announcement of the contract award decision and expires after ten days.

## 7. Which are the review bodies?

- A review can be conducted by the contracting authorities and/or the Administrative Courts.

## 8. Are there filing fees for an appeal?

- There are no fees for an administrative appeal made under the Public Contracts Code (*principle of gratuitousness*).
- EUR 204 for a judicial appeal made under the Administrative Courts Law.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- An administrative appeal made under the Public Contracts Code does not suspend the procedure but until the term for deciding on the appeal is complete, the following acts may not be undertaken: (i) qualification; (ii) beginning of the negotiation; and (iii) award of the contract.
- Since the approval of Decree-Law no. 214-G/2015, 2 October, a judicial appeal of the award decision made under the Administrative Court Law has a suspensive effect with no need to apply for interim measures.

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

- As a rule, the Public Contracts Code according to Directive 66/2007/EC establishes that public contracts are ineffective:
  - if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible;
  - if the contracting authority has awarded a contract before the the standstill period has expired.
- When a judicial or arbitral decision refrains from declaring the contract ineffective, the Public Contracts Code enforces the application of one of the following alternative penalties: (i) shortening of the duration of the contract or (ii) imposing fines on the contracting entity.
- The judicial or arbitral decision referred to in the preceding paragraph cannot ward off the annulment effect based on balancing an economic interest directly related to the contract in question, when such interest is based on, inter alia, (i) the costs resulting from delay in performance of the contract, (ii) the opening of a new procedure, (iii) a change of the contractual party, or (iv) a change of legal obligations resulting from the annulment effect.

### 11. To which extend can procurement contracts be amended after awarding?

- As a general rule, modifications to existing contracts are only allowed if (i) it is expressly provided in the tender documentation (review or option clauses and change of the private contractor); (ii) there is an abnormal change of circumstances (as long as the outcome of this increase is not higher than 25% of the initial value of the contract); and (iii) there is relevant public interest (as long as the outcome of this increase is not higher than 10% of the initial value of the contract).
- The PCC also foresees the possibility of modifying an existing contract to include additional works, supplies or services that cannot be performed separately for economic or technical reasons (i) due to unforeseen circumstances and with a value lower than 10% of the value of the original contract; or (ii) due to unforeseeable circumstances and with a value lower than 40% of the value of the original contract (for concession contracts this threshold is 50%).
- Modifications to existing contracts are not admitted if (i) it is considered to be a substantial modification; (ii) it has the purpose or effect to prevent, restrict or distort competition; (iii) had it been part of the initial procedure, it would have allowed for the admission of other tenders or a change in the classification of the admitted tenders.

### 12. Is there a mandatory or voluntary use of e-procurement or e-signatures?

- According to the Law no. 96/2015 of 17 August, the use of e-procurement and e-signatures is mandatory (except for direct award and prior consultation procedures).



# Serbia

By **Srđan Janković**, CMS Belgrade

October 2018

## 1. Where can one find public procurement notifications for Serbia?

- Public Procurements Portal: <http://portal.ujn.gov.rs/Default.aspx>.
- Internet sites of respective contracting authorities.

## 2. Which are the relevant thresholds for the applicability of the Serbian Public Procurement Act?

The Law on Public Procurements specifies that a contracting authority need not apply that law for the procurement of goods, services or works whose annual value is less than RSD 500,000 (approx. EUR 4,200), provided that the aggregate annual value of the same type of procurements does not exceed this threshold.

## 3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

- The contracting authority is free to choose between the open and the restricted procedure.
- The negotiated procedure can be carried out with or without prior publication:
  - the negotiated procedure with prior publication may be used in the following cases:
    - if none of the offers received in the open procedure, restrictive or qualifying procedure or competitive dialogue, is acceptable;
    - in exceptional cases where, due to the nature of goods or services, or due to associated risks, it is not possible to predict the value of the procurement; and
    - for the procurement of services whose nature makes them impossible to specify and that do not meet the conditions for competitive dialogue.



- The negotiated procedure without prior publication may be used in the following cases:
  - if no offers or applications were received in the open or restrictive procedure, or no offer is acceptable;
  - if, due to technical or artistic reasons relating to the subject of procurement, or due to reasons relating to the protection of exclusive rights, the goods, services or works can only be procured from a specific candidate;
  - if, due to emergency caused by extraordinary circumstances or unpredictable events, the contracting authority prevents the authority from obeying the minimum time periods set out in the Law;
  - if additional deliveries of goods from the same supplier are intended to partially replace products, materials or fittings or to expand the volume of current products materials or fittings;
  - if additional services or works that were not included in the initial project or in the initial public procurement agreement have, due to unforeseeable circumstances, become necessary for the execution of the public procurement agreement;
  - if the public procurement of goods are traded on commodity markets;
  - if goods may be procured under exceptionally favourable terms from a supplier that has entered liquidation or insolvency; and
  - if services are procured that extend a completed design contest, if the contract is concluded with the winning contestant or contestants, and under the condition that the contracting authority includes all prize-winning contestants in the negotiated procedure.
- Competitive dialogue can be applied where the subject of procurement is so complex that the procurement contract cannot be concluded through the open or the restrictive procedure.

#### 4. Which decisions of a contracting authority can be appealed?

An appeal can be submitted at any time during the procurement procedure against any decision reached by the contracting authority, except in specific cases regulated by the law.

#### 5. Which time limits exist for appeals? Are further appeals precluded after these limits?

An appeal against the decision on the type of procurement procedure, the content of a public call for submission of bids or the content of procurement documents, is subject to the following deadlines:

- Seven days prior to expiration of deadline for submission of bids;
- Three days in qualification procedure and small value procedure (RSD 5m threshold – approx. EUR 42,300);
- At any time, provided the appellant already pointed out perceived deficiencies to the contracting authority in accordance with the law, and the authority failed to remedy those deficiencies.

After a decision on the award of contract, on the conclusion of a framework agreement, on the recognition of qualified bidders, and on the cessation of procedure has been reached, the appeal is limited by the following deadlines:

- Ten days from the announcement of the decision on the official Public Procurement Portal;
- Five days from the receipt of the decision for small value procurements, as well as for decisions based on a framework agreement.

However, please note that a contracting authority's actions cannot be appealed later if the appeal is based on reasons the bidder knew or could have known at a previous time, but failed to appeal separately at that time, and this separate deadline for the appeal has expired.

#### 6. How long is the standstill period?

The contracting authority may only conclude the procurement contract upon expiration of deadlines prescribed for the submission of appeal or, if the appeal has been filed, upon rejection of the appeal.



## 7. Which are the review bodies?

The State Commission decides on appeals filed against awarding decisions. The State Commission's decisions cannot be appealed, but a bidder can initiate administrative dispute proceedings before the Administrative Court.

## 8. Are there filing fees for an appeal?

Fees for filing an appeal are as follows:

- RSD 60,000 (approx. EUR 500) for appeals filed in small value procedures and in the negotiated procedures without the announcement of a public call;
- RSD 120,000 (approx. EUR 1,000) for appeals filed in a procedure where the estimated value of the public procurement or the value of all the disputed tranches does not exceed RSD 120m (app. EUR 1m);
- RSD 250,000 (approx. EUR 2,110) for appeals filed before offers are opened in procedures where the estimated value of the public procurement exceeds RSD 120m;
- 0.1% of the estimated value of the public procurement or the price offered by the awarded bidder, for appeals filed after offers are opened in a procedure where the estimated value exceeds RSD 120m;
- 0.1% of the aggregate estimated value of all the tranches of the public procurement, or the price offered by the awarded bidder, for appeals filed after offers are opened in a procedure where the estimated value exceeds RSD 120m.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

The appeal generally has an immediate suspensive effect. It prevents the contracting authority from undertaking any further activities until the decision on the appeal has been adopted.

The procedure is not suspended in the following exceptional circumstances:

- In the negotiated procedure without the announcement of a public call, where the procedure is carried out due to an exceptional emergency caused by extraordinary circumstances or unforeseeable events;
- According to the reasoned decision of the contracting authority's responsible person, in cases where the delay caused by a suspension would significantly hinder the contracting authority from performing its business activities to an extent disproportional to the scope of the procurement; and
- Upon approval of the State Commission, if the delay caused by a suspension would significantly jeopardise interests of the Republic of Serbia.

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

Serbia is not yet an EU member state. Therefore, none of the EU directives apply directly to the citizens and entities in Serbia. However, relevant principles contained in the EU directive 66/2007/EC were incorporated into the domestic legal framework.

Based on this:

- The State Commission has the right to consider a procurement contract ineffective, either by its own initiative or upon proposal of an interested party, in cases stipulated by the Public Procurement Law; and
- The State Commission will not consider the contract ineffective if doing so would have excessive detrimental consequences for the business operations or functioning of the contracting party or for interests of the Republic of Serbia. However, in such cases it will instead either shorten the duration of the contract or impose a fine on the contracting authority of up to RSD 1m (approx. EUR 8,450).

**11. To which extend can procurement contracts be amended after awarding?**

The public procurement volume may be changed if the following cumulative conditions are met:

- The possibility of such a change must be specified in the tender documents and the contract;
- Such a change is limited to 5% of the value of the contract;
- The total value of the change cannot exceed RSD 5m (approx. EUR 42,300) or RSD 10m (EUR 84,600) for public procurements in the sector area.

A change of price or other important element of the contract is permitted only for objective reasons that are clearly and precisely specified in the tender documents and the contract, or in other applicable laws.

**12. Is it mandatory or voluntary to use e-procurement or e-signatures?**

The use of e-procurement or e-signatures is voluntary.



# Slovakia

By **Martin Baláž**, CMS Bratislava

October 2018

## 1. Where can one find public procurement notifications for the Slovakia?

— Journal of Public Contracts (Vestník verejného obstarávania) administered by the Office for Public Procurement (OPP), accessible online.

## 2. What are the relevant thresholds for the applicability of the Slovak Procurement Law? (Act on Public Procurement – APP)

An above-threshold contract:

	Goods and Services not listed in Annex I to the APP	Goods listed in Annex I to the APP	Services listed in Annex I to the APP	Construction works	Goods and Services in the defence and security sector	Design contest
<b>Contracting authorities – Slovakia and its governmental bodies</b>	EUR 144,000	EUR 144,000	EUR 750,000	EUR 5.548m	EUR 443,000	EUR 144,000
<b>Contracting authorities – municipalities and self-governing regions and their associations, organisations financed and controlled by them</b>	EUR 221,000	EUR 221,000	EUR 750,000	EUR 5.548m	EUR 443,000	EUR 221,000
<b>Other contracting entities</b>	EUR 443,000	EUR 443,000	EUR 1m	EUR 5.548m	EUR 443,000	EUR 443,000
<b>Contracting authority in the defence sector</b>	EUR 221,000	EUR 144,000				

A below-threshold contract:

	<b>Goods and Services generally available on the market (except for food and Services listed in Annex I to the APP)</b>	<b>Services listed in Annex I to the APP</b>	<b>Construction works generally available on the market</b>	<b>Construction works not generally available on the market</b>	<b>Food for specified facilities</b>	<b>Other Goods and Services</b>
<b>Contracting authorities</b>	EUR 15,000	EUR 200,000	EUR 15,000	EUR 150,000	EUR 200,000	EUR 50,000

A below-threshold contract in the defence and security sector:

	<b>Goods and Services</b>	<b>Construction works</b>				
<b>Contracting authorities</b>	EUR 70,000	EUR 800,000				

### 3. Under what circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

- The contracting authority is free to choose between the open and the restricted procedure (Sec. 66 and 67 APP).
- A **negotiated procedure with publication** can be carried out where goods, works or services comply with at least one of the following conditions (Sec. 70 APP):
  - the needs of the contracting authority cannot be satisfied without the adjustment of the already available solutions;
  - they include a proposed solution or innovative solution;
  - the contract cannot be awarded without negotiation due to special circumstances;
  - the technical specifications cannot be precisely determined;
  - during the previous open procedure or restricted procedure, all bids were irregular or unacceptable.
- A **direct negotiated procedure** may only be used if at least one of the following conditions is fulfilled (Sec. 81 APP):
  - in the previous open or restricted procedure, no bid was submitted or none of the tenderers or bids complied with the participation conditions (provided that the original conditions of awarding the contract did not change substantially);
  - the goods, works or services may only be provided by a certain economic operator (artistic reasons, non-existing competition or protection of exclusive rights);
  - the supply, works or service contract will be awarded due to an emergency that was not caused by the contracting authority and could not have been foreseen by the contracting authority, and neither an open procedure nor restricted procedure or negotiated procedure with publication can be conducted due to the time pressure;
  - the procurement is for research, experimental, study or development purposes (does not apply to the large-scale production associated with economic activities aimed at achieving profit or covering research and development costs);
  - in the case of the supply of supplementary goods from the original supplier, if the change of the supplier would cause incompatibility or unreasonable technical difficulties in operation or maintenance;



- in the case of procurement of goods with quoted prices and which are purchased directly on an exchange;
  - in the case of procurement of goods offered under particularly favourable conditions by a liquidator, administrator or executor;
  - the service contract follows a design contest conducted under APP that is awarded to the winning candidate, or
  - new construction works or services that comply with an existing basic project that states the scope of possible additional works or services, and further detailed conditions for their awarding are met.
- A **competitive dialogue** can be carried out (Sec. 74 APP) where goods, works or services comply with at least one of the conditions referred to in Section 70 APP (see above). The objective of the competitive dialogue is to find and define the most suitable solution for the contracting authority. Bids can be evaluated only on the basis of the best price-quality ratio.

#### 4. Which decisions of a contracting authority can be appealed?

It is possible to submit objections against any actions of the contracting entity (Sec. 170 (3) APP). The objections have to be preceded by the delivery of the request for remedy.

#### 5. What are the time limits for appeals? Are further appeals precluded after the expiry of these limits?

- Objections must be delivered to the OPP and the controlled entity within ten days of the event in question at the latest.
- Failure to observe this time limit leads to the preclusion of further appeals.

#### 6. How long is the standstill period?

- The contracting authority and/or contracting entity may conclude a contract (or framework agreement or concession contract, as the case may be) with the successful tenderer no earlier than **16 days** after sending the information about the tender evaluation results (provided that no request for remedy was delivered or that no objections were delivered in due time).

#### 7. Which review bodies exist?

- For the first stage of the review proceedings (submission of objections), the competent authority is the OPP. Objections have to be delivered to the both OPP and controlled entity (contracting authority).
- If the complaint is not successful, it is possible to appeal to the Board of the OPP.
- After that, the next stage is an appeal to the court against a final OPP board decision.

#### 8. Are there any filing fees for an appeal?

- For second stage proceedings (i.e. before the OPP) there is no fee but the petitioner must pay a deposit (to be repaid if the petition is successful). The deposit has to be credited to the OPP's account at the latest on the working day following expiration of the period determined for delivery of the objections. The deposit amount depends on the contract and the contract value, and ranges from EUR 600 to EUR 150,000. Should the OPP reject the objections, the deposit becomes state budget income (Sec. 172 APP).
- The appeal procedure is linked to an additional deposit.
- At the subsequent stage (court proceedings) a court fee of EUR 70 applies.

#### 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- Appeal to the Board of the OPP does have a suspensive effect (Sec. 177 (1) APP).

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

- The OPP will impose on the contracting authority or contracting entity a fine amounting to:
  - 5% of the contractual price if it fails to fulfil the obligation to conclude the contract under APP in the manner or according to the procedure set out by the APP;
  - 5% of the contractual price if it breaches the tender evaluation criteria;
  - 5% of the total of the contractual prices if it unlawfully divides the contract to avoid using the procedure for awarding an above-threshold contract or a below-threshold contract;
  - 5% of the contractual price if it concludes a contract with an entity that failed to comply with its duty to register with the public sector partners register;
  - 2% of the contractual price if it breaches any other obligation or prematurely concludes the contract;
  - a fine of EUR 1,000 is levied for a delay of up to 15 working days in concluding the contract or fulfilling any other obligations. An additional EUR 1,000 will be levied for each subsequent period of 15 days, or part thereof;
  - EUR 500 to EUR 30,000 for breaching any obligations referred to in the APP or failure to fulfil the obligation imposed by an OPP's decision.

## 11. Can procurement contracts be amended after signing?

- The contract may be amended after signing if:
  - the original contract contains clear terms and conditions for amendments and changes;
  - the supplementary goods/performance are necessary and the change of supplier is not possible due to economic or technical reasons or would cause significant difficulties or double expenses;
  - unforeseen circumstances occur;
  - the original supplier will be replaced by another supplier defined in the contract, i.e. the legal successor of the existing supplier;
  - no substantial modification to the original contract is made, regardless of the value of the change;
  - the value of all modifications is lower than the financial limit (for below-threshold contracts) and at the same time lower than 10% of the contract value, in the case of goods supply contracts or service contracts; or lower than 15% of the contract value, in the case of construction works contracts.
- A modification of the contract, framework agreement and concession contract must be in writing.

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

- The use of e-procurement has been mandatory since 19 October 2018. According to Sec. 20 (1) APP, communication and information exchange in public procurement must take place in writing, through electronic means.
- An e-signature may be required by the OPP if it is necessary in relation to the level of potential risk. Usually an authentication in the e-procurement system allowing the tenderer to be identified or a simple e-signature will suffice. A qualified e-signature is necessary if required by law or the contacting authority/entity.

# Spain

By **Javier Torre de Silva**, **María Guinot** and **Juan José Zabala**, CMS Madrid  
October 2018

## 1. Where can one find public procurement notifications for Spain?

- **European Union Official Journal.**
- **Official Spain's Official State Gazette** (*Boletín Oficial del Estado*).
- **Public Sector Contracting Platform** (*Plataforma de Contratación del Sector Público*):
- Official Journal of each of the 17 Autonomous Communities and a number of local entities.
- Spanish contracting authorities and contracting entities also publish tender notices on their respective websites.

## 2. What are the relevant thresholds for the applicability of the Public Sector Contracts Act? (*Ley de Contratos del Sector Público 9/2017 – LCSP*)

All onerous contracts – whatever their legal nature – concluded by public sector entities are subject to the LCSP.

The LCSP defines certain thresholds to define those contracts subject to harmonised regulation:

- Works contracts, works concession contracts and service concession contracts whose estimated value, net of VAT, equals or exceeds EUR 5.225m.
- Supply contracts whose estimated value, net of VAT, equals or exceeds (i) EUR 144,000 when they are concluded by Central Government Authorities; (ii) EUR 221,000 in the case of other supply contracts.
- Service contracts whose estimated value, net of VAT, equals or exceeds (i) EUR 144,000 when they are concluded by Central Government Authorities; (ii) EUR 221,000 in the case of other service contracts; (iii) EUR 750,000 in the case of service contracts for social and other specific services (Annex IV).

The LCSP also provides thresholds for minor contracts with an estimated value of less than EUR 40,000 for works contracts and less than EUR 15,000 in the case of supply or service contracts. The LCSP establishes a simplified procedure for awarding minor contracts.

### 3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

The LCSP regulates five award procedures: (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue and (v) association procedure for innovation.

- Contracting authorities may apply open or restricted procedures, except to concession contracts for specific services, which must be awarded by restricted procedure (art. 131.2 LCSP).
- Contracting authorities may apply a negotiated procedure with prior publication to works contracts, supply contracts, services contracts, works concession contracts and service concession contracts in the following situations (art. 167 LCSP):
  - where the performance of the contract requires previous work or a previous design to be adapted by tenderers;
  - where the performance of the contract includes a project or innovative solutions;
  - where the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity, or the legal and financial make-up of the contract or because of the risks attached to it;
  - where the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European technical assessment, common technical specification or technical reference;
  - where all tenders submitted in response to an open or a restricted procedure were irregular or unacceptable;
  - in the case of personal social services contracts under the terms established in the LSCP.
- The negotiated procedure without prior publication may be used for works contracts, supply contracts, services contracts, works concession contracts and service concession contracts only in the following cases (art. 168 LCSP):
  - where no (suitable) tenders or no (suitable) requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the remuneration system cannot be modified, the initial conditions of the contract are not substantially altered and that a report is sent to the European Commission when requested;
  - where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance not belonging to the Spanish Historical Heritage; (ii) competition is absent for technical reasons; or (iii) the protection of exclusive rights, including intellectual and industrial property rights;
  - where the contract has been declared secret or reserved, or where its execution must be accompanied by special safety measures, or where the protection of national essential security interests is involved.
- The negotiated procedure without prior publication may be used for works, supply and service contracts (art. 168 LCSP):
  - where urgent and compelling reasons due to unforeseeable events, non-attributable to the contracting authority, demand a prompt execution of the contract that cannot be accomplished by the urgency procedure;
  - where no (suitable) tenders or no (suitable) requests to participate have been submitted in response to an open procedure or a restricted procedure.
- The negotiated procedure without prior publication may also be used for supply contracts in the following cases (art. 168 LCSP):
  - where the products involved are manufactured purely for research, experimentation, study or development;
  - for additional deliveries by the original supplier under the terms established in the LCSP;
  - for supplies quoted and purchased on a commodity market;
  - for the purchase of supplies or services on particularly advantageous terms, from either a supplier that is definitively winding up its business activities, the liquidator in an insolvency procedure, a judicial arrangement or similar.
- The negotiated procedure without prior publication may also be used for: (i) service contracts that follow a design contest and are awarded to the winner under the contest rules; and for (ii) works contracts, in which the task comprises repetition of similar works assigned to the contractor (art. 168 LCSP).



- Competitive dialogue can be used in the cases listed in art. 167 LCSP referred to above (art. 172.3 LCSP).
- Association procedure for innovation seeks to promote the most innovative companies and can be used where the objective of the contract is the development of innovative products, services or works and the further purchase of the resulting supplies, services and works. The need for innovative supplies, service or works that cannot be satisfied by those already on the market must be justified by contracting authorities (art. 177 LCSP).

#### **4. Which decisions of a contracting authority can be appealed?**

Special appeal on contracting may be filed against the following contracting authority decisions (art. 44 LCSP):

- Procurement notices, contract specifications and documents establishing conditions governing the contracting procedure;
- Procedural acts/decisions adopted during the contracting procedure, provided that these directly or indirectly decide the award, determine the impossibility of continuing the procedure or cause irreparable defenselessness or damage to legitimate rights or interests. For instance, a decision that rejects a tender;
- Contract award decisions adopted by contracting authorities;
- Modifications of contracts breaking the LCSP;
- Formalisation of orders to own means when these do not meet the legal requirements; and
- Concession rescue decisions.

The cases mentioned in which the special appeal on contracting applies include:

- Works contracts whose estimated value exceeds EUR 3m;
- Supply and services contracts whose estimated value exceeds EUR 100,000;
- Framework agreements whose object is to conclude a previous contract; and
- Works concession contracts and service concession contracts whose estimated value exceeds EUR 3m.

This special appeal on contracting procedure cannot be filed in relation to awarding procedures carried out following an emergency procedure.

Any other decisions adopted in a procurement procedure, when the contracting authority is a Public Administration, may be challenged by ordinary administrative appeals.

All decisions may be challenged before national courts after, where appropriate, an administrative appeal.

## 5. What time limits exist for appeals? Are further appeals precluded after these limits?

In general, the special appeal on contracting must be filed within 15 working days following the notification of the appealed decision. This appeal is optional.

The period is calculated according to the following rules:

- When the special appeal is filed against the content of the tender documents, the calculation starts on the day after the procurement notice is published on the Contracting Authority Profile;
- In the case of a negotiated procedure without prior publication, the calculation starts on the day after the invitation to selected candidates is sent;
- When a special appeal is filed against procedural acts, or against a decision taken in a negotiated procedure without publication, the time limit calculation starts on the day after the appellant becomes aware of such a decision/act;
- When a special appeal is filed against a contract award notice, the time limit calculation starts on the day after the notice is published;
- When a special appeal is filed against a contract modification based on a breach of the LCSP, the calculation starts the day after the modification is published on the Contracting Authority Profile;
- When a special appeal is filed against an order to own means, the calculation starts on the day after it is published on the Contracting Authority Profile; and
- In all other cases, the calculation starts on the day after notice of the decision has been published.

When the special appeal is not filed, the time limit for judicial appeal is of two months. However, it must be noted that special rules apply in certain specific cases.

## 6. How long is the standstill period?

The standstill period applies only when the special appeal on contracting is applicable. In these cases, the contract cannot be formalised within a period of 15 working days from the date on which the award notice is submitted to bidders and selected tenders, according to art. 153.3 LCSP.

## 7. Which review bodies exist?

- Special appeal on contracting:
  - state level: a specialised public procurement body: the Central Administrative Court on Procurement Appeals (Tribunal Administrativo Central de Recursos Contractuales);
  - autonomous Region level: a specific public procurement body for every autonomous region;
  - local level: the autonomous region in which the specific local corporation is located may establish the competent authority. If this is not the case, the autonomous region public procurement body is competent.
- Ordinary administrative appeal: the competent review body depends on the internal organisational rules of each Public Administration.
- Judicial appeals before courts: if the contracting authority is considered a Public Administration, a contentious-administrative appeal can be filed. The competent court will depend on the public nature of such Public Administration.

## 8. Are there any filing fees for an appeal?

- No fees can be charged for administrative appeals filed under the LCSP (art. 44.7 LCSP) nor for ordinary appeals.
- Regarding judicial appeals, filing fees shall apply in some cases.

### 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- Filing a special appeal on contracting, when challenging an awarding decision, has a suspensive effect in relation to the tender procedure, except in the case of contracts based on a framework agreement or specific contracts to be awarded under a dynamic purchasing system, without prejudice of preventive measures that may be adopted with regard to these last-named (art. 53 LCSP).
- In any other case, if the challenged decision or resolution does not concern the award of the contract, and in case of an ordinary administrative appeal or a judicial appeal, it is necessary to apply for interim measures.

### 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

- If a preparatory act of a contract, or the awarding of the contract is declared to be null by means of a definitive and final decision, the nullity will invalidate the contract itself, according to art. 42 LCSP. The contract will enter into a settlement stage, in which each party must return every benefit received by virtue of it.
- The annulment of acts that are not preparatory will only affect them and their consequences.
- If the cancellation of a contract could seriously affect the public service, it may be decided that the provisions of the contract can continue to apply on the same terms after its cancellation until urgent measures have been taken to avoid damaging the public interest.

### 11. To which extend can procurement contracts be amended after awarding?

Amendments to procurement contracts that have already been awarded may only be made in the following cases (art. 203 LCSP):

- When it is established in the initial tender documents;
- Exceptionally, when an amendment is required but it is not provided in the initial tender documents, under the terms established in the LCSP.

In all other cases, if it is necessary that a contract in force is executed in a way other than that agreed, the contract must be dissolved and a new contract concluded.

### 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

E-procurement has been mandatory in Spain since 9 March 2018.

All notifications and communications related to contract award procedures regulated by the LCSP must be made by electronic means.

Regarding e-signatures, the LCSP provides that contracting authorities must specify the required security level for the electronic means used at each stage of the procurement procedure. It should be proportional to the risk associated with the exchange of information to be made. Therefore, the type of e-signature will depend on the circumstances of each case.

# Switzerland



By **Marquard Christen** and **Felix Kesselring**, CMS Zurich

October 2018

## Executive Summary

The Swiss Confederation and its 26 cantons each have their own public procurement regimes. Each regime distinguishes between public procurements that fall within the ambit of international treaties and those that do not. Most of the public procurement notices (and many of the contract award notices) at federal, cantonal (and municipal) level are published online on **[www.simap.ch](http://www.simap.ch)**. Apart from that e-procurement is not well developed in Switzerland yet.

The public procurement regimes are currently undergoing a major revision. The objective of the revision is to harmonise the procurement regimes of the Swiss Confederation (national level) and the cantons and to implement the new WTO Agreement on Government Procurement (GPA) 2012. The revision also includes the enhancement of e-procurement. The revised regimes are planned to enter into force in 2020.

## Preliminary Remarks on the Legal Framework in Switzerland

The Swiss Confederation and the 26 cantons each have the power to enact their own public procurement legislation for public procurements by entities on a national and cantonal/municipal level within the framework provided by international and national law. Thus, public procurement in Switzerland is regulated on three levels:

- International level: the WTO Agreement on Government Procurement (GPA), the bilateral Agreement between the European Community and the Swiss Confederation on certain Aspects of Government Procurement (EU-CH Agreement) and the EFTA Convention (Annex R). The EU-CH Agreement and the EFTA Convention extend the ambit of the GPA to municipalities and to additional sectors not mentioned in the GPA.
- National level: the Federal Act on Public Procurement (FAPP) and the Ordinance on Public Procurement (OPP).
- Cantonal and municipal level: the Intercantonal Agreement on Public Procurement (IAPP) and the Federal Act on the Internal Market (FAIM) provide the legal framework for legislation by the 26 cantons (for an overview of the legislation in the cantons and additional information on public procurement in the cantons and some municipalities see [link](#)).

Public procurements falling within the ambit of the international treaties are generally referred to as public procurements in the international treaty area. National and cantonal law contains specific rules for these public procurements which implement Switzerland's obligations under these treaties. Both national and cantonal legislation also contain provisions for public procurements outside the international treaty area, i.e. for public procurements (i) below the thresholds set by international law, (ii) by other procuring entities than the ones listed in the international treaties and (iii) for goods and services which are not listed in the international treaties. Please note that there are no (federal level) or only limited remedies (cantonal and municipal level) available to bidders with regard to public procurements outside the scope of the international treaties.



## 1. Where can one find public procurement notifications for Switzerland?

Simap.ch: Most of the public procurement notices (and many of the contract award notices) on federal, cantonal and municipal level are published on this online portal: **www.simap.ch** (information available in German, French, Italian and English).

Official journals of the following cantons contain publications of public procurement notices on the cantonal and municipal level:

- **Official Journal of the Canton of Aarau** (*'Amtsblatt des Kantons Aarau'*).
- **Official Journal of the Canton of Appenzell Ausserrhoden** (*'Amtsblatt des Kantons Appenzell Ausserrhoden'*) (requires login).
- Official Journal of the Canton of Appenzell Innerhoden (*'Volksfreund'*) Volksfreund (not available online).
- **Official Journal of the Canton of Basel-Landschaft** (*'Amtsblatt des Kantons Basel-Landschaft'*).
- **Official Journal of the Canton of Basel-Stadt** (*'Amtsblatt des Kantons Basel-Stadt'*) (payment of a subscription fee required).
- **Official Journal of the Canton of Geneva** (*'Feuille d'avis officielle de la République et Canton de Genève'*) (payment of a subscription fee required).
- **Official Journal of the Canton of Glarus** (*'Amtsblatt des Kantons Glarus'*).
- **Official Journal of the Canton of Graubünden** (*'Amtsblatt des Kantons Graubünden'*).
- **Official Journal of the Canton of Jura** (*'Journal officiel de la République et Canton du Jura'*).
- **Official Journal of the Canton of Luzern** (*'Luzerner Kantonsblatt'*).
- **Official Journal of the Canton of Neuchâtel** (*'Feuille officielle de la République et Canton de Neuchâtel'*) (registration required).
- **Official Journal of the Canton of Nidwalden** (*'Amtsblatt des Kantons Nidwalden'*) (payment of a subscription fee required).
- **Official Journal of the Canton of Obwalden** (*'Amtsblatt des Kantons Obwalden'*).
- **Official Journal of the Canton of Schaffhausen** (*'Amtsblatt für den Kanton Schaffhausen'*).
- **Official Journal of the Canton of Schwyz** (*'Amtsblatt des Kantons Schwyz'*).
- **Official Journal of the Canton of St.Gallen** (*'Amtsblatt des Kantons St.Gallen'*).
- **Official Journal of the Canton of Solothurn** (*'Amtsblatt des Kantons Solothurn'*).
- **Official Journal of the Canton of Ticino** (*'Foglio Ufficiale della Repubblica e Cantone Ticino'*).
- **Official Journal of the Canton of Thurgau** (*'Amtsblatt des Kantons Thurgau'*).
- **Official Journal of the Canton of Uri** (*'Amtsblatt des Kantons Uri'*).
- **Official Journal of the Canton of Vaud** (*'Feuille des avis officiels du Canton de Vaud'*) (payment of a subscription fee required).
- **Official Journal of the Canton of Wallis** (*'Amtsblatt des Kantons Wallis'*).
- **Official Journal of the Canton of Zug** (*'Amtsblatt des Kantons Zug'*).
- **Official Journal of the Canton of Zurich** (*'Amtsblatt des Kantons Zürich'*).

## 2. What are the relevant thresholds for the applicability of federal and cantonal procurement law?

Thresholds applicable on the **federal level** in the international treaty area (in CHF):

Awarded by	Supplies (goods)	Services	Works (construction services)
Federal contracting authorities listed in Annex 1 of Appendix I of the GPA	CHF 230,000	CHF 230,000	CHF 8.7m
Additional public and private procuring entities with regard to activities in certain sectors (see Article 2a OPP; exemption applies to railway freight transportation).	CHF 700,000	CHF 700,000	CHF 8.7m

Outside the ambit of the international treaties a different set of federal rules applies regardless of any thresholds (see Articles 32 ss. OPP). However, thresholds may be relevant for the determination of the applicable procurement procedure.

Thresholds applicable on the cantonal and municipal level in the international treaty area (in CHF):

### GPA

Awarded by	Supplies (goods)	Services	Works (construction services)
Cantons and entities governed by public law	CHF 350,000	CHF 350,000	CHF 8.7m
Authorities and public companies in the sectors water, energy, transport and telecommunication	CHF 700,000	CHF 700,000	CHF 8.7m

### EU-CH Agreement and EFTA Convention (additional thresholds)

Awarded by	Supplies (goods)	Services	Works (construction services)
Municipalities	CHF 350,000	CHF 350,000	CHF 8.7m
Private companies with exclusive or special rights in the sectors water, energy and transportation	CHF 700,000	CHF 700,000	CHF 8.7m
Public as well as private companies with special or exclusive rights in the sectors railway transportation as well as gas or heat supply	CHF 640,000	CHF 640,000	CHF 8.0m

Outside the ambit of the **international treaties a different set of cantonal** rules applies regardless of any thresholds. However, currently the following minimal thresholds determine the procurement procedures to be applied (in Swiss francs):

Type of procedure	Supplies (goods)	Services	Works (construction services)	
			Ancillary construction trades ('Bauneben-gewerbe')	Main construction trades ('Bauhaupt-gewerbe')
Direct award	below CHF 100,000	below CHF 150,000	below CHF 150,000	below CHF 300,000
Invitation procedure	below CHF 250,000	below CHF 250,000	below CHF 250,000	below CHF 500,000
Open/restricted procedure	from CHF 250,000	from CHF 250,000	from CHF 250,000	from CHF 500,000

Please note that the cantons are free to stipulate lower thresholds.applied (in CHF):

### 3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

In Switzerland, the following main procurement procedures exist:

- Open procedure ('*offenes Verfahren*'): All interested providers/suppliers may submit a tender after the planned procurement has been published (Art. 14 FAPP; Art. 12 I a IAPP).
- Selective procedure (two-step procedure; '*selektives Verfahren*'): All interested providers/suppliers first submit their request to participate in the procurement procedure before the procuring entity decides, based on previously published qualitative selection criteria, which providers/suppliers it wants to invite to submit a tender (Art. 15 FAPP and Art. 12 OPP; Art. 12 I b IAPP).
- Invitation procedure ('*Einladungsverfahren*'): The procuring entity chooses a certain amount of providers/suppliers which shall be invited to submit a tender without prior publication of the planned procurement (Art. 35 OPP; Art. 12 I lit. bbis IAPP).
- Limited procedure (direct award; '*freihändiges Verfahren*'): The procuring entity directly awards the contract to the provider/supplier of its choice (Art. 16 FAPP and Art. 13 and 36 OPP; Art. 12 I lit. c IAPP).
- Federal level: In the international treaty area, the procuring entity is free to choose between the open and the selective procedure (Art. 13 I FAPP). The limited procedure may only be used if certain requirements are fulfilled (examples: no tenders have been submitted in the open or selective procedure, due to technical reasons only one provider/supplier is in the position to provide the required goods or due to an unforeseeable event the procurement is of such urgency that there is no time for an open or selective procedure; Art. 13 I FAPP and Art. 13 OPP). Outside the international treaty area, the procuring entity may also use the invitation procedure (Art. 35 OPP) and the scope of application of the limited procedure is wider (Art. 36 OPP).
- Cantonal and municipal level: In the international treaty area, the procuring entity is free to choose between the open and the selective procedure. The limited procedure (direct award) may only be used exceptionally (Art. 12bis I IAPP). Outside the international treaty area, see answer to question 2 above (Art. 12bis II IAPP).
- A negotiation procedure does not exist in Switzerland. On a cantonal and municipal level, negotiations in public procurement proceedings are not permitted (except, of course, in the limited procedure). On a federal level, negotiations are permitted in the context of all procedures if (i) reference to negotiations is made in the tender notice and (ii) none of the bids submitted appears to be the most commercially advantageous (Art. 20 FAPP and Article 26 OPP).

- The dialogue exists in Switzerland in so far as it has been introduced in 2010 on the federal level as an element of the public procurement procedure. It may be applied – if explicitly mentioned in the tender notice – in the context of complex procurements or procurements regarding intellectual services in order to further develop approaches and courses of action suggested by bidders (Art. 26a OPP). In addition, a so-called planning and global solution competition (*'Planungs- und Gesamtleistungswettbewerb'*) exists which allows the procuring entity to evaluate different alternatives beforehand in order to then formulate the tender notice and procure the goods or services in one of the procedures described above (Art. 40 ss. OPP).

#### 4. Which decisions of a contracting authority can be appealed?

- There is no exclusive list of decisions which can be appealed.
- On a federal level, Art. 29 FAPP contains the following non-exclusive list of decisions which can be appealed, provided that the procurement falls within the scope of international treaties: The award of the contract, the discontinuation of the award procedure, the invitation to tender, the decision on the selection of participants in the selective procedure, the exclusion of a bidder from the procedure and the decision on registration of a provider/supplier under the terms of Art. 10 FAPP. Note that there are no appeals on the federal level against decisions regarding public procurements which do not fall within the ambit of international treaties (Art. 39 OPP).
- On a cantonal level, in principle, all decisions of a contracting authority both within and outside the international treaty area can be appealed (Art. 15 I IAPP and Art. 9 II FAIM). Art. 15 Ibis IAPP contains a (non-exclusive) list of appealable decisions similar to the one in Art. 29 FAPP on the federal level.

#### 5. What are the time limits for appeals? Are further appeals precluded after the expiry of these limits?

- A decision of a federal authority must be appealed within 20 days following publication of the decision or, if earlier, notification of the decision to the respective party (Art. 30 FAPP). On the cantonal level, the time limit is restricted to ten days (Art. 15 II IAPP). Appeals against decisions of the federal and cantonal review bodies to the Federal Supreme Court must be filed within 30 days (Art. 100 Federal Supreme Court Act).
- Further appeals are precluded after these time limits.

#### 6. How long is the standstill period?

- A contracting authority may not award the contract until the time limit for an appeal has not expired (see answer to question 5 above) or, if an appeal has been filed, until the review body has decided whether to grant interim relief or not (Art. 22 FAPP; Art. 14 I IAPP).

#### 7. Which review bodies exist?

- Federal level: Federal Administrative Court (Art. 27 FAPP).
- Cantonal level: Each canton must provide for at least one independent review body (usually the administrative court of the respective canton; Art. 15 I IAPP and Art. 9 II FAIM).
- Decisions of both the Federal Administrative Court and the cantonal review bodies may be appealed to the Federal Supreme Court if the estimated contract value exceeds the applicable threshold under the FAPP or EU-CH Agreement and a legal question of fundamental importance arises (Art. 82 s. Federal Supreme Court Act).

#### 8. Are there any filing fees for an appeal?

- On a federal level: Filing fees for an appeal depend on the (estimated) contract value and, generally, vary between CHF 200 and CHF 50,000 (Federal Administrative Court) or between CHF 200 and CHF 100,000 (Federal Supreme Court). The filing fees will be reimbursed if the appellant succeeds.
- On a cantonal level, filing fees for an appeal vary from canton to canton.



### 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- An appeal does not have an automatic suspensive effect. Interim measures must be applied for (Art. 28 FAPP and 17 IAPP). On a cantonal level, Art. 17 II IAPP provides for the possibility of a court to grant interim relief ex officio which however, in practice, is hardly ever granted.

### 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

- It is disputed in Switzerland whether a contract which has been concluded in violation of procurement law (i) is void or must be cancelled or terminated or (ii) whether the review body may only declare its invalidity and award damages (Art. 32 FAPP; Art. 9 III FAIM and Art. 18 II IAPP). Damages on a federal level are limited to the amount of costs incurred by the tenderer in connection with the award procedure and appeal proceedings (Art. 34 II FAPP).

### 11. To which extent can procurement contracts be amended after awarding?

- Generally, it is forbidden to amend procurement contracts after awarding. However, it is allowed (i) to specify the contract, and/or (ii) to amend it in its material scope if the amendments are non-substantial, and/or (iii) to amend it if the limited procedure is applicable (e.g. in case of unforeseeable events, see question 3 above), and/or (iv) to execute tendered and awarded amendments (e.g. options and alternatives).
- Amendments are non-substantial (and, therefore, admissible, see ii above) if, for instance, they purely favour the contracting authority (e.g. additional discounts or improved products/services offered by the bidder), or it is sufficiently unlikely that a competitor of the bidder would have made a more favourable bid than the bidder actually did, with regard to the award criteria applied in the award procedure and taking the amendments into account.

### 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

- E-procurement is not fully available on federal and cantonal level. While the use of the e-procurement platform **www.simap.ch** is mandatory for the federal contracting authorities and some of the cantons and municipalities, its use by bidders is voluntary.
- If electronic submission is allowed, generally, it is mandatory for bidders to use a recognised e-signature.
- It is planned to amend current legislation on public procurement in order to fully allow e-procurement, including electronic auctions for standardised services. Entry into force is envisaged for 2020.

# Turkey



By **Döne Yalçın** and **Levent Bilgi**, CMS Istanbul

October 2018

## 1. Where can one find public procurement notifications for Turkey?

- All tender notifications and related tender documents are accessible online through the Electronic Public Procurement Platform ('EPPP') <https://ekap.kik.gov.tr/EKAP/Ortak/IhaleArama/index.html> (tender search engine), which is located at the Public Procurement Authority ('PPA') web page <http://www.ihale.gov.tr/>.
- The Public Procurement Bulletin ('PPB') (and its archive) is available online at: <https://ekap.kik.gov.tr/EKAP/Ilan/BultenIndirme.aspx> (bulletin search engine). The Bulletin is issued daily. Depending on the issue, it supplies information regarding pre-announcement, publication, correction or cancellation of a tender. Awarded tenders, within a brief summary, are listed on the PPB as well. Apart from this compulsory content, if requested by the relevant contracting authority, publication, corrections, termination or award decisions are also available on the PPB, in regard to the specific tenders which are as follows:
  - launched by the administrations, which are not in the scope of the Public Procurement Law ('PPL');
  - launched by the administration, which lie in the scope of the PPL but procuring in respect of the 'exceptions' stipulated under the PPL or procurements of such administrations, which do not fall under the scope of the PPL;
  - launched by the private legal entities, which are established by a special law or by way of by-laws rendered by the Council of Ministers.
- Alternatively, notifications can be obtained in hardcopy from the contracting authority. The contracting authorities also publish tender notices on their websites.
- The tender search engine and the bulletin search engine are only available in Turkish. Under the PPA's web page, general announcements (i.e. press releases, legislative amendments etc.), related legislation, statistics and information relating to the contracting authority are available in English.

## 2. Which are the relevant thresholds for the applicability of the PPL in Turkey?

- Turkey is not yet a member state and not subject to EU directives, but due to the pre-accession phase, a similar threshold mechanism to that provided under the EU Directives has been designed and amended for supply, service and work contracts and are covered by the PPL.
- The different thresholds are stipulated based on the type of procurement and legal structure of the authorities. In principle, the thresholds are determined to (i) specify the notification periods and (ii) support local bidders with the fee advantage, if any, and restrict foreign bidders from participating in a tender.
- In connection with the above, the contracting authority, at its discretion, may only restrict the 'participation' of foreign (non-domestic) bidders if the estimated cost of the tender is below the referenced thresholds.
- The thresholds are applied in accordance with the estimated costs.
- Estimated Costs: The contracting authority must conduct all necessary price research and must determine an estimated cost, excluding value added tax. Estimated costs must not be stated in tender or prequalification advertisements, and must not be explained to tenderers or to others who do not have any formal relationship with the tender proceedings.
- The contracting authority provides bidders with a notice period to prepare for the submission of their tenders. The notice periods and the relevant data for publication differs depending on the estimated costs of the contract.

Contracting Authorities Involved	Scope	Thresholds for the period between 1 Feb 2018 – 31 Jan 2019 (in TRY)
		Thresholds ('T')
Central government authorities and central public institutions	Supply and Service	<b>TRY 1.239599m</b> (Approx. EUR 167,690)*
Other government authorities (local government authorities, local public institutions, other institutions operating under central government authorities, etc.) that fall under the scope of the PPL	Supply and Service	<b>TRY 2.066004m</b> (Approx. EUR 279,480)*
All administrative authorities that fall under the scope of PPL	Works	<b>TRY 45.452920m</b> (Approx. EUR 6.149m)*
No PPA procedure	< TRY 70,000	< TRY 30,000

\*Calculated according to the exchange rate of the Central Bank of the Republic of Turkey on 21 September 2018 (EUR 1 = TRY 7.39)

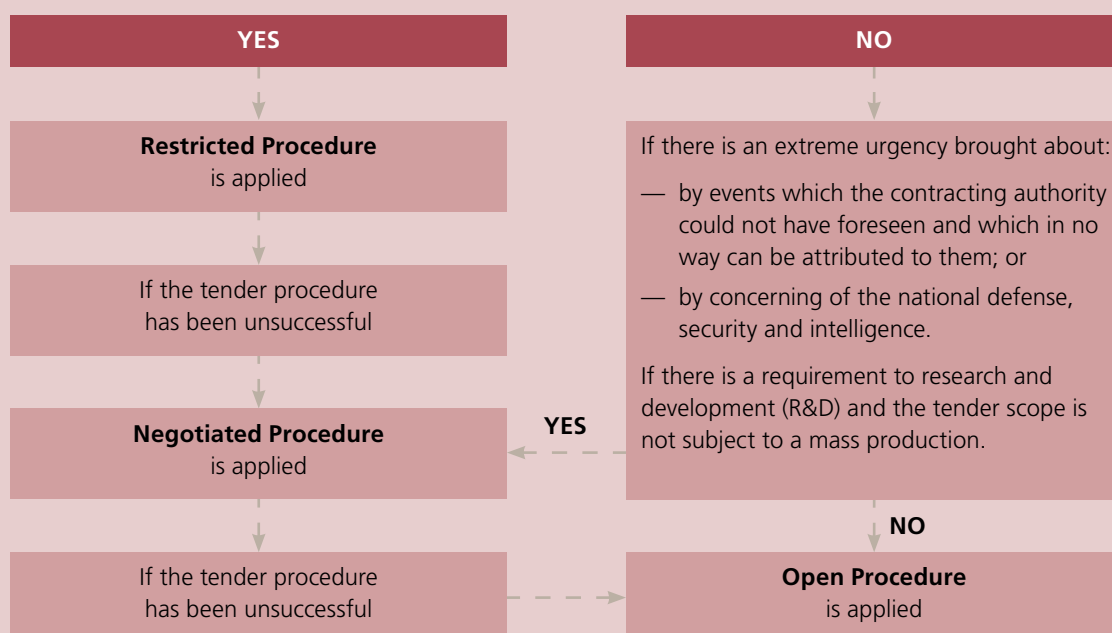
- The notice periods are determined in accordance with the thresholds and the tender procedures and types. The chart, indicating the related notice periods for the contracting authorities:

Procedure/Type of the Tender	The Limits Applied to the Estimated Costs ('EC')	The Announcement Requirements Prior to the Launch Date of the Tender
<b>IF <math>EC \geq T</math></b>		
Open	N/A	(*)Forty (40) days – Published in the PPB, at least one (1) time
Restricted	N/A	(**)Fourteen (14) days – Published in the PPB, at least one (1) time
Negotiated	N/A	Twenty-five (25) days – Published in the PPB, at least one (1) time
<b>IF <math>EC &lt; T</math></b>		
Supply and Service	Up to TRY 135,238	Seven (7) days – Published in the PPB and at least two (2) local newspapers, where the tender and works take place
Works	Up to TRY 270,489	Seven (7) days – Published in the PPB and at least two (2) local newspapers, where the tender and works take place
Supply and Service	TRY 135,238 – 270,489	Fourteen (14) days – Published in the PPB and at least one (1) local newspaper, where the works take place
Works	TRY 270,489 – 2.254192m	Fourteen (14) days – Published in the PPB and at least one (1) local newspaper, where the works take place
Supply and Service	> TRY 270,489	Twenty-one (21) days – Published in the PPB and at least one (1) local newspaper, where the works take place
Works	> TRY 2.254192m	Twenty-one (21) days – Published in the PPB and at least one (1) local newspaper, where the works take place
<p>— The (*) Forty (40) day period will be shortened by: (i) seven (7) days if the publication is prepared and send electronically, and additionally (ii) five (5) days if the publication is duly obtained from the EPPP, which are in total limits the forty (40) day period to twenty-eight (28) days.</p> <p>— (**) An invitation letter must be sent to the pre-qualified tenderers, forty (40) days prior to the date of the tender. This forty (40) day period will be shortened by five (5) days, if pre-qualification documents are duly obtained by the bidders from the EPPP.</p>		



### 3. Under which circumstances can one use the (i) open procedure, (ii) restricted procedure, (iii) negotiated procedure, (iv) competitive dialogue?

- Under the PPL, there are three (3) procedures applicable to the tenders. These are open, restricted and negotiated procedures. In principle, open procedure is applied to all public tenders.
- Restricted procedure: Only the persons who are invited following pre-qualification by the contracting authority, can submit their tenders.
- Negotiated procedure: Exceptional procedure with or without a publication of a tender. In addition to the chart below, it is only applied under certain conditions. In particular, if no bid is submitted under open or restricted tender procedures, negotiated procedure applies to the works, goods or services to be procured. Prices can be negotiated following the submission of price offers.
- The procedures are applied based on following conditions:
  - If it is not possible to define the technical and financial aspects clearly because of specific and complex characteristics of the works, goods or services to be procured; and/or
  - If the estimated costs of the procurement regarding works is higher than half of the threshold value.



Contracting authorities apply the negotiated procedure, subject to certain publication requirements of a tender.

— With prior publication:

- if no bid is submitted under open or restricted procedure;
- if research and development (R&D) is required and the tender scope is not subject to mass production;
- in cases where prior overall technical and financial analysis is not possible under supply, service and work contracts due to its complex nature.

— Without prior publication:

- if there is extreme urgency brought about by events which the contracting authorities could not have foreseen and which can in no way be attributed to them; or concerning national defence, security or intelligence;
- in the event that the estimated cost for the product, good, supply and service procurements are up to TRY 225.40

In addition to the above procedures, the contracting authorities may organize a 'design contest', apply 'special procedure for procurement of consultancy services' and without a publication procedure and a security condition, procure a 'direct purchase', provided that certain conditions are fulfilled.

It should be noted that, direct (purchase) procurement is not typical procurement procedure, but it is a procurement method that allows contracting authorities to procure its requirements that fall under the following thresholds:

Location of the contracting authority	Estimated Value of Services, Supplies, Works
Within the boundaries of metropolitan municipalities	TRY <b>67.61</b> (Approx. EUR <b>9.15</b> )*
Outside the boundaries of metropolitan municipalities	TRY <b>22.52</b> (Approx. EUR <b>3.05</b> )*

\*Calculated according to the exchange rate of the Central Bank of the Republic of Turkey on 21 September 2018 (EUR 1 = TRY 7.39)

- Please note that when this guide went to print, 30 out of 81 cities in Turkey were governed by metropolitan municipalities. The respective thresholds are subject to a slight increase each year in accordance with the communiqué published each year based on the data provided by Turkish Statistic Institution.
- Moreover, to comply with the EU directives framework agreement, dynamic purchase, electronic auction and electronic notification concepts are applied under the PPL as well.

#### 4. Which decisions of a contracting authority can be appealed?

- Briefly the appeal under PPL is a 'complaint (to the contracting authority)' and an 'objection (to the PPA)' mechanisms. Accordingly, the candidate/participant must submit a complaint petition based on the reply or non-reply of the contracting authority within a certain period, an objection application must be filed to the PPA.
- In order to be eligible to file an administrative lawsuit relating to the tender or in connection with the contract, this appeal phase must be exhausted.
- Any procedure or action of the contracting authority under the procurement process can be appealed by the candidates, tenderers or potential tenderers who claim that they have suffered a loss of right or damage or likely to suffer a loss of right or damage due to unlawful procedures or actions.

## 5. Which time limits exist for appeals? Are further appeals precluded after these limits?

- The Complaint: The time limit for appeal is **five (5) days** for the tenders, which are procured (i) under extremely urgent and unforeseeable conditions (i.e. disaster, disease etc.), and (ii) concerned with national defence, security and intelligence matters. Other than these two tenders, the limit for appeal is **ten (10) days** for all tenders, starting on the day after the unlawful procedure or action of the contracting authority came to the attention of or should have come to the attention of the applicant.
- Complaints regarding the procurement notice start on the date the notice is first published, while the period for applications for other provisions for prequalification or tender documents not reflected in the procurement notice starts from the purchasing date of the related document.
- For complaints regarding the procurement notice, prequalification or tender documents must be submitted at the latest **three (3) days** before the tender or application deadline provided that the time limits do not exceed the time limits stated above (in the first paragraph).
- *The Objection*: Upon completion of the complaint phase, the applicant may challenge the contracting authority's decision before the PPA within **five (5) days**.
- Further appeals (initiating an administrative lawsuit and related judicial proceedings) are precluded after the expiry of the abovementioned limits.

## 6. How long is the standstill period?

- There is a standstill period of:
  - no less than **five (5) days** from the day on which the award decision was sent, provided that the procurement needs to be completed in a short span of time due to extremely urgent and unforeseeable conditions or national security matters; and
  - no less than **ten (10) days**, from the day on which the award decision was sent.
- In practice, the period commencing when the contracting authority awards the tender to when it signs the contract with the winner/contractor is **thirty-five (35) days** for the local contractors. For foreign contractors, an additional **twenty-four (24) days** are available.

## 7. Which are the review bodies?

- The review authorities, in order of application, are as follows:
  - the contracting authority itself, for the complaints and the PPA for the objections;
  - first instance court: the administrative courts handle lawsuits about the procurement process as the first instance court after the decisions of the PPA;
  - Supreme Court: The Council of State examines the final decisions of the administrative courts, and concludes the appeal applications as the Supreme Court.
- An accelerated procedure is stipulated for the disputes related to public procurement. Accordingly, the final decision of the administrative courts are appealable without requiring an application to be made before the district administrative court, which normally acts as the second instance court in an administrative procedure. Nevertheless, as an exception, the decisions of administrative courts regarding the prohibition from participation in procurements can only be appealed after first applying to district administrative courts and obtaining a final decision from such district administrative courts.

## 8. Are there filing fees for an appeal?

- There is no filing fee for complaints made to the contracting authority itself.
- The filing fee of an objection depends on the estimated costs of the procurements:
  - TRY 4,280 for procurements with estimated costs of up to TRY 713,655;
  - TRY 8,562 for procurements with estimated costs between TRY 713,655 and TRY 2.854626m;
  - TRY 12,843 for procurements with estimated costs between TRY 2.854626m and TRY 21.409697m;
  - TRY 17,129 for the procurements with estimated costs of TRY 21.409697m and above.
- An application fee for a lawsuit at the administrative courts is TRY 35.90.
- An application fee for an appeal at the Council of State is TRY 55.20.
  - the fee for suspension of immediate execution TRY 59.10;
  - the judgment and writ fee is 74.20.

## 9. Does an appeal have a suspensive effect or is it necessary to apply for interim measures?

- The complaint or objection applications do not have a suspensive effect. Application for an interim injunction, e.g. suspension of immediate execution at the administrative courts is necessary and has a suspensive effect.
- However, unless the PPA has given its final decision about the objection, the contract cannot be signed by the contracting authority.

## 10. Ineffectiveness and alternative penalties according to Dir 66/2007/EC

- As stressed above, Turkey is not yet an EU member state, so the referenced directive is not applicable as this document was going to print.

## 11. To which extend can procurement contracts be amended after awarding?

- Once the procurement contract has been signed, the contractual provisions may be amended in two cases, particularly provided that the contract price is not exceeded and the contracting parties agree mutually on the respective amendments according to general rules under Turkish law. The respective two cases are as follows:
  - place of work or delivery;
  - the duration of the work and payment terms, provided the work is done or delivered before the foreseen and agreed duration.
- A contract can be assigned to third parties on condition that such an assignment is legally possible and the contracting authority provide its written approval. However, such third parties must take over all rights and obligations arising out of the contract as previously determined in the tender process.

## 12. Is it mandatory or voluntary to use e-procurement or e-signatures?

- There is no mandatory use of e-signatures for the procurements. Thus, no e-signatures are required in this respect.

Turkey has a centralised public e-procurement platform operated by the Turkish Public Procurement Authority. The initial public discussions on this platform, namely *Elektronik Kamu Alımları Platformu* ('EKAP'), stem back to May 2009 and came to an end on July 2016. Since then, EKAP is fully functional and utilized frequently in Turkey. EKAP is a tool that can be used by all kinds of administrative bodies, which are deemed to be within the scope of the Public Procurement Law (including local and governmental bodies). These bodies have the discretionary power to conduct a public procurement through EKAP. In January 2019, a new process for e-procurement will be put into operation concerning service and work tenders with regard to both negotiated procedures and open procedures to ease the efficient use of EKAP in Turkey.





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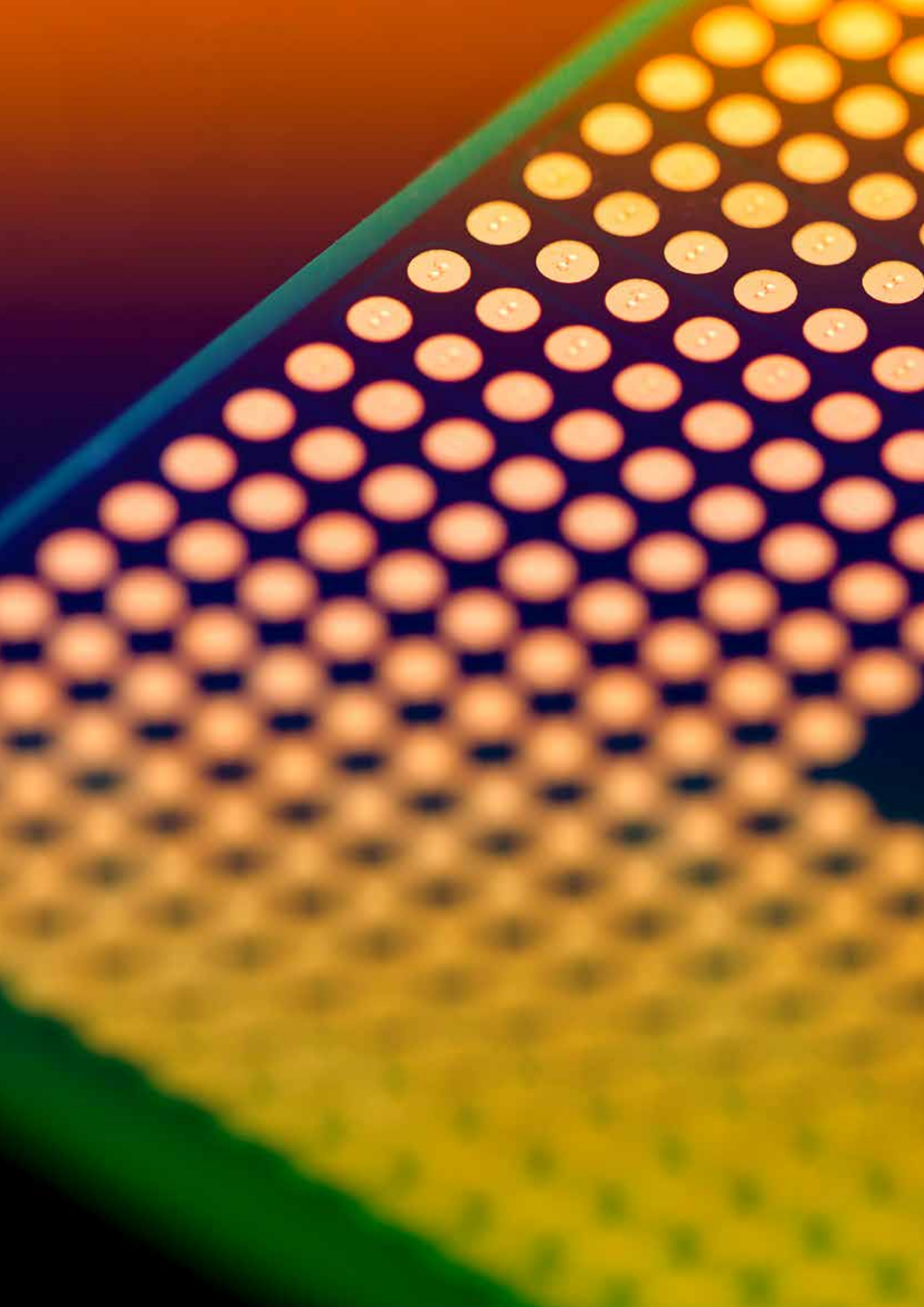
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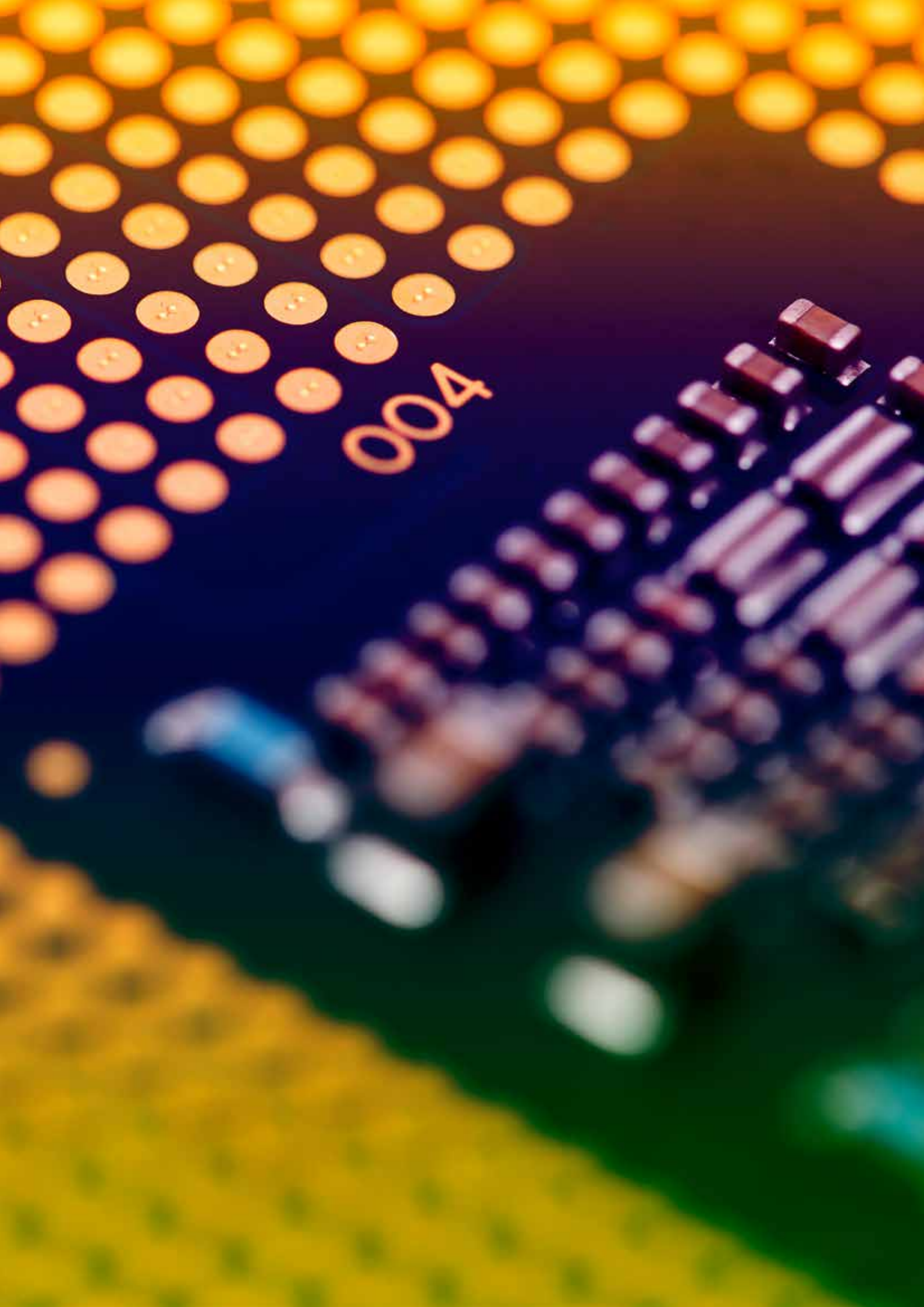
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