



Public Procurement 2009

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Legislative framework

1 What is the relevant legislation and who enforces it?

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

Also relevant are the 2007 Regulations on the coordination of procedures for the award of public works contracts, public supply contracts, public service contracts and related matters (the Regulations) issued under article 89 of the Law.

Law 11(I)/2006, which provides for the coordination of procurement procedures in the water, energy, transports and postal services sectors, is also of relevance.

An unsuccessful bidder may file a hierarchical recourse with the Tenders Review Authority (TRA) of the Republic, established under the Public Contracts Law (Law 101(I)/2003). The TRA has the authority, inter alia, to confirm the decision of the awarding authority, or annul the decision of the awarding authority if it finds that it contravenes the applicable legislation.

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

The provisions of the Law and the Regulations are in full conformity with the text of the relevant Directives (almost word for word).

3 Are there proposals to change the legislation?

At present there is nothing on the horizon indicating a possible amendment to the Law. Considering that the Law was passed in 2006 and the Regulations in 2007, any significant change in the current legal framework in the next few years would be a surprise.

4 What is the relevant legislation for the procurement of military equipment?

The Law is the relevant legislation governing public procurement contracts for military equipment, subject to the provisions of article 296 of the Treaty for the Establishment of the European Union (article 10 of the Law).

Applicability of procurement law

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

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

A 'body governed by public law' is defined as any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; having legal personality; and financed, for the most part, by the state, regional or local authorities, or other bodied governed by public law, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law.

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

We are not aware of any pending proceedings on the matter. It is anticipated that so far as an entity is governed by public law it will be deemed to fall within the 'contracting authority' definition. An indicative list of bodies and categories of bodies governed by public law that fulfil the criteria in question 5 is given in annex III of the Law.

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

The Law includes a number of thresholds according to the nature of the contract and the awarding body. For public supplies and services contracts awarded by the central government authorities listed in annex IV of the Law the threshold is €137,000. For certain defence products (those not listed in annex V of the Law) purchased by central government authorities the threshold for public contracts is €211,000. This higher threshold also applies to all public contracts awarded by contracting authorities not listed in annex IV and to certain telecommunications services, irrespective of the body procuring them. For public works contracts the threshold is €5.278 million.

In line with the Directive, the calculation of the estimated contract value is based on the total amount payable excluding VAT, as estimated by the contracting authority, taking account of any form of option, any renewals of the contract and any premiums or other payments to candidates or tenderers.

The Law prohibits the subdivision of contracts into smaller contracts to circumvent its requirements, and where procurement may be in several lots, the aggregate value must be used. If the contracting authority is to provide the contractor with goods, services or facilities, the estimated value of the supplies must be included in the contract value. Hire or leasing contracts with a fixed term of less than 12 months are evaluated by taking the aggregate payments under the contract. For contracts lasting longer than 12 months, any estimated residual value must also be included. Where the hire contract is for an indefinite period the value is calculated by taking the monthly value and multiplying it by 48.

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

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

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

This will depend on the nature or degree of the amendment. If the amendment is substantial then it is likely that a new procurement procedure will have to take place. For example, the ECJ has held that changes to essential terms of a contract not provided for in the initial tender documents require a new procurement procedure. It also held that terms are essential if their inclusion in the contract notice or the tender documents would have made it possible for bidders to submit a substantially different offer.

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

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

11 In which circumstances do privatisations require a procurement procedure?

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

12 In which circumstances do public-private partnerships (PPPs) require a procurement procedure?

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

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

The Law does not apply to service concessions (article 16).

14 What are the rules and requirements for the award of an in-house contract without a procurement procedure?

The Law does not define in-house contracts and it could be argued that such contracts are a somewhat unknown concept for Cyprus.

However, the ECJ in case C-295/05 (*Tragsa* case) considered the concept of in-house awards of contracts holding that public procurement rules do not apply to in-house contracts where the contracting authority exercises control over the contractor similar to that which it exercises over its own departments, and the contractor carries out the essential part of its activities with the same contracting authority.

An agreement between two ministries of the state is presumably not caught under the procurement legislation because ministries are likely to be considered as two different departments belonging to the same entity, namely the state. On the other hand, a contract between two municipal councils could be caught under the procurement legislation since municipalities are self-controlled and constitute separate local authorities. The situation is not quite clear as regards an agreement between a municipal council and an entity that has both public and private participation (a joint venture) but is controlled by the public body. However, the ECJ in case C-26-03 (the *Stadt Halle* case) ruled that the participation of a private entity in a joint venture per se is sufficient to hold that the public entity does not exercise control over the joint venture similar to that which it exercises over its own departments.

The procurement procedures

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

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

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

The Law requires contracting authorities to treat economic operators equally and non-discriminatory and always in a transparent manner (article 3).

17 How are conflicts of interest dealt with?

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

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

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

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

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

The procedure to be used will depend on the nature and the complexity of the specific public contract. Although no official data has been made public, it seems that to date the prevailing type of procurement adopted has been the open procedure.

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

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

21 When and how may the competitive dialogue be used?

The competitive dialogue is used in cases of particularly complicated contracts, for which the use of the open or the restricted procedure does not allow the award of the contract. A public contract is considered particularly complicated where the contracting authority cannot objectively identify the technical, legal and financial specifications of the contract. The contracting authority will publish a contract notice in which it makes known the needs and requirements and engage with the candidates in a dialogue the aim of which is to explore and define the means which may satisfy the needs and requirements in the best possible manner. During the dialogue the contracting authority must ensure that no information provided by any candidate is revealed to other candidates without the consent of the candidate who provided the information. The contracting authority will continue the dialogue until it is in a position to specify the solutions that correspond to the needs of the project.

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

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

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

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

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

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

Local legislation does not provide for any conditions under which consortium members may be changed in the course of a procurement procedure. It is anticipated that the members of consortia may change as long as they can fulfil the requirements and conditions set by the tender documents.

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

Tender specifications should secure equal access to tenderers and should not result in the creation of unjustified barriers to the opening of public procurement to competition. Technical specifications should be defined in such a way so as to take into account the accessibility criteria for persons with special needs. Such technical specifications are mentioned in the tender documents or in the contract notice or in supplementary documents and are in line with European standards.

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

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

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

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

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

28 What are the requirements for the admissibility of alternative bids?

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

29 Must a contracting authority take alternative bids into account?

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

Update and trends

As noted in question 43, a bill to implement Directive 2007/66/EC is currently going through the Cyprus Parliament. Apart from this, no further legislative changes are expected.

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

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

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

The Law allows contracting authorities to choose between two options: the most economically advantageous tender or the lowest price.

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

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

- 33** What is the required process for dealing with abnormally low tenders?

If a tender appears to be abnormally low the contracting authority should not reject it outright, but first seek clarifications from the tenderer about the factors enabling it to submit such a low bid, *inter alia*, regarding its economic character, the selected technical solutions or the favourable conditions that the tenderer may have, the originality of the subject matter of the tender, or the possible granting of state aid to the tenderer.

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

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

Further to question 26, the general view is that it would be unfair, disproportionate and in breach of competition to prohibit any person or entity from participating in public procurement competitions for an indefinite period. Depending on the criminal offence for which a bidder has been convicted, he or she may be excluded for a period of three to seven years from the delivery of the Criminal Court's judgment. There is no provision in the Law on 'self cleansing'.

Review proceedings and judicial proceedings

- 35** Which authorities may rule on review applications?

The TRA and the Supreme Court of Cyprus are the appropriate bodies. The TRA's authority derives from article 55(1) of Law

101(I)/2003, which established the TRA.

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

- 36** How long does a review proceeding or judicial proceeding for review take?

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

- 37** What are the admissibility requirements?

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

According to article 56(1) of Law 101(I)2003 every person who has or had an interest in a specific public contract and has suffered or might suffer loss through an act or decision of the contracting authority that breaches any provisions of the law, has the right to file a hierarchical recourse. The TRA has the authority to examine summarily and reject a hierarchical recourse without hearing the interested party or the contracting authority if it finds such hierarchical recourse unjustified.

Under article 146(1) of the Constitution the Supreme Court has exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, act or omission of any organ, authority, or person exercising any administrative authority is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

- 38** What are the deadlines for a review application and an appeal?

A person who decides to file a hierarchical recourse must inform the contracting authority in writing about the alleged breach and of his or her intention to file a hierarchical recourse against the said act or decision within five days from receiving knowledge of the act or decision. A hierarchical recourse must be filed within 10 days from the date that the interested person has been informed of the contracting authority's decision.

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

- 39** Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure?

No, but the applicant has the right to file an application for interim measures together with the hierarchical recourse and the TRA has the authority to stay any further steps in connection with the award of the procurement contract until the full hearing of the hierarchical recourse.

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

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded?

The Law requires contracting authorities to inform unsuccessful bidders in writing as soon as possible and before signing a contract with the successful bidder. The contracting authority must give reasons for the rejection of an unsuccessful bidder's tender within 15 days of being asked to do so.

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

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

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

It is quite common for interested parties to challenge the award decision either before the TRA or the Supreme Court.

43 May a contract be cancelled or terminated if the procurement procedure that led to its conclusion violated procurement law?

Directive 2007/66/EC, which amends council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, provides that a contract shall be considered ineffective where there has been an infringement of the procurement directives. This of course is subject to any overriding considerations of public interest. The Directive has not yet been transposed into domestic law, but a bill to implement it is currently (April 2009) before the Cyprus Parliament.

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

44 Is legal protection available in cases of a de facto award of a contract, namely, an award without any procurement procedure?

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



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