

THE COMPARATIVE SURVEY
ON THE NATIONAL PUBLIC
PROCUREMENT SYSTEMS
ACROSS THE PPN



Authority for the Supervision of Public Contracts
Department for the co-ordination of European Union Policies





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* Former Yugoslavian Republic of Macedonia



Since the Italian delegation assumed the Presidency of the PPN, we have highlighted the importance of the role of the Network for the harmonization and the implementation of public procurement law, in order to promote public and private investment, in compliance with EU Law and the principles of transparency and competition.

As also indicated in the European Code of Best Practice facilitating access by SMEs to Public Procurement Contracts the PPN can have a considerable role in the collecting and sharing of best practice among PPN Members.

In this context, is it clear how important the cooperation with the European Commission is through the Advisory Committee on Public Contracts in gaining support for our activities.

The Italian comparative survey, that I am delighted to present to you here, underlines its value in complementing the ongoing work of the European Commission on the evaluation of the Public procurement Directives that are presently in force.

In order to share correctly our best practice, it is important to understand in which national legal framework it has been developed. This study represents a significant advance through which we can analyse and compare the various systems European-wide in the field of Public Procurement.

It is also an useful tool for economic operators and contracting authorities with the ambition to enhance, as a consequence, the development of the Public procurement market that, as highlighted in the Report by Mr. Monti, is a means of revitalising the Single Market.

This work has been achieved due to the fundamental cooperation of all Countries listed in the study, whose cooperation supports the carrying out of all the activities of the Network. For this reason, as President in charge of the PPN, I would like to thank all delegations for their efforts. I also owe a special thank you to the Task Force Members.

A handwritten signature in blue ink, which appears to read "Giuseppe Brienza".

Giuseppe Brienza

President of the Authority for the
Supervision of Public Contracts



Public procurement in the European Union represents a strategic area of the single market.

According to European Union rules public sector procurement must follow transparent open procedures ensuring fair conditions of competition for suppliers. The opening up of public procurement within the single market has increased cross-border competition and improved prices paid by public authorities.

In the current economic context, public procurement is a key element to stimulate innovation and economic development and an important instrument for the maintenance of the single market, as underlined by the European Commission in the recent Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Region “towards a Single Market Act for a highly competitive social market economy”.

Public Procurement policy should also aim at strengthening SMEs participation in public procurement and supporting achievement of other policy objectives at EU level: innovation, green growth, social inclusion.

Hence, it is necessary to consolidate the harmonisation process and to ensure the correct implementation of EU Public Procurement law. In this context the Department for the co-ordination of European Union Policies plays a key role in co-ordinating all national, regional and local administrations in order to elaborate and validate a national position on EU draft law and guidelines, transpose EU law into national law and promote initiatives in order to prevent and solve infringement procedures for breach of EU Law.

In this framework the Department supports the Authority for the Supervision of Public Contracts in carrying out the Public Procurement Network Presidency activities.

With the view of strengthening the application and the enforcement of Public Procurement rules through mutual exchange of experience and benchmarking, which is the main objective of the Public Procurement Network, the Italian Presidency realised this study, which aims at providing to all operators involved in Public Procurement an updated overview of the Public Procurement System in Europe.

Roberto Adam

Head of the Department for the co-ordination
of European Union Policies

2 INTRODUCTION

The Italian Presidency has launched a comparative survey on the existing Public Procurement system in European countries, with regard to national legislation, the institutional system and the review procedures.

Since the approval of EC Directives 2004/18 and 2004/17, the Public Procurement system has significantly changed in EU Countries, both in the legislative and in the institutional framework. The study aims at providing an updating of the national legislation and the structures responsible for Public Procurement in Europe, within the key disciplines of the existing EU framework.

The survey involved the 27 EU Countries and also Non-EU countries as *Macedonia, Norway, Switzerland* and *Turkey*.

The study provides also useful information to contracting authorities and economic operators, by giving an update of the legal, institutional and review framework on Public Procurement in Europe.

3 THE EUROPEAN UNION LEGAL FRAMEWORK

Public Procurement in European Union is ruled by primary provisions deriving from EU Treaty as well as secondary provisions (directives and regulations).

Core provisions of the EU procurement legislation are consolidated in *Directives 2004/17* and *2004/18/EC*, the «so called» legislative package of public procurement approved in 2004 by the European Parliament and the European Union Council of Ministers, with the aim of simplifying and modernising procurement procedures, increasing competition and transparency. Directive 2004/18/EC provides for rules in the so called “classical sector”, covering most of contracting authorities – Ministries, Central Government and municipal bodies, as well as part of State and municipal enterprises.

Directive 2004/17/EC concerns the so called “utilities sector”, covering contracting authorities operating in specific fields, such as water treatment, energy, management of port and airport facilities etc.

In order to improve the effectiveness of national review procedures for the award of public contracts, Public Procurement Remedies Directives (Directives 89/665/EEC and 92/13/EEC) have been revised. *Directive 2007/66/EC* provides for rules aiming at clear and effective procedures by seeking redress where bidders consider contracts have been unfairly awarded.

The Directive provisions give to the rejected bidders the opportunity to start an effective review procedure at a time, when unfair decisions can still be corrected and also seeks to combat illegal direct awards of public contracts, considered as the most serious infringement of EU procurement law.

In the field of defence and security procurement, in 2009 a specific discipline was introduced in order to set rules for the procurement of arms, munitions and war material, including works and services, for defence purposes, but also for the procurement of sensitive supplies, works and services for non-military security purposes. *Directive 2009/81/EC* aims at establishing a new European legislative framework which is tailored to the award of sensitive public contracts in the fields of defence and security, taking into account the particular requirements of these purchases, such as security of information, security of supply and the necessary flexibility of the procedures.

In 2010 the European Commission started a process to assess the need for and the impact of an initiative on *concessions*, with the aim of improving the current legal framework. According to the Commission, such an initiative would facilitate the use of concessions and ensure best value for money for both users and contracting authorities, by providing all interested parties with legal security and guaranteeing transparency and equal treatment for economic operators. On the basis of the results of the ongoing consultation, addressed to all interested stakeholders (contracting authorities, economic operators, social partners), the Commission will evaluate in 2011 the option of adopting a legislative initiative on services concessions.

Still in 2010 the European Commission launched a comprehensive EU-wide evaluation of the impact of EU procurement policy. The evaluation, which should be finalised by mid-2011, will study the impact of the core disciplines of EU procurement legislation in order to assess whether it effectively achieved its objectives in a legally secure and proportionate manner and to identify areas where the Directives are subject to improvement.

In addition, the evaluation will focus on the use of procurement to support achievement of other policy objectives, such as innovation, green growth and social inclusion.

4 PRESENTATION OF THE SURVEY

In order to collect information the Italian Presidency has sent to PPN Members a questionnaire which focused on the following issues:

- The legislative framework, by indicating the rules adopted for the transposition of EU Directives on Public Procurement (primary and secondary sources); the national rules on below the EU thresholds contracts; the national rules on some excluded contracts (such as services of Annex B of EU Directives).
- The institutional framework, by indicating the institutions/structures responsible for Public Procurement, specifying the status, the composition and the competences, both in ordinary and in “special” sectors; by indicating the bodies responsible for the supervision/control of Public Procurement procedures (for instance audit offices, Court of auditors; independent bodies ex art. 81 Directive 2004/18).
- The review system on Public Procurement.

In attachment are available the contributions from the delegations involved in the study.

5 SUMMARY RESULTS OF THE SURVEY

National rules and procedures for the transposition of EU law into national law

EU Countries have been required to describe the system, by indicating the legislative reference, which regulates the transposition process of EU law into national law, in particular in the PP framework: institutions involved (Parliament, Government); transposition act (law, legislative decree), procedures.

EU candidates, potential candidates for accession and other Members have been asked to describe the envisaged legal framework for the transposition process of EU law into national law.

As concerns the system provided by the national legislation to transpose EU law, the *Italian* system is worthy of consideration, as an original and unique procedure among European Countries. The transposition process is regulated by Law n.° 11 of 4 February 2005, “General rules for the participation of Italy in the legislative process of the European Union and for the execution procedures of EU obligations”.

The main transposition instrument is represented by a law adopted every year, defined *EC law*: the President of the Council of Ministers or the Minister for European Community Policies, on the base of the acts adopted by EU Institutions, following the verification of the conformity of national law with EU law, on 31 January each year, presents to the Parliament a government bill having as object the “*Dispositions for complying with obligations deriving from the belonging of Italy to the European Union*”.

In particular, the *EC law*: modifies or repeals national law, violating EU obligations or national implementing rules which are object of an infringement procedure of the European Commission; transposes, directly, EU law into national laws or delegates the Government to adopt legislative acts of transposition; authorizes the Government to execute EU Directives by regulatory or administrative way; fixes fundamental principles to be respected by Regions and Autonomous Provinces in implementing EU law regarding issues of their respective legislative competence; transposes into national law EU law regarding issues of competence of Regions and Autonomous Provinces in case such as where an Institutions does not comply with their transposing obligation.

Recently a draft law has been presented to review Law n.º 11 of 4 February 2005, implementing some recent innovations from the Lisbon Treaty. The law proposal aims at assuring more synergy between the phase of co-ordination of the national position on EU draft law and the transposition of EU law into the national legislation. Moreover, the *EC law* will be split into two different annual laws: *the law of European delegation*, to be presented to the Parliament by 28th of February every year, which concerns only legislative delegations and authorizations to implement by regulatory way; *the European law*, eventually to be presented to the Parliament, also separately from the the *law of European delegation*, which concerns provisions for direct implementation.

The system provided by the *Lithuanian* legislation presents more analogies with the Italian system. According to the law, the *European Law Department*, under the Ministry of Justice, coordinates EU law transposition into national legal acts.

After receiving information from different State institutions for preparing draft law implementing EU Law, the Department prepares a general plan of the legal acts which are necessary to adopt in order to harmonize Lithuanian legislation with EU law, controls implementation of this plan and reports to the European Commission, the Lithuanian Government and the Lithuanian National Parliament about the implementation of this plan.

A the similar allocation of legislative competences on Public Procurement can be observed in some Federal Countries such as *Austria*, *Switzerland* or *Germany*, or in some Countries like *Italy* where Regions have a large autonomy.

In *Austria*, *Belgium* and *Germany*, Public Procurement is a matter of concurrent legislative power allocated between the Federation and Federal Countries.

According to the *Italian* Constitution, State, Regions and Autonomous Provinces, in their respective competences, share the power to transpose EU law into national law. Anyway, Public Procurement is related to competition, which is a matter of State exclusive legislative power.

From a comparative analysis of legislative instruments used to transpose the EU law into national law, emerges a similar allocation of competences between the Parliament and the Government, both in EU Countries and Non-EU Countries such as *Macedonia, Norway and Turkey*. Generally, the Government has the power to propose draft law and to adopt regulatory acts to implement primary law, whereas the Parliament approves draft law. In particular, in most of the countries involved in the survey, the Ministry for Economy or for Finance is responsible for drafting legislation to transpose EU directives on Public Procurement.

In *Poland* the institution responsible for drafting acts or regulations on Public Procurement is a specific body, the *Public Procurement Office*.

In *Italy* the responsible institution is the Ministry for Infrastructures.

Often consultative bodies are involved (i.e. in *Italy* and *Belgium* the *State Council*; in *Sweden* the *Swedish Council Law*). In *Ireland* the Minister for Finance authorises the other Ministers of the Government to enact regulations in order to give effect to an obligation of EU law.

In *Belgium*, the *Public Procurement Commission* is responsible for proposing draft law in order to transpose the EU Public Procurement Directives; it is composed of representatives from the Federation and the Federal Countries, from supervision bodies and from representatives of enterprises and Trade Unions.

In some countries stakeholders are consulted on a draft law for transposing an EU directive (*United Kingdom, Cyprus*). In other EU Countries (*Lithuania* and *Slovenia*) citizens also have an opportunity to comment and give their remarks and suggestions on the draft law which is available on the Internet.

The legal system

National legislation adopted to transpose EU law

PPN Countries have been asked to describe the national legislation adopted to implement EU law (i.e. Directives 2004/18 and 2004/17, Remedies Directive) both currently in force and being prepared (i.e. Defence and Security Directive). In case of legislative acts, the survey focused on the option of transposing EU Public Procurement directives by means of a unique legislative act (such as a code) or by means of separate legislative acts.

In *Italy*, EU Directive 2004/18 and EU Directive 2004/17 have been transposed into national law by Legislative Decree 12 April 2006 n. 163, “Code of Public contracts of works, services and supplies” (hereinafter, “*The Code*”). The Code enacted a single statute containing the provisions applying to all public works, services and supply contracts, above and below the EU threshold, both in ordinary and special sectors, in order to simplify and rationalize the rules by identifying a set of core principles and provisions.

EU Directive 2007/66 of 11 December 2007, regarding the improving of the effectiveness of review procedures concerning the award of public contracts, has been transposed by Legislative Decree 20 March 2010 n. 53, which modified some articles of the Code, whereas procedural rules have been transposed in Decree 2 July 2010 n. 204, the new Administrative Justice Code.

With reference to EU Directive 2009/81 of 13 July 2009, on the co-ordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, Government has been delegated by *EU law* 2010 to transpose such a Directive. The *Code* delegated the Government to adopt a regulation containing the executive discipline of the Code. The Regulation is in the process of being published on the National Official Journal.

From a comparative analysis it emerges that also *France, Portugal* and *Austria* also adopted a *Code* for public contracts which transposed EU Directives 2004/18 and 2004/1.

In particular, in *Austria* the *Federal Act on Public Procurement* contains the rules on reviews only at federal level. In fact, considering that according to Austrian constitutional law, the legislative power to regulate the review procedures is shared between the Federation and the Austrian Countries, 9 legislative acts dealing with Public Procurement review on municipal and State level have been adopted.

Most of the countries involved in the survey chose the option to transpose EU Directives 2004/18/EC and 2004/17/EC by means of a unique legislative act and, in most cases, together with the Remedies Directive. In *the Netherlands* the government is in the process of making a new Public Procurement law, which will include all Directives.

It also emerges that in all new accession countries (*Estonia, Poland, Hungary, Bulgaria, Latvia, Lithuania, Slovak Republic, Czech Republic, Romania*) and in the *Macedonia* a unique legislative act, the *Public Procurement Law*, was adopted.

In other countries Remedies Directive has been transposed by a separate act as in *Luxemburg*. In *France* Directive 2006/77 has been incorporated into the Administrative Justice Code and the Civil Procedure Code. In *Germany* and in *Sweden* Directives 2004/18 and 2006/77 have been transposed by the same act whereas Directive 2004/17 has been transposed by a separate act.

As concerns Directive 2009/81, at the moment *Turkey* only intends to transpose it in a unique legislative act which will include all Public Procurement EU Directives.

The other countries, including *Italy*, are planning to transpose this directive by a separate legislative act, considering that it introduces very specific provisions and several exceptions to the rules applying to public contracts in the “civil” sector.

A few countries opted to transpose EU directives by the use of separate acts (*Ireland, United Kingdom, Cyprus, Finland, Spain*).

National legislation on procurements not covered by EU directives

National legislation on procurements below the EU thresholds contracts

PPN Countries have been asked to indicate the national rules for procurements below the EC thresholds (legislative acts and regulations), by briefly specifying:

The award procedures used; the rules for publication and time limits for submission of applications and tenders; the rules for qualitative selection and award criteria.

Most countries have rules for above the thresholds procurements which also apply to below the thresholds procurements. In some countries as *Germany* and *Romania* a separate discipline exists.

In *Italy* the *Code* essentially brings together all the provisions governing contracts above and below the EU threshold, by applying most of its provisions to the latter, with a few limited exceptions, relating to publicity, applications to participate in public tenders, deadlines for the presentation of tenders and a few specific provisions relating to negotiated procedures for the awarding of public works, anomalous tenders and procedures for awarding tenders under the Italian "*in economia*" procedure. Moreover the Code sets out that EC Treaty obligations should be observed when awarding all public contracts.

In other countries, such as the *United Kingdom* and *Turkey*, there is not a specific discipline but general EU principles of transparency and non discrimination apply.

As concerns procedures used for the awarding of below the threshold procurements, the national legislation often provides simplified procedures, also with regard to the deadlines, especially for lower threshold. Anyway, an adequate publicity is assured through the publication of invitations to tender in the national Official Journals or websites (*Italy, Cyprus, Finland, Lithuania and Denmark*).

Procurements of services in Annex II B of Directives 2004/18/EC and 2004/17/EC

Procurements of services in Annex II B of the EU directives are regulated in various ways: in some countries it is only necessary to comply with general Treaty obligations such as transparency, equal treatment and non discrimination; in other countries the same discipline for above the threshold contracts or the use of simplified procedures are provided.

The institutional system

PPN countries have been asked to describe the institutions and the structures responsible for managing Public Procurement (at central, local and regional level) by indicating the legal status, the composition and the specific competences.

Institutions/Structures responsible for Public Procurement

It emerges from the survey that a homogeneous system exists in relation to the allocation of competences for the managing and control of Public Procurement procedures.

In general, every contracting authority is responsible for procurement procedures both at State level (central or federal) and at regional or local level.

In *France* a very recent phenomenon of sharing resources and know-how appeared in local authorities and some regions are able to offer local authorities, under their jurisdiction, a free access to their dematerialisation platform.

In most of the involved countries a central body, often belonging to the government, is responsible for the general co-ordination of Public Procurement policies.

In *Italy*, the Department for the Co-ordination of European Union Policies operates within the Prime Minister's Office and supports relationship between the Italian Government and the European Institutions. In particular, in the framework of Public Procurement, the Department is responsible for the co-ordinating activity of all national, regional and local administrations in order to: elaborate and validate a national position on EU draft law and guidelines; and the transposition of EU law into national law. The Department represents the national position of the Italian delegation at the Public Procurement Council Working Group and the Advisory Committee on Public Contracts, Economic and Statistical Working Group and Electronic Public Procurement Working Group of the European Commission. Furthermore, the Department promotes initiatives in order to prevent infringement procedures for breach of EU Law and co-ordinates the activities finalized to solve infringement procedures started by the European Commission against Italy.

The Ministry of Infrastructure and Transport proposes draft law for transposing EU directives and for modifying national law not complying with EU law. The Ministry has also a consultative function, by providing for advice to contracting authorities, in order to implement EU law correctly.

The *Authority for the Supervision of Public Contracts of works, services and supplies*, adopts regulatory acts solving interpretative doubts concerning the rules on public procurement. It also proposes legislative modifications to the Government and suggests revisions of implementing regulation to the Minister of Infrastructure.

From the survey it emerges that in several countries there are specific government bodies responsible for the co-ordination of Public Procurement policies, like the *Public Procurement Office* in *Poland*. In *Slovenia* the *Public Procurement Agency* is going to be established and it will be in charge of carrying out joint public procurement for government and judiciary institutions.

Often co-ordination bodies are dependent on their Ministries of Economy or Finance (*The Netherlands, Portugal, Lithuania, Bulgaria, Malta, Hungary*). The *United Kingdom* model consists of a semi-centralised public procurement structure, the OGC, *The Office of Government Commerce*, as the key institution, even though the devolved governments of Scotland, Northern Ireland and Wales have their own institutions and arrangements for public procurement.

In relation to the *utilities* sector, public enterprises or private concessionaires mainly operate in some countries (*France*) or privatised bodies with significant competition (*United Kingdom*). In *Italy* and *Germany* public responsibility lies mainly at local level, often by means of associations with local authorities

Supportive bodies

In most of the countries involved, there are consultative bodies which provide legal advice to contracting authorities/entities (*France, Austria, Italy*).

In *The Netherlands* the governmental agency *PIANOo* under the Ministry of Economic Affairs has been established for the special purpose of helping contracting authorities to professionalise their public procurement process. *PIANOo* provides contracting authorities with all kinds of information about public procurement, answers questions, organises lectures and conferences about public procurement and meetings between contracting authorities and economic operators.

Supervision bodies

PPN Countries have been asked to identify the bodies responsible for the supervision/control of public procurement procedures (Audit offices, Court of Auditors; independent bodies), by specifying their legal status, their composition and their competences. *EU Countries*, which set up an independent body *ex art. 81 Directive 2004/18*, have been asked to specify its structure and competences (advisory role, legal nature of acts, alternative dispute resolution/conciliation functions; supervision functions; sanctioning functions).

In general, there are internal and external audit offices, which are responsible for the supervision of the procurement procedures, in particular from the point of view of legality, accounting rules, economic efficiency, and efficacy.

In several countries, such as *Italy*, the Court of Auditors is appointed to control Public Procurement procedures.

In new accession countries, the role of supervision and control on public contract award procedures in relation to EU rules is played by specialized bodies -*Public Procurement Offices*- which are not independent but belong to the Government structure (*Lithuania, Poland, Romania, Slovak Republic, Malta*).

In particular, in the *Slovak Republic and Malta* the supervision body also has sanctioning functions in the case of infringement of EU rules. In *Latvia* the *Procurement Monitoring Bureau* carries out controls and also acts as a first level complaints examination body.

In *Denmark* the *Danish Competition Authority*, which is an agency under the Ministry of Economic and Business Affairs, provides for advice concerning the interpretation and the application of the rules on public procurement, deals with the control and review on public procurement procedures.

From the survey it emerges that some EU countries, as well *Norway* and *Turkey*, set up an independent body responsible for the supervision on public procurement.

In *Italy* the *Authority for the Supervision of Public Contracts* has been established with the aim of supervising public contracts in order to grant compliance with principles of transparency, rightfulness and competition awarding procedures and with effective and convenient execution of contracts, as well as compliance with competitions rules within each single tender. It is an independent body with regard to functions, evaluation and administrative responsibility, is autonomously organized and supervises the entire public procurement system, both at a State and at a Regional level. According to the Code, the Authority may impose pecuniary or restrictive sanctions when detecting any irregular, unlawful or illegal behavior. *D.Lgs. 163/2006* (the *Code*) implementing directives 2004/17CE and 2004/18CE, identified the Authority as the responsible entity for the implementation of community law control, provided by art. 81, par. 2 of the aforementioned directives.

In the *Czech Republic* the *Office for the protection of competition* is a non-political authority which exercises supervision over awarding of public contracts and has also sanctioning functions.

In *Poland* an independent body exists, the *Supreme Chamber of Control*, which undertakes audits from the point of view of legality, economic efficiency and efficacy on State and local administrations acts. The President of the *Supreme Chamber of Control* is responsible for its activity before the Parliament and is appointed by it.

In *Sweden* the *Competition Authority* is responsible for information and the supervision of Public Procurement. It provides proposals for changes to rules and other measures to eliminate obstacles to effective competition, as well as it may apply for the Administrative Courts to impose a fine on a contracting authority for some infringements according to the Directives.

In *Slovenia* the *National Review Commission* was established on the basis of Auditing of Public Procurement Procedures Act. It is a specific, independent, professional and expert State institution providing legal protection to tenderers at all procedural levels of the award of public contracts. Members are nominated into office by the Slovenian Parliament. The National Review Commission decides on the audit claim.

In Norway the *Public Procurement Complaint Board* (KOFA) is an independent advisory body, composed of ten highly qualified lawyers. Although its decisions are not legally binding, due to the high quality of its recommendations, the Board's opinions are followed by the parties in nearly all cases.

In Turkey the body responsible for the supervision/control of public procurement procedures is the *Public Procurement Authority*, an administrative and financially autonomous body, with several competences: to evaluate and conclude complaints, to prepare, develop and guide the implementation of the legislation, to compile and publish statistics related to procurements and contracts, to keep the records of those prohibited from participating in tenders, and to carry out research and development activities.

Main central purchasing bodies

In most of the countries involved there is one main central purchasing body, as provided by EU Directives.

In Italy, *Consip S.p.A.*, a public stock company owned by the Ministry of the Economy and Finance, operates as a central purchasing body on behalf of the State. Its main activity consists of the implementation of the Programme for the rationalization of public expenditure in goods and services through the use of information technology and innovative purchasing tools, with the aim of rationalizing the expenditure in goods and services of public administrations.

Consip has been committed to draft and conclude, also by using electronic technologies, and through framework contracts for the supply to the public administrations of specific categories of goods and services, which are defined every year through a Ministerial Decree, with providers selected on the basis of a transparent procedure.

Within the framework contract, the providers have to accept any orders for specific goods and services, coming from public entities enabled to use the contracts themselves. Public entities shall or may purchase within the framework contracts. It is mandatory for State administrations, whereas the other administrations, whenever they perform their own tenders, have to take price and quality of the framework contracts as a reference. Italian Regions can also set up purchasing bodies which act on behalf of regional or local authorities.

In Portugal there is a National System of Public Purchases which comprises the National Agency for Public Purchases, as central body charged with the task of defining, managing and implementing, in a progressive manner, the system, and the "Ministerial Purchasing Units", which pursue such an activity at the level of each Ministry, within the bounds defined by the National Agency for Public Purchases. In such a system, the use of framework contracts is mandatory for central administrations and it is on a voluntary basis for entities of the autonomous administration and public enterprises.

Also in other countries, State administrations are obliged purchase through central purchasing bodies within the framework contracts, such as *Finland* and *Lithuania*, whereas in *France* it is on a voluntary base.

In the *United Kingdom*, *Buying Solutions* operates as a central purchasing body for the Government and public entities.

In *Germany* two main central purchasing bodies exist at federal level (covering purchases for Defence and Interior Ministries).

The review system

The new Public Procurement Remedies Directive had a significant impact on national review procedures. Since the Directive 2006/77/EC came into force, the Italian Presidency launched a survey on the draft transposition of the Directive into EU Countries law (available at www.ppneurope.org) in order to have a comparative analysis on difficulties in transposing specific Remedies Directive rules, to exchange information and benchmarking on the transposition approaches among EU Countries and to support the European Commission in the monitoring activity on the transposition process into national law.

In order to give a complete overview on the national framework in Public Procurement, the survey includes some information on general features of the review system in PPN countries: the scope of EU Legislation; nature and competences of review bodies; and the review procedures (pre-contractual and contractual review).

Scope of the review system

PPN countries have been asked to specify if a different review system is envisaged for procurements below the EC threshold.

It emerges from the survey that in EU Countries, Directive 2006/77 applies to all contracts covered by Directive 2004/17/EC and 2004/18/EC: works, services and supply contracts and also concessions. In some other EU Countries (*Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Hungary, Italy, Lithuania, Poland, Romania, Slovenia, Sweden*) the Directive applies also to below the EU threshold.

Review bodies

PPN countries have been asked to describe their review bodies (first instance and appeal), by indicating their nature: judicial (administrative or other courts) or non judicial (a review body specific on public procurement).

In most of the countries involved by the survey review bodies are of *judicial* nature (administrative or-civil).

In some countries the national legislation provides for a specific *non judicial* review body on public procurement as the first instance: Cyprus (*Tenders Review Authority established by the Tender Review Law*), Czech Republic (*Office for the protection of Competition*), Denmark (*National Complaint Board for public procurement - administrative quasi-judicial board*), Estonia (*Public Procurement Appeal Committee*), Poland (*National Appeal Chamber – non judicial review body -appeals*), Slovakia (*Office for Public Procurement*), Spain (*administrative review*), Finland (*Market Court*), Macedonia (*State Appeals Commission*), Latvia (*Procurement Monitoring Bureau*), Slovenia (*National Review Commission*).

Review procedure

PPN countries have been asked to specify the competences devoted to the review body both in the pre-contractual and in the contractual review procedure

Pre-contractual review

In almost all EU Countries involved, the review body can impose the suspension or the cancellation of the decisions related to the awarding procedures. In *Sweden* the review body can also ask for modification. In *France* and the *United Kingdom* the review body can order the modification of the decisions or documents related to the awarding procedure. In *Belgium* the review body can add a default fine (periodic penalty payment) to its suspension.

Contractual review

As concerns the implementation of the Remedies Directive in case of infringements of Public Procurement law, in general EU Countries transposition law provide for ineffectiveness, or, in case of overriding reasons of general interest, alternative penalties.

As concerns the meaning of ineffectiveness, the judge may opt between *ex tunc* or *ex nunc* ineffectiveness (*Denmark, Poland, Romania, Spain, Italy, and Sweden*).

In some countries ineffectiveness is provided *ex nunc* (*Czech Republic, United Kingdom*), in other countries *ex tunc* (*Bulgaria, France, Germany, The Netherland*).

In most of the EU Countries the review body can opt between ineffectiveness and alternative penalties. In some Countries the transposition law provides only for alternative penalties (*Bulgaria, Denmark, Poland and United Kingdom*).

With regard to nature and scale of the alternative penalties, almost all EU Countries transposition laws provide for financial penalties or the shortening of the duration of the contract (in *Bulgaria* and *Czech Republic* only financial penalties).

Financial penalties (from a minimum of 5-10% up to 15-20% of the total estimated amount of the contract) are usually paid as revenues of the State budget.

6 CONTRIBUTIONS*

** The content of the contributions has been provided by PPN members*



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

EU law in Austria is adopted by federal or state legislation, either by law or legislative decree. The procedure is the same as for all other legislation. This is the same for transposition of PP directives.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

EU law (Directives 2004/18 and 2004/17, Remedies Directives) was adopted in the *Bundesvergabegesetz 2006 – BVergG 2006, BGBl. I Nr. 17/2006 idF BGBl. I Nr. 15/2010*¹.

The adoption of the Defence and Security Directive is currently in preparation.

There is one code, *the BVergG 2006*, which deals with PP in general and the PP review on federal level; there are 9 *Landesvergabegesetze*, which deal with PP review on municipal and state level. There are several Regulations i.e. dealing with levies for complaints and publication obligations via Internet (of PINs, CANs and other publications required by the PP Directives).

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

The *BVergG 2006* is also applicable for procurement procedures below the EC thresholds (material and remedy system). For procurement procedures below the thresholds a “lighter” and more flexible regime for the award of contracts has been established.

¹ Available at: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004547>

The same applies for the *Landesvergabegesetze* and regulations which also cover the remedies below the thresholds. Procurements below the EC thresholds are also regulated in the *BVergG 2006*. Procurements below the EC thresholds however have a lighter and more flexible procedure as the ones above. The *BVergG 2006* provides procurement procedures applicable only for procurements below the EC thresholds.

The publication is regulated in the §§ 78 ff *BVergG 2006* and has to inform about the contracting entity, the competent review body, technical specifications and also if the award will be on the “lowest price” or the “economically most advantageous offer”. The time limit set for submission of applications and tenders depends on the chosen procurement procedure and varies between at least 14 and 22 days, with the possibility to shorten this limit in extraordinary cases (§§ 64 to 67 *BVergG 2006*).

Qualitative selection and award criteria are either the best price (“*Billigstbieterprinzip*”) or the economically most advantageous offer (“*Bestbieterprinzip*”).

Procurement of services in Annex II B of Directives 2004/18/EC and 2004/17/EC

Procurement of services in Annex II B of Directives 2004/18/EC and 2004/17/EC is covered by the *BVergG 2006*. Those services have to be awarded in a competitive and transparent procedure (only in exceptional cases without transparency). The relevant provisions of the *BVergG* mirror the requirements as set out by the jurisprudence of the ECJ.

Procurement of service concessions

Procurement of service concessions is also covered by the *BVergG 2006*. Those concessions have to be awarded in a competitive and transparent procedure (only in exceptional cases without transparency). The relevant provisions of the *BVergG* mirror the requirements as set out by the jurisprudence of the ECJ.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

In general every contracting entity/authority is responsible for the managing of its own procurement. Federal, state, municipal authorities as well as entities financed by such authorities or being governed by or under the supervision of these authorities, are responsible for public procurement following the regime of the *BVergG 2006*.

The contracting entities/authorities of these levels are themselves responsible for the conduct of their procurement procedures.

Main organisations responsible for procurement within the utilities sector

There is a big variety of organisations responsible for procurement within the utilities sector. Important entities include inter alia the “ÖBB” (responsible for public transport, see www.oebb.at), the *Flughafen Wien AG* (Viennese Airport, see www.viennaairport.com), the *Verbund* (responsible for electricity, see www.verbund.at).

Supervision bodies

The Court of Auditors (*Rechnungshof*) is responsible for the supervision of conduct on federal, state and municipal level.

The *Rechnungshof* and its competences are regulated in Article 121 ff B-VG² (Austrian constitution).

It is a supportive body of the federal and state parliaments. The *Rechnungshof* consists of a president, a vice president and the required number of attendants.

Besides other competences it is responsible for control on federal, state and municipal level. Therefore the necessity (as such) and the concrete conduct of public procurement procedures are controlled by the *Rechnungshof*.

Austria did not set up an independent body ex Art. 81 Directive 2004/18.

Main central purchasing bodies

There is one main central purchasing body, the “*Bundesbeschaffung GmbH*” (see www.bbg.gv.at), which was established by the *BB-GmbH-Gesetz, BGBl. I Nr. 39/2001*, to create synergies between federal authorities in order to reach optimized and economically reasonable result.

Supportive bodies

Every contracting entities/authorities can empower an entity (“*Vergebende Stelle*”) to conduct a procurement procedure on behalf of the contracting entity/authority.

Contracting authorities/entities have the possibility to ask for legal advice, which is provided by the *Verfassungsdienst* of the *Bundeskanzleramt* (for the federal level) and by the state administrations (for the state and local level).

² Available in English at: http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erv&Dokumentnummer=ERV_1930_1

4 THE REVIEW SYSTEM

Scope of the review system

All review authorities deal with procedures both above and below the EC thresholds.

Review bodies

Regarding contracting authorities/entities at federal level the review body is the *Bundesvergabeamt* (see www.bva.gv.at).

Regarding the contracting authorities/entities at regional and municipal level, most States ("*Länder*") use existing independent administrative review bodies ("*Unabhängige Verwaltungssenate*" or "*UVS*" short) as review authorities. Two *Länder* (Salzburg and Vienna) have established special review bodies ("*Vergabekontrollsenate*").

Review procedure

Pre-contractual review

If the bidder either thinks that he should not have been eliminated from the procurement or, if he was not eliminated, wants a review of his shortcoming in the procurement process, he can make an application for nullification ("*Nachprüfungsantrag*").

The review body has the competence to nullify the decisions of contracting authorities/entities during a procurement procedure, esp. the decision to award a contract ("*Zuschlagsentscheidung*").

Contractual review

If the contract between the contracting authority/entity and its preferred bidder is already formed, the contract can be declared void or be nullified according to the system of Directive 2007/66.

The review body can state that the selection of the successful bidder and the award of the contract constitute a breach of the PP legislation. This statement is a precondition for a claim for damages before a civil court.



Belgium

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

The power to set the general rules concerning public procurement lies with the federal authority. This power is, however, not absolute, federated entities being able to establish supplementary rules which do not violate federal regulations.

Transposition of European directives into Belgian law necessitated the introduction of laws and royal decrees providing for their enforcement (see below).

A draft bill, drawn up by the Federal Public Service Chancellery of the Prime Minister, is examined by the Public Procurement Commission established at federal level. This draft bill is submitted to the Inspectorate General of Finances, to the Minister for the Budget and then to the Council of Ministers for approval. The text is then sent for an opinion to the legislative section of the Council of State, which will examine in particular its consistency and conformity with regard to European and national law. The draft bill is then adopted by the Government and transmitted to Parliament. It is discussed and, if necessary, amended, then voted and adopted by the Chamber of Representatives as well as, in some cases, by the Senate. The King sanctions and promulgates the text and the Act is published in the *Moniteur belge* (Belgian official journal).

A draft royal decree providing for the enforcement of the Act follows the same procedure except for the legislative process.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

European directives are not transposed through a code but through an Act which is amended according to the new directives to be transposed. To that extent, it may be referred to as a “unique legislative act”.

Legislation currently in force:

This matter is currently governed by the Act of 24 December 1993 relating to public procurement and to certain public works, supplies and services contracts as well as by several royal decrees.

The Act is divided into three parts:

- The first part relates to public procurement in the classical sectors. This part is enacted by the royal decree of 8 January 1996¹;
- The second part relates to public procurement in the water, energy, transport and postal services sectors awarded by public authorities and corporations. This part is enacted by the royal decree of 10 January 1996²;
- The third part concerns contracts with certain private enterprises benefiting from special or exclusive rights to manage activities in the water, transport and postal services sectors. This part is enacted by the royal decree of 18 June 1996³.

The royal decree of 26 September 1996⁴, also pursuant to the Act of 24 December 1993, sets the general rules for the execution of public procurement contracts and public works concessions. It applies to contracts covered by the first two parts of the Act. Its purpose is not to transpose European directives.

The transposition of the directives into Belgian law was already effected in the framework of the current legislation but warrants a new reform in a restructured context, especially with a view to the transposition of the “optional” provisions of Directives 2004/17 and 2004/18 (competitive dialogue, framework agreement in the classical sectors, dynamic purchasing system, etc.). The Act of 15 June 2006 relating to public procurement and certain public works, supply and services contracts will enter into force, according to the latest forecasts, in 2011. The decrees providing for its enforcement are currently in preparation.

Legislation currently in preparation:

- Bill modifying certain provisions of the Act of 15 June 2006 relating to public procurement and certain works, supply and services contracts;
- Draft royal decree on the awarding rules enforcing the Act of 15 June 2006 for the traditional sectors;
- Draft royal decree on the awarding rules enforcing the Act of 15 June 2006 for special public sectors;
- Draft royal decree on the awarding rules enforcing the Act of 15 June 2006 for special private sectors;

1 Royal decree of 8 January 1996 relating to public procurement of works, supplies and services and to public works concessions.

2 Royal decree of 10 January 1996 relating to the public procurement of works, supplies and services in the water, energy, transport and postal services sectors

3 Royal decree of 18 June 1996 relating to competitive tendering within the framework of the European Community for certain public contracts for works, supplies and services, in the water, energy, transport and postal services sectors.

4 Royal decree of 26 September 1996 setting out the general rules for the enforcement of public procurement of public works concessions.

- Draft royal decree relating to the general rules for the execution of public procurement contracts, enforcing the Act of 15 June 2006;
- Draft royal decree relating to the control of federal public procurement, to delegations and conflicts of interest;
- Bill relating to public procurement and certain contracts in the fields of defence and security (intended to ensure the transposition of Directive 2009/81/EC);
- Draft royal decree on the awarding rules enforcing the above Act;
- “Remedies” bill applicable both to public procurement subject to the Act of 15 June 2006 and to procurement in the fields of defence and security;
- Draft “clean vehicles” royal decree (intended to ensure the transposition of Directive 2009/33/EC).

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

Public procurement contracts below the European thresholds are also subject to the Act of 24 December 1993 relating to procurements and certain works, supply and services contracts and to the decrees providing for its enforcement. The royal decrees providing for enforcement of 8 January 1996, 10 January 1996 and 26 September 1996 are therefore also applicable for public procurement contracts not submitted to the directives. That is why these decrees contain, in addition to the joint provisions, provisions specific to procurements below the European thresholds.

The same applies in the special sectors, except for below-threshold procurements of private enterprises benefiting from special and exclusive rights. The same will apply after the ongoing legislative reform. The Act that will govern the matter will then be the Act of 15 June 2006

- The different procedures for the award of contracts currently in force are harmonised with those provided for in the directives.
- Advertisements are obligatorily published in the “*Bulletin des adjudications*” (Bulletin of calls for tender).
- Time limits for requests to participate and the submission of tenders - When the awarding authority chooses to follow a restricted procedure it first selects the candidates. Only these will be subsequently permitted to bid. Below the European thresholds, the time limits are shorter than in the Directives. Those deadlines are the following: for the restricted tendering procedure, the restricted call for tenders and for the negotiated procedure with advertisement:

- a. The requests to participate must be submitted within 15 days (with a minimum of 10 days in case of emergency);
- b. The time limit for the receipt of tenders is 15 days (with a minimum of 10 days in case of emergency).
- c. For the open tendering procedure and the open call for tenders, the deadline for the submission of tenders is 36 days. In case of emergency, that time limit is reduced to 10 days.

Qualitative selection for the award of contracts must be made whatever the chosen mode of award except for the procedure negotiated without advertisement. The criteria correspond to those provided for in the directives. The mention of the chosen criteria is made in the notice in the case of publication or otherwise in the special terms and conditions.

The compulsory causes of exclusion are identical to those of the directive: criminal conviction for participation in a criminal organisation, for corruption, fraud and money laundering. It should be noted that the obligation of exclusion applies except in the case of urgent requirements in the general interest.

The optional causes of exclusion are identical to those of the directive: bankruptcy or petition for bankruptcy, liquidation, cessation of business, composition, criminal conviction for an offence concerning professional conduct, serious professional malpractice, non-payment of social security contributions, non-payment of duties and taxes, false tax returns.

Economic and financial capacity is verified by appropriate bank declarations, balance sheets and abstracts of balance sheets and of annual accounts or declarations relating to overall turnover and concerning the object of the contract.

Technical and professional capacity criteria are specific to each type of contract.

Unlike the quality selection criteria which make it possible to assess the capacity of candidates, the criteria for awarding the contract are intended to assess the intrinsic value of the bid. A strict separation between the criteria for award of contract and the selection criteria is applied as is stipulated in the directives. Generally speaking, we may sum up by saying that the rules regarding the selection and award criteria are comparable to those for the procurements subject to the directives. The rules applicable in the event of a negotiated procedure without advertisement are more flexible nevertheless. The qualitative selection procedure is an example worth mentioning where it is not compulsory to formalise.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

These procurements are subject to the national legislation like other procurements but they are not advertised at the European level when the procedure is initiated.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

Institutions responsible for drawing up regulations relating to public procurement contracts:

The Commission for public procurement, which is currently governed by the royal decree of 10 March 1998, is composed of representatives of the federal authority, of federated entities, of public corporations, of the supervisory authorities (Court of auditors and Inspectorate General of Finances) of representatives of businesses and trade unions.

The Commission is an advisory body charged with putting forward or amending draft texts transposing the European directives concerned with public procurements and with contributing to drafting the regulations which will subsequently be submitted to the Government for approval. It also gives its opinion on items of general interpretation.

The Federal Public Service Chancellery of the Prime Minister – Public Procurement Department acts in particular as the secretariat of the Procurements Commission. This service is charged with the preparation, coordination and monitoring of the legislation relating to public procurement and, in particular, with the transposition of European law into Belgian law.

Moreover, every year it makes a statistical report for the European Commission relating to public procurement in Belgium.

This department also participates in European meetings and serves as a point of contact for the European Commission.

Each contract awarding body is responsible for its own public procurements whether at Federal, Regional, Community or local level. It is not possible to give an exhaustive list of these contract awarding bodies.

Some of them belong to main identifiable categories (for example Federal public departments, Regional and Community ministries, the provinces, towns and municipalities, etc.) others have, by contrast, a specific non-categorisable status. Lists of examples of the latter appear in the annexes to the regulation.

Main organisations responsible for procurement within the utilities sector

The contract awarding bodies are in particular public corporations, intermunicipal agencies, autonomous municipal authorities, regional companies, port and airport authorities, etc.

Supervision bodies

The Court of auditors exercises external supervision over the budget, accounting and financial operations of the Federal State, the Communities and the Regions (and even at local level on a voluntary basis).

Other supervision structures also exist. For example, the Inspectorate General of Finances attached to the Federal Public services and the Regional and Community ministries supervises contracts the amount of which exceeds certain financial thresholds.

At the level of the federated entities, the Regions exercise supervision over the local authorities and have to approve the implemented procurement procedures.

Main central purchasing bodies

The CMS (*Central Procurement body for the federal services*) takes charge of the grouped public procurement and monitoring procedures on behalf of the federal public services (public service organisations, scientific institutions, etc.):

- for supplies and services,
- relating to large quantities,
- of a repetitive kind (with purchase orders),
- when central purchasing involves a large-scale saving.

There are a certain number of other central purchasing bodies in Belgium, for example that of the Federal Police for the benefit of local police areas, those created by certain health care institutions.

Supportive bodies

The Purchasing Advice and Policy Unit (ABA - CPA) is part of the Federal Public Service Personnel and Organisation. It provides advice to the purchasing departments of the federal authorities.

4 THE REVIEW SYSTEM

Scope of the review system

The transposition of the “Remedies Directive” into Belgian law has been effective since 25 February 2010. The Act of 23 December 2009, modifying the Act of 24 November 1993 aims, on the one hand, to transpose Directive 2007/66/EC and, on the other hand, to partially extend these procedures to procurements below the European thresholds.

The royal decree of 10 February 2010⁵ supplements the Belgian procurement system to which the Directive in principle does not apply.

For example, the European threshold being relatively high in respect of works, the Belgian legislator made the standstill period⁶ applicable to works⁷ contracts subject to obligatory publicity at the Belgian level only but of which the amount of the bid to be approved net of VAT comes to € 2,422,500⁸ instead of € 4,845,000 (the European threshold on 1 January 2010).

Despite this extension, procurements not subject to the Directive benefit from all the Belgian legal protection rules but not from all the rules applicable at the European level.

Review bodies

It is the nature of the contracting authority which will be taken into account to determine the competent review body and not that of the contract entered into⁹. Thus the review body for the cancellation and suspension of the disputed decision (most often the decision concerning the award of contract) will be:

5 The royal decree of 10 February 2010, modifying certain royal decrees enacting the law of 24 December 1993 relating to procurements and certain contracts for works, supplies and services. (M.B. 16.02.2010), in force on 25 February 2010. This decree contains three types of measure: on the one hand, provisions concerning information and communication for contracts subject to section III of the law of 23 December 2009 for which the King can make rules governing exceptions and, on the other hand, new or amended appendices relating to ex ante voluntary transparency and to notices of the award of contracts and, finally a certain number of formal modifications intended to correct inconsistencies essentially appearing in the footnotes of articles.

6 As well as its corollaries: ineffectiveness and alternative penalties.

7 This principle does not, however, apply to works contracts relating to defence mentioned in Article 346, 1, b of the treaty on the workings of the European Union.

8 The text of article 65/30 of the ACT of 24 December 1993 formulates this threshold in these terms: “works contracts subject to obligatory advertisement at the Belgian level of which the amount of the bid to be approved net of VAT is between the amount set by the King for European advertisement and an amount corresponding to half of the amount cited in the second place.”

9 See article 65/24 of the Act of 24 December 1993.

- The administrative disputes section of the Council of State when the contracting authority is an authority covered by article 14, § 1, of the consolidated laws on the Council of State;
- The ordinary court when the contracting authority is not an authority covered by Article 14, § 1, of the consolidated laws on the Council of State.

Moreover, certain types of dispute (declaration of ineffectiveness, alternative penalties, damages) come at present exclusively within the competence of the ordinary court.

The administrative court is not a full litigation court and the plaintiff therefore does not escape the system whereby a case may be “shuttled” between the courts, which has not disappeared from Belgian law, the Act of 23 December 2009 reserving the cancellation of a contract, in the form of a declaration of ineffectiveness *ex tunc* or *ex nunc*, to the ordinary court alone.

The Belgian system is unusual in that the decision taken by the court of first instance will be subject to appeal or not according to the court in which the case is heard. Thus the Council of State has jurisdiction as court both of first and final instance, its judgement not being subject to appeal. By contrast, the decision of the ordinary court of first instance can be the subject of an appeal in the Court of Appeal and, if need be, of a further appeal to the Supreme Court of Appeal.

Arbitration, which was in principal prohibited to public authorities before 1998, is seldom used.

Review procedure

Pre-contractual review

Article 65/11 of the Act of 24 December 1993, establishing the ‘standstill period’ (= the period between the choice of contractor and conclusion of the contract) is motivated by a preventive principle since it provides that when a request for the suspension of the execution of a decision for the award of a contract is made during this period according to a procedure of extreme urgency or a summary procedure, the contracting authority cannot conclude the contract before the review body has given its ruling. The ‘*remedies directive*’ objective of carrying out quick and effective reviews of illegal decisions by the contracting authority at a stage where infringements can still be corrected is thus met.

Belgian law does not make a completely clear distinction between pre- and post-contractual interim orders. If the case, has been brought before the court during the standstill period, which has or should have been respected, the court will rule validly, its decision not being without influence on any illegal execution of the contract, which might have occurred after its submission.

The contracting authority cannot conclude the contract without the review body ruling either on the request for interim measures or on the request for suspension. There is therefore an automatic suspension of the execution of the decision to award the contract, which is a relative innovation in Belgian law.

For the administrative authorities and similar bodies, the Council of State is empowered to suspend the decisions taken in respect of the award of a procurement contract. In Belgium, the Council of State is not empowered to suspend the execution of a contract. However, by virtue of Article 65/13 of the Act of 24 December 1993, a suspension order in respect of the “*acte détachable*” (the decision to award a contract) *ipso jure* entails the suspension of the subsequent contract.

The interim injunction judge (civil) has the same competence in respect of decisions taken by other contracting authorities.

The review body can add a default fine (periodic penalty payment) to its suspension. In addition, it has the possibility of ordering interim measures with the aim of correcting the alleged violation or of preventing damage to the interests concerned or it may order interim measures necessary for the execution of its decision (was not the case before).

Finally, Belgium does not have the possibility offered by the Directive of suspending the award of a contract until a judgement on the merits is given.

Contractual review

The judge has the power, even, in some cases, the obligation, to annul the contract. Article 65/17 of the Act of 24 December 1993 uses the Community terminology “*the review body considers ineffective a contract concluded in each of the following cases: [cases corresponding to those listed in article 2.5 of the directives]*”.

As previously stated, Belgian law has no clear division between the pre- and post-contractual interim orders.

On the one hand, the decision of the court before which the case has been validly brought during the standstill period will not be devoid of effect. Coupled with the relinquishment of the condition of serious harm that is difficult to correct, Article 65/13 of the Act of 24 December 1993 introduces a fundamental change in the regulations by stating that the suspension by the review body of the execution of the decision to award a contract entails *ipso jure* the suspension of the execution of the contract (possibly concluded in breach of Article 65/11). The suspension order of the Council of State will therefore have, by the effect of the law, an influence on the contract, which would not have been the case previously because of the decision in the FEYFER/FORMANOVA¹⁰ case.

On the other hand, the ‘true’ repressive phase of the procedure will come when a claimant tries to demand the ineffectiveness of the contract. It is not difficult to consider that this ineffectiveness, provided for in Article 65/15 of the Act of 24 December 1993 is the most severe penalty that can be pronounced by the review body in respect of a procurement contract.

¹⁰ For fuller development on this aspect see E. THIBAUT and S. WAUTHIER, “The new litigation system for procurement contracts according to the Act of 23 December 2009” (Le nouveau régime contentieux des marchés publics après la loi du 23 décembre 2009) IN DE KONINCK, C., FLAMEY, P. THIEL, P. & DEMEULENAERE, B. (eds.), *Public Contracts Chronicle (Chronique des Marchés Publics) 2009/2010*, Brussels, EBP Publishers, 2010, pp. 861 and following.

Whatever the nature of the contracting authority, the court – ordinary court exclusively – receives from Article 65/17 of the Act of 24 December 1993 the competence to annul the contract.

Given the important consequences of such a penalty, its application is limited to serious infringements.

Thus, at the request of any interested person, the review body, subject to the exceptions stated in Articles 65/18 and 65/20, considers ineffective a contract concluded in each of the following cases:

- When the awarding authority has concluded a contract without previously giving it European publicity, whereas this is required by Community law on procurements, by the Act or the decrees providing for its enforcement;
- When the awarding authority has concluded the contract without observing the standstill period of two weeks or without waiting for the review body to rule on whether this infringement¹¹:
 - a) has deprived a tenderer of the possibility of lodging or carrying to completion the appeal for suspension mentioned in Article 65/11 par. 2 of the Act of 24 December 1993 and,
 - b) is accompanied by an infringement of Community law with respect to public procurement contracts, of the Act and the decrees providing for its enforcement and when this infringement has damaged a tenderer's chances of getting the contract.

Nullification of the contract can, for overriding reasons of general interest, be replaced by alternative penalties provided for in Article 65/22 of the Act of 24 December 1993. This article allows the court, automatically or on the request of an interested party to shorten the term of the contract or to impose a financial penalty on the contracting authority. The penalty pronounced is effective, proportionate and deterrent. The financial penalty, which amounts to a maximum of 15% of the amount awarded exclusive of value added tax, is paid to the treasury.

¹¹ Part of the doctrine sought the annulment of a contract concluded before the expiry of the standstill period or before the court had ruled, without any further conditions (see in this connection Ph. FLAMME, M-A FLAMME, Cl. DARDENNE, "European and Belgian Public contracts, irresistible Europeanisation of public procurement law" (Les Marchés Publics européens et belges, irrésistible européanisation du droit de la commande publique), éditions Larcier, 2009, p. 310, n°233.). This approach was not adopted by Belgium, which, as the Directive allows, subjects the declaration of ineffectiveness to conditions additional to the simple failure to observe the standstill period.



Bulgaria

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

As a European Union member state, Bulgaria has brought its national legislation in line with the European public procurement directives, particularly with the “Classical” Directive 2004/18/EC and the “Utilities” Directive 2004/17/EC.

Apart from that, the process of transposition of the “Remedy” Directive 2007/66/EC has reached its final stage and the draft law is to be approved by the National Parliament in June 2010.

As far as the new “Defense and Security” Directive 2009/81/EC is concerned, the draft law preparation has already started, but is yet to gather speed, as the transposition deadline is 21 August 2011.

All the other European regulations concerning thresholds, standards forms and CPV are also part of the legislation in force in the country.

In Bulgaria, public procurement legal matters are regulated by the Public Procurement Act/ PPA (promulgated, SG No. 28/2004), effective as of October 1, 2004. With the amendments and supplements to PPA from 2006 (promulgated, SG No. 37/2006) the regulatory base has been harmonized with the EU law and the requirements of EU Directives in the area of public procurement. Since then, the act has undergone some changes. It was last amended on October 16, 2009.

The bylaws regulating the enforcement of PPA are as follows:

- The Rules for Implementation of PPA (RIPPA, promulgated, SG No. 53/2006, last amendment - January 13, 2009);
- The Ordinance on the award of small public contracts (OASPC, promulgated, SG No. 84/2004, last amendment - January 13, 2009);
- The Ordinance on the Award of Special-Purpose Public Contracts (OASPPC, promulgated, SG No. 80/2004, last amendment – January 23, 2007);
- The Ordinance on Exerting Ex-ante Control over procedures for the award of public contracts financed in whole or in part with European funds and;
- The Ordinance for the conduct of contests in urban development and investment design.

The other key element of the system is the institutional framework. The state policy on public procurement is implemented by the Minister of Economy, Energy and Tourism. The Public Procurement Agency is an independent legal entity which supports the Minister of Economy, Energy and Tourism with policy implementation in that area. The Public Financial Inspection Agency (PFIA) and the National Audit Office act as controlling authorities with regard to adherence to public procurement legislation (Article 123 of the Public procurement act).

The legality of any decision, activity or inactivity on the part of a contracting party in the course of public procurement procedures until contract conclusion is subject to an appeal with the Commission on Protection of Competition (Article 120 of the Public procurement act). The decisions of the Commission on Protection of Competition may be appealed with a three-member committee of the Superior Administrative Court.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

The main act introducing EU law into the national legislation in the field of public procurement is the Public procurement act. As mentioned above, since the modification from 2006 it has been fully in line with Directive 2004/18/EC and Directive 2004/17/EC. Directive 2007/66/EC will be transposed with the Law on amendments and supplements to the Public procurement act, which has just been adopted on first reading by the National Assembly and is expected to come into force in June 2010.

As far as defence and security procurement is concerned, there is ongoing debate on the mechanism for harmonizing national legislation with Directive 2009/81/EC and the final decision is yet to be made.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

As the national thresholds set in the Public procurement law are lower than the EC ones, public procurement in Bulgaria below the thresholds in the EU directives can be divided into the following categories:

- Procurement above national but below EU thresholds

It is important to mention that pursuant to Article 14, paragraph 1 of the Public procurement act it shall apply obligatorily in assigning public procurement of the following cost without VAT:

1. For works – over 2 150 000 BGN, and where the procurement has a place of fulfilment outside the country – over 6 000 000 BGN;
2. For supplies – over 180 000 BGN, and where the procurement has a place of fulfilment outside the country – over 250 000 BGN;
3. For services – over 110 000 BGN, and where the procurement has a place of fulfilment outside the country – over 250 000 BGN;
4. For design contests – over 110 000 BGN.

In this case contracting authorities/entities shall apply the provisions of the Public procurement law, which are fully in line with Directive 2004/17/EC and Directive 2004/18/EC. The only specificity is that all notices are to be published only in the Public Procurement Registry and the State Gazette but not in the Official Journal.

- Procurement below national thresholds

In this case contracting authorities/entities shall apply the provisions of the Ordinance on the award of small public contracts. For sake of proportionality the ordinance introduces additional thresholds. Above the higher ordinance threshold procedures similar to those set in the Public procurement act are to be followed.

Between the two thresholds at least three tenders are to be collected. Below the lower threshold there is no obligation for collection of three tenders and only the general principles are applied.

In more detail, according to Article 1, paragraph 2 of the Ordinance Small public contracts shall be public contracts, which have the following values, net of value added tax as follows:

1. For public works contracts – less than or equal to BGN 2 150 000, and where the place of performance of the public contract is outside the country – less than or equal to BGN 6 000 000;
2. For public supply contracts- less than or equal to BGN 180 000, and where the place of performance of the public contract is outside the country – less than or equal to BGN 250 000;
3. For public service contracts – less than or equal to BGN 110 000, and where the place of performance of the public contract is outside the country – less than or equal to BGN 250 000;
4. For design contests – from BGN 30 000 to BGN 110 000 including.

In Article 3, paragraph 1 of the Ordinance it is stipulated that small public contracts shall be awarded in accordance with the principles under Article 2 of the Public procurement act by means of conduct of an open contest or negotiated procedure with invitation. The open contest is similar to the open procedure with slightly reduced time limits and the negotiated procedure with invitation is almost identical to the negotiated procedure without prior publication of a notice regulated in the Public procurement act. As far as publication is concerned, all notices for small public contracts are published only in the Public procurement register.

According to Article 2 of the Ordinance the contracting authorities may not conduct a procedure for the award a small public contract, nevertheless they shall be obligated to gather no less than 3 tenders, which include technical and financial offer, unless it is objectively impossible, when the contracts have the following values, net of value added tax:

- For public works contracts – from BGN 45 000 to BGN 200 000 and where the place of performance of the public contract is outside the country – from BGN 500 000 to 1 500 000;
- For public supply or service contracts – from BGN 15 000 to 50 000, and where the place of performance of the public contract is outside the country – from BGN 50 000 to 100 000.

When the value of contract is below BGN 45 000 for works and below BGN 15 000 for supply or services contracting authorities may not gather 3 tenders.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

In accordance with Article 5, paragraph 1, item 2 of the Public procurement act, public procurement for services, included in Appendix №3 (non-priority services), shall be assigned by way of open procedure, limited procedure or negotiated procedure with prior notice. The proceedings follow the same rules set in the Public procurement act.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

The main actors in the Bulgarian public procurement system and their functions are as follows:

Policy and policy implementation

- Ministry of Economy, Energy and Tourism;
- Public Procurement Agency.

Appeal

- Commission for Protection of Competition;
- Supreme Administrative Court.

Control

- Public Financial Inspection Agency;
- Bulgarian National Audit Office.

The main bodies responsible for policy implementation in the sphere of public procurement are the Ministry of Economy, Energy and Tourism and the Public Procurement Agency as an executive agency under it.

The Public Procurement Agency was established on 12.03.2004 with a Decree No. 56 of the Council of Ministers (promulgated in the State Gazette No 24 of 23.03.2004) as an independent body under the Ministry of Economy and Energy, whose purpose is to assist the Minister in implementing the national policy in the field of public procurement.

In accordance with Article 19 of PPA and the Statute of the Agency, the powers of the Executive Director can most generally be grouped into the following categories:

- *Draft law preparation*

As a result of its important role in the public procurement system, the Agency is responsible for the preparation of all the amendments to the Public Procurement Act and the secondary legislation, as well as of the elaboration of new legal acts in the field.

- *Methodology and promotion of best practices*

A substantial part of the Agency's activity is devoted to providing methodological guidelines and promotion of best practices. These responsibilities of the agency can take different forms – from the design of standard forms, through the elaboration of handbooks, to the organization of trainings and seminars.

- *Ex-ante control*

Since the beginning of 2009 the Public Procurement Agency has new responsibilities in exerting *ex-ante* control over public procurement. On the one hand, in accordance with Article 19, paragraph 2, point 22 of PPA the agency assists MA/IB with *ex-ante* control of public procurement procedures over the EU thresholds, financed with EU funds. On the other hand, in accordance with Article 19, paragraph 2, point 24 of PPA the agency executes *ex ante* control of negotiated procedures without publication of notice (for all cases but those according to Art. 31, par. 1, (a) and (b) and par. 2, (c) of Directive 2004/18/EC).

- *Maintenance of the Public Procurement Register*

One of the principal functions of the Agency, facilitating the activities of all public procurement stakeholders, is the maintenance of the Public Procurement Register (PPR). It is an electronic database containing the full set of information on the procedures conducted and the contracts concluded, which contracting authorities and entities are obliged by law to provide. The PPR is an essential tool guaranteeing adherence to the principles of openness and transparency, which is a precondition for free and fair competition on the public procurement market.

- *Monitoring and analysis of the public procurement market*

In order to permit assessment of policy implementation and legal acts application, as well as to fulfill the statistical obligations under the European directives, the Agency has the responsibility to analyze the public procurement market. As already mentioned, the main source of information for the market analysis is the Public Procurement Register.

- *Cooperation at local and international level*

Fulfilling its mission to implement the policies in the field of public procurement, the Agency has always relied on the active cooperation with key domestic and international institutions. At local level, this took the form of organization of, or participation in, various events on important public procurement issues. Apart from that, the PPA is working closely with the bodies engaged in the public procurement review and control process. Furthermore, the PPA has ascertained itself as a proactive participant in the European dialogue in the area of public procurement.

In general, the overall activity of the Agency is intended to assure compliance with all the crucial principles of public procurement, including:

- Optimizing public spending
- Promoting openness and transparency
- Fostering competition
- Reducing administrative burdens
- Preventing irregularities

Main organisations responsible for procurement within the utilities sector

There are no specific organizations responsible for procurement within the utilities. In all their activities the contracting entities rely on the guidance and support of the sectorial ministries and agencies, and especially the Ministry of Economy, Energy and Tourism and the Public procurement agency.

Supervision bodies

In accordance with Article 123, paragraph 1 of the Public procurement act control over compliance with this Law shall be exercised by the National Audit Office and by the authorities of the Agency for the State Financial Inspection.

The contracting authorities covered under Article 7, paragraph 1 of the Public procurement act, which fall within the scope of the National Audit Office Act, shall be subject to control by the National Audit Office. The contracting authorities covered under Article 7 herein, which fall within the scope of the Law for the State Financial Inspection, shall be checked by the authorities of the Agency for the State Financial Inspection as to compliance with this Act within the framework of financial inspection.

Any contracting authorities, which are not subject to financial inspection under the Law for the State Financial Inspection, shall be checked by the authorities of the Agency for the State Financial Inspection as to compliance with the public procurement regime by means of checks.

The National Audit Office of the Republic of Bulgaria performs independent audit of the budget and other public funds, guarantees the public trust in the expenditure of funds and contributes to the sound financial management in the country. Its organization, mandate and procedures for its activity are regulated by the National Audit Office Act (Promulgated, Official Gazette No.109/18.12.2001). The National Audit Office consists of President and 10 members, elected by the National Assembly for a term of 9 years. The organizational structure of the National Audit Office includes 10 departments, 6 Regional Offices in the country with respective sectors and administration. The National Audit Office reports its activity to the National Assembly and informs the public on the results of its audits.

The Public Financial Inspection Agency (PFIA) is an administration under the minister of finance created in 2006 after implementing of significant reform in the scope of Public Internal Financial control (PIFC). The basic objectives, of the Public Financial Inspection Agency are to protect the public financial interest through implementing of follow up financial inspections for observing the normative acts providing the budget, financial-economic or accounting activity of organizations and persons in the scope of its activity.

PFIA is the institution of realizing sanctioning function after uncovering of breaches - reveal caused damages and bringing to administrative punitive and proprietary responsibility of the guilty persons upon existence of the respective lawful grounds. It is the unique competent authority in the country, which realizing administrative punitive responsibility of the public procurements. Main task of the public financial inspection is determining of frauds and breaches of EU financial interests. The fundamental activity principles are lawfulness, objectivity, official principle and confidentiality.

Main central purchasing bodies

Pursuant to Article 8, paragraph 4 of the Public procurement law following a proposal made by the Minister of Economy and Energy, the Council of Ministers may establish a central purchasing body for the needs of the executive authorities, and the municipality mayors – for the needs of the municipalities.

With Decision 68 as of 11 February 2010 the Council of Ministers determined the Minister of Finance as a central purchasing body as of July 1, 2010. In executing this function the Minister is to be assisted by a specialized unit within the Ministry of Finance.

The activities of this unit are regulated by CoM Decree 112/04.06.2010. However, the central purchasing body is not fully operational yet.

Supportive bodies

As mentioned above, the main supportive role in the system is played by the Public procurement agency.

4 THE REVIEW SYSTEM

Scope of the review system

As mentioned above, according to Article 120 of the Public procurement act the legality of any decision, activity or inactivity on the part of a contracting party in the course of public procurement procedures until contract conclusion is subject to an appeal with the Commission for Protection of Competition. The decision of the Commission for Protection of Competition may be appealed with a three-member committee of the Superior Administrative Court. This decision is final and binding.

Different review system is envisaged for procurement below the higher threshold of the Ordinance on the award of small public contracts and for the contracts awarded pursuant to the Ordinance on the Award of Special-Purpose Public Contracts. In these cases the Administrative procedure code is to be applied. The appeal bodies are the Administrative courts and the Supreme Administrative Court.

Review bodies

The public procurement procedures are appealed against in front of the *Commission for Protection of Competition* (first instance) and the *Supreme Administrative Court* (Appeal). The CPC is administrative, non-judicial review body.

Review procedure

Pre-contractual review

Pursuant to Art.120, Para 1 of PPA, any decision, action or omission to take action by the contracting authority in a public procurement award procedure until conclusion of the contract or the framework agreement shall be appealable as to the legal conformity thereof before CPC, i.e. only acts of the contracting authority issued in the course of the procedure are appealable before the Commission - starting from the date of the decision to initiate the procedure until the conclusion of the public procurement award contract or framework agreement, only referring to their legal conformity.

Acts issued on behalf of the contracting authority by an entity, which is officially authorized to organize and conduct the public procurement award procedure, are also appealable before CPC.

The appeal does not suspend the public procurement award procedure unless CPC imposes an interim measure of suspension.

Contractual review

According to Para 2 of Art.120 of PPA, any interested party may lodge an appeal within ten days after being notified of the relevant decision or action or, if not notified, after the date of learning or after the date on which the time limit for executing the respective action expired. With the amendments to the Public Procurement Act, effective 01.07.2006, the legislator provides an opportunity to each interested party to lodge an appeal before CPC, however the term "interested party" is not defined. Under CPC practices, the interested parties are different depending on the nature of the contracting authority's act.

The ten-day period for appeal against any act, actions or omissions of the contracting authorities, in the course of the public procurement award procedure is preclusive, i.e. the right to appeal of any interested party is precluded upon expiry of this period.

An appeal cannot be lodged after concluding the public procurement contract, the wording of the indicated provision not referring to cases where the public procurement contract or the framework agreement awarding is concluded in violation of the law.

Pursuant to Art.121a, Para 1 of PPA, upon motivated request by the appellant the Commission for Protection of Competition may impose a temporary measure stay of the procedure for assigning public procurement. At pronouncement on the request the Commission shall consider the negative consequences from the delay of the procedure and the actual danger of serious harm of the public interest or of the interests of the parties.

CPC has to rule on the request within seven-day period of initiating the case. The Commission delivers its ruling at a closed meeting.

The ruling of CPC for imposing or not imposing an interim measure is appealable before the SAC within seven-day period from its communication to the parties. The appealed ruling suspends neither the proceedings with CPC nor the execution of an imposed interim measure.

CPC rules on the appeal within two-month period of initiation of the proceedings. This set period is instructive, i.e. upon objective circumstances CPC may pronounce after its expiry.

The decision of CPC, together with its reasons, is prepared and announced to the parties in the proceedings not later than fourteen days of ruling the appeal.

The decision of CPC is appealable before a three-member panel of the SAC within fourteen-day of notifying the parties to the procedure. The ruling of the court is final.

The rules and procedures for obtaining a transcript of the Decision of CPC is the same as those for obtaining a transcript of the Determinations of the Commission.



Cyprus

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

The transposition process of EU law into national law and indeed the implementation process of any law in Cyprus are regulated by the Cyprus Constitution. Article 54 paragraph (f) of the Constitution stipulates that the responsibility of drafting bills to be submitted to the House of Representatives (Parliament) belongs, amongst other duties, to the Council of Ministers. Subsequently article 63 specifies that the authority of bill enactment lies with the House of Representatives (Parliament).

In this respect the first draft of a bill, in relation to transposition of EU law in public procurement, is prepared by the Competent Authority in Public Procurement (Treasury Department). The draft bill is then circulated to all interested parties (contracting authorities, organised bodies of economic operators, etc) for comments.

Upon redrafting the bill, it is then forwarded to the office of the Attorney-General (government legal advisor) for legal vetting. The bill as finalised by the Attorney-General is submitted through the Minister of Finance to the Council of Ministers for approval and then to the House of Representatives (Parliament) for enactment.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

EU law in public procurement is transposed into national law on a case by case basis, by separate laws:

- Directive 2004/18/EC has been transposed by Law 12(I) of 2006
- Directive 2004/17/EC has been transposed by Law 11(I) of 2006
- Directive 2007/66/EC has been transposed by Law still to be approved by Parliament
- Directive 2009/81/EC, Law is at the stage of drafting.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

The same legislative package on public procurement applies to all contracts regardless of their value in the case of contracting authorities which apply the Law 12(I) of 2006.

Each of the contracting entities of the utility sector (Law 11(I) of 2006) has their own rules for contacts below thresholds.

In addition, for contracts whose estimated value is up to € 50.000, apart from the open and restricted procedure, a contracting authority may also apply the so called “simplified procedures”. However, the Law stipulates that no public contract may be split up with the intention of applying the “simplified procedures”.

The “simplified procedures” were established based on experiences for low budget contracts with the intention of speeding up the completion of the award procedures and at the same time of decreasing the management costs.

It provides that for public contracts whose estimated value does not exceed:

- € 2.000 - the contracting authority may directly award the contract without following any of the tender procedures;
- € 15.000 - the contracting authority may ask for the submission of written or oral tenders from a restricted number of economic operators;
- € 50.000 - the contracting authority may award the public contract without prior publication of a contract notice on the following basis:
 - a) The contracting authority shall prepare the necessary contract documents, which shall be given to at least four economic operators of its choice, giving reasons for such choice.
 - b) The period from the date of the invitation to tender until the date of the submission of the tender shall be at least 7 days.
 - c) Tenders shall be submitted to the address of the contracting authority before the specified date and time as specified in the invitation to tender.

The rules of the contracting entities of the utility sector (Law 11(I) of 2006) are similar to the above rules.

A circular letter has been issued with respect to the application of the procedures relating to the contracts below the thresholds.

Cyprus’ legislation on contracts below the thresholds, amongst others, provides that the contract notice and a contract award notice are published in the Official Gazette of the Republic as well as on the e-procurement site.

The minimum time limit for the receipt of tenders is 14 days from the date the contract notice is sent to the Official Gazette of the Republic. The publication notice is published automatically on the same day in the e-procurement site.

The minimum time limit for the receipt of requests to participate is 10 days from the date the contract notice is sent to the Official Gazette of the Republic. The publication notice is published automatically, on the same day, in the e-procurement site.

The minimum time limit for the receipt of tenders is 14 days from the date the invitation is sent to the selected Economic Operators.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

A circular letter was issued which states that the provisions of the law should be applied proportionally. Any derogation from the provisions of the Law should be justified.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

Contract award procedures usually are managed by evaluation committees. Although the decision of the award of the contract varies according to the type of the contracting authority, i.e. the Central Government, Local Authorities etc.

In the case of the Central Government evaluation committees can award the Contract up to the EU thresholds. Contracts above thresholds are awarded by Tender Boards. The composition of the Evaluation Committees is minimum 3 persons and the decisions are taken by majority vote. The Tender Boards are composed by 5 members and decisions are taken by majority vote.

There are regulations which describe the bodies responsible for public procurement as well as the administrative procedures for managing award of contracts i.e. submission, opening, evaluation of tenders etc. There are different regulations for the CAs of the Central Government, the CAs governed by public law and for local Authorities.

Public procurement is managed independently at a Contracting Authority/Contracting Entity level.

For the case of Central Government, according to our national regulations, the Head of each contracting authority is responsible for deciding upon the internal procedures that should be followed for managing the tender processes.

For the rest of the Contracting Authorities i.e. the management of it depends on their law of establishment and it varies from authority to authority.

Main organisations responsible for procurement within the utilities sector

The organisations responsible for procurement within the utilities sector are specified within the regulations of each contracting entity. These regulations are similar to the Government's.

Supervision bodies

The bodies responsible for the supervision/control of public procurement procedures are:

- The Treasury of the Republic as the “Competent Authority of Public Procurement”;
- The Audit Office of the Republic;
- The Internal Audit Office.

The Competent Authority of Public Procurement has the following competences:

- To carry out checks on the contracting authorities for the purpose of ensuring compliance with the provisions of the Public Procurement Law and the regulations which are issued under it;
- To issue circulars for the better application of the Law and the regulations which are issued under it;
- To communicate to the contracting authorities the announcements of the Commission;
- To gather and to submit the necessary statistical information to the Commission within the prescribed time limits which are foreseen by the law.

The authority of the Auditor General is stem from the Constitution of Cyprus and is to carry out audits on all Contracting Authorities and all Contracting Entities.

The Internal Audit Service is responsible for auditing the Internal Procedures of Ministries, Department and Independent Services of Cyprus.

Main central purchasing bodies

The main central purchasing bodies are the departments of the Central government. Namely are the Information Technology Department for IT products, the Purchasing and Supply Department for common use products, the Electromechanical Services Department for Electromechanical products and the Printing Office.

Supportive bodies

Public Procurement Directorate

4 THE REVIEW SYSTEM

Scope of the review system

The scope of the Review system is to examine hierarchical recourses against acts or decisions of a contracting authority prior to the conclusion of any public supply, works and services contract and which infringe any provision of the law in force.

The same review system applies to all contracts regardless of their value.

Review bodies

A non – judicial body, the Tenders Review Authority (TRA) has been set up with power to review acts taken or decisions reached by contracting authorities prior to the conclusion of any public contract, for an alleged infringement of the law.

Furthermore there is always the right of the interested person to file an application for judicial review to the Supreme Court of Cyprus instead of applying for review to the TRA.

Review procedure

Pre-contractual review

Any person having or having had an interest in obtaining a particular public contract and who has been or risks been harmed by an alleged infringement by an act, or decision of a contracting authority, may, prior to the conclusion of any such public contract, apply for review to the (TRA). This does not prejudice the right of the interested person to file an application for judicial review to the Supreme Court of Cyprus instead of applying for review to the TRA.

Additionally, the TRA may, upon the filing of an application for review, at the request of the applicant, to order interim measures in order to prevent further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure leading to the award of a public contract or the implementation of any decision taken by the contracting authority, until a final decision is reached.

Furthermore, the national legal system provides for any person aggrieved by any decision of the TRA, to challenge such decision before the Supreme Court of Cyprus. Damages can only be awarded by the Court.

It is further noted that any interested person may exercise his/her right to file an application to the Supreme Court of Cyprus instead of applying for review to the TRA, provided that these two procedures do not run concurrently.

Upon examination of the hierarchical recourse the Tender Review Authority may:

- Confirm the act or decision of the contracting authority;
- Annuls such act or decision of the contracting authority, if it contravenes any provision of the law in force and precedes the conclusion of the public contract;
- Annul or amend, by reason of contravention of any provision for the law in force, any condition contained in the contract documents or in any other document related to the contract award procedure which refers to the technical, economic or financial specifications.

Contractual review

A contract is consider ineffective by the Tenders Review Authority when:

- 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 in accordance with the Law 12(I)/2006 and 11(I)/2006;
- In case of an infringement depriving the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of the Law, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract

The Tenders Review Authority can declare the contract ineffective with no retroactive effect and impose penalties.



Czech Republic

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

Legal subjects can be obliged to legal duties only by an Act. The Acts are approved by two chambers parliament and by the president of the republic. Governmental regulations and decrees can only deal with details of duties set down by the Act.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

All above mentioned directives are implemented by The Act no. 137/2006 Coll. on Public Contracts, as amended and by The Act no. 139/2006 Coll. on Concession Contracts and Concession Procedure (the Concession Act), as amended (in following only as "The Acts"). The Acts are added by governmental regulations and decrees.

The governmental regulations no. 77/2008 Coll. and 78/2008 Coll., as amended by regulation no. 474/2008 Coll., deal with thresholds defining the scope of directives 2004/17/EC and 2004/18/EC.

Here the list of Decrees:

- Decree no. 274/2006 Coll. establishing the List of Military Materiel for the Purposes of the Act on Public Contracts;
- Decree no. 326/2006 Coll. on Particulars of the Attestation Procedure for Electronic Tools, Essentials of the Application for Attestation and the Amount of Fee for the Submission of Application for Attestation (Attestation Procedure and Electronic Tools Decree);
- Decree no. 328/2006 Coll. establishing the Lump Sum of the Costs of Proceedings for the Review of Practices of Contracting Body for the Purposes of the Act on Public Contracts;

- Decree no. 329/2006 Coll. laying Down Detailed Requirements upon Electronic Means, Electronic Tools and Electronic Acts in Awarding Public Contracts;
- Decree no. 330/2006 Coll. on Publication of Notifications for the Purposes of the Act on Public Contracts as amended by Decree no. 16/2010;
- Decree no. 217/2006 Coll. Implementing Concession Act;
- Decree no. 238/2006 Coll. Laying Down Essentials of the Application for Prior Opinion on Conclusion of a Concession Contract or a Contract under Concession Act and on Amendment to the Concluded Concession Contract or Contract under Concession Act.

The Act no. 179/2010 Coll. amending The Acts will enter into force on 15th September 2010. Therefore there is a revision of decrees foreseen.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

This is the same legislation as legislation on procurement covered by the EU directives, however sector contracting entities (as defined in the article 2 of the directive 2004/17/EC) are not obliged to use any award procedure.

The award procedures for procurements below the EU thresholds are foreseen by the directive 2004/18/EC.

In addition simplified procedure below the EU threshold can be used. In the simplified procedure below the thresholds, the contracting authority shall invite not less than 5 candidates to submit tenders and to demonstrate the fulfilment of qualifications by means of an invitation in writing. The contracting authority shall make public the written invitation in a suitable manner for the entire duration of the time limit for the submission of tenders.

The contracting authority has to use the publication forms laid down by the Commission regulation (EC) No 1564/2005, except for the invitation in the below threshold procedure. The forms have to be published at the national web Public Procurement Information System¹.

Time limits are shortened, for details see § 39 of the Act on Public contracts².

If the contracting authority awards a below-the-threshold public contract, it shall be obligated to require demonstration of the fulfilment of basic and professional qualifications prerequisites by the economic operator.

The fulfilment of basic qualifications prerequisites in respect of below-the-threshold public contract shall be demonstrated by the submission of solemn declaration.

¹ English version at: <http://www.isvzus.cz/uisvz/index.jsp?language=change>

² The English translation is available at: <http://www.portal-vz.cz/CMSPages/GetFile.aspx?guid=e8e63f4f-a001-4337-91e4-767ca2877d52>

The fulfilment of professional qualifications prerequisites shall be demonstrated by:

- An extract from the Commercial Register;
- A licence to pursue business activities under separate legal regulations to the extent corresponding to the subject-matter of the public contract ;
- Evidence issued by a professional self-governing chamber or any other professional organisation proving membership thereof in such a chamber or another organisation (only if relevant) and
- Evidence attesting professional competence of the economic operator or any other person through which the economic operator assures professional competence (only if relevant).

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

The form “contract notice” need not to be published in TED. Contracting authorities can always use also the negotiated procedure with publication.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

- Office for the protection of competition;
- Ministry for Regional Development: it has been established by the Act No. 2/1969 Coll. on establishing ministries and other central authorities of state administration of the Czech Republic, as amended. It is responsible for governmental proposals of legislation on public procurement and concession contracts;

Every contracting entity is responsible for its own procurements. If contracting entities associate or group in another way for the purposes of common action aimed at the award of a public contract they are considered as a sole contracting entity.

The Act on Public contracts enables to conclude a contract with central purchasing body. Central purchasing body can be any Contracting authority which is obliged to award public procurement for other contracting entities by a contract. It is not created by any state decision. See § 3 of the Act on public contracts for details.

Supportive bodies

The Ministry for Regional development is also responsible for methodology.

Supervision bodies

The Supreme audit office of the Czech Republic controls the efficiency and economy of public procurement. It does not control the procedural compliance of award and concession procedures with The Acts.

The Office for the protection of competition is a Non-political authority based by the Act No. 2/1969 Coll. on establishing ministries and other central authorities of state administration of the Czech Republic, as amended. The office residents in the town Brno and it is divided into four sections. One of them is the section of public procurement which exercises the supervision over awarding of public contracts.

The Office for the protection of competition controls whether the award procedures and concession procedures were in compliance with The Acts. It can also impose a ban to perform the contract on public procurement. Its decisions are administrative decisions issued under the Act no. 500/2004 Coll. administrative proceedings code, as amended. It can be revised by the Chairman as well as by the administrative courts

4 THE REVIEW SYSTEM

Scope of the review system, review bodies and procedures

Regional court in Brno and Supreme Administrative Court of the Czech Republic are responsible for the review procedures.

Regional court in Brno is entitled to revise administrative decisions of the Office for the protection of competition or administrative decisions of its chairman. Its judgement can be set aside by the Supreme Administrative Court of the Czech Republic.

Regarding the contractual review, law suits related to the contracts are decided by common courts.



Denmark

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

Governmental order number 600 af 30/06/1992 (*bekendtgørelse af lov om samordning af fremgangsmåderne ved indgåelse af bygge- og anlægskontrakter og indkøb m.v.*) gives the Danish Minister of the Interior and Health and the Danish Minister of Economic and Business Affairs the authority to legislate with a view to implement EU Directives on public procurement.

Usually the preparatory legislative work is done in the context of the Authorities or administrative bodies under the relevant ministry e.g. the Danish Competition Authority.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

The following Community Directives on public procurement have been implemented into the Danish legal system:

- Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;
- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

According to Danish law the public procurement directives are directly applicable since they are incorporated *telles quelles*. The directives have been implemented by the following governmental orders:

- Governmental order number 937 of 16 September 2004 concerning the procedures for the award of public works contracts, public supply contracts and public service contracts;
- Governmental order number 936 of 16 September 2004 concerning procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

Governmental order number 937 implements the procurement directive 2004/18/EC on public works, supplies and services. Governmental order number 936 implements the utilities directive 2004/17/EC. Each directive is printed as an annex to the respective governmental order. Thus the actual text of the directives constitutes the current legislation in the field of public procurement in Denmark.

Some of the provisions in the procurement directives are non-compulsory for Member States, e.g. the provisions on framework agreements, centralised purchasing, electronic auctions and competitive dialogue. This entails that each Member State must decide whether to implement these rules into national law. Denmark has chosen to give access to all new procurement procedures and instruments with only one limitation. Electronic auctions cannot be used in the field of public works contracts – mainly to prevent a risk of fragmenting the building process. The procurement directives have been in practical use in Denmark since 1 January 2005.

The remedies directive (*directive 2007/66/EC*) has been implemented through law number 492 of 12/05/2010 (*Lov om håndhævelse af udbudsreglerne m.v.*).

The directive on defence and security procurement (*directive 2009/81/EC*) has not been implemented yet. The Danish Competition Authority is currently in the process of preparing of legislative act.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EC Thresholds

Public work contracts below the EU threshold value are governed by the Danish Act on Tender Procedures for Public Work Contracts, law number 338 of 18 May 2005. It entered into force on September 2005. The Act applies to contracting authorities as defined in Directive 2004/18/EC, any other entity or body receiving public grants for the work in question and contractors who invite offers from subcontractors in relation to award of public works from a contracting authority.

The award of supplies and services below EU thresholds and above the national threshold (500.000 DKR) in the classical sector are governed by Act on tender procedures for Public Work contracts (*Law no. 572 of 06/06/2007*).

These two laws are incorporated in Governmental Law order number 1410 of 07/12/2007 (*Tilbudsloven, Bekendtgørelse af lov om indhentning af tilbud på visse offentlige og offentligt støttede kontrakter*)

Works contracts are generally concluded on the basis of an open or restricted procedure.

The parties covered by the act can also use a third procedure called “*underhåndsbud*”, which is characterised as all other procedures than a procedure whereby economic operators are invited to submit tenders on the basis of the same tender material. Contracting authorities as defined in Directive 2004/18/EC or any other entity or body receiving public grants for the work in question can only use this procedure if the works contract is estimated to have a value below 3 mio DKR.

In an open tender procedure, economic operators are invited to submit tenders through an advertisement in the press or electronic media. The contract documents shall specify the time and place for receipt of bids.

In a restricted procedure the invitation to bid is addressed directly and only to those from which bid is desired. These economic operators are selected in a prequalification phase, with a minimum 15 days to forward documentation for economic and technical ability.

The award criteria can only be “lowest price” or “economically most advantageous tender”.

There are no specific procedures for the award of supplies and services contracts. The contracting authority only has to conduct the procedure in such a way that economic operators are selected on the basis of objective, and non-discriminatory criteria. There are no time limits for receipt of tenders. Time limits only has to comply with the principle of equal treatment i.e. shall not be so short that practically all potential bidders will find it is impossible to forward a bid. There are no rules for qualitative selection or award criteria. The chosen criteria only have to be non-discriminatory and objective.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

The award of both annex II A and II B services above the national threshold (500.000 DKR) in the classical sector are governed by Act on tender procedures for Public Work contracts (*Law no. 572 of 06/06/2007*), which is incorporated in Governmental Law order number 1410 of 07/12/2007 (*Tilbudsloven, Bekendtgørelse af lov om indhentning af tilbud på visse offentlige og offentligt støttede kontrakter*).

3 THE INSTITUTIONAL SYSTEM

Institutions/Structures responsible for public procurement

Each contracting authority at both state, regional and local level is ultimately responsible for managing their public contracts. It is thus not possible to describe the structure or indicate legal status, composition and competences of authorities responsible for the management of public procurement.

Supervision bodies

There are no such supervisory bodies in Denmark.

Main central purchasing bodies

The main central purchasing bodies are:

SKI (*Statens og Kommunernes indkøbsservice*) is a central purchasing body securing volume discounts on the most ordinary goods and services to the public. SKI establishes framework agreements on behalf of the Danish state and municipalities which aims to benefit both providers and public purchasers.

SKI is a limited company owned by the state (55 per cent) and Local Government Denmark (45 per cent.). SKI's income is based on the suppliers on the framework agreements paying a share of the turnover that goes through the agreements. The business model gives SKI an incentive to establish agreements that are used often and thus financing SKI's continued existence. SKI is a non-profit corporation.

Government Procurement under the auspices of the Danish Agency for Governmental Management conducts public procurement procedures and establishes public contracts on behalf the Danish government and municipalities.

Supportive bodies

The main supportive body is the Danish Competition Authority which is an agency under the Danish Ministry of Economic and Business Affairs. The Danish Competition Authority has been the responsible authority in the procurement area since 1993. The reason for placing the matters concerning the public procurement under the auspices of the Danish Competition Authority is that public procurement rules are regarded as an important part of the competition rules.

The Danish Competition Authority strives to ensure the development of effective and free competition in the field of public contracts. Among the essential tasks of the Danish Competition Authority is to ensure the proper understanding and application of the procurement rules. An important part of the Authority's work is therefore to provide advice concerning the interpretation and the application of the rules on public procurement.

In 1996 the Minister for Economic and Business Affairs increased the control of compliance with the procurement rules, as the Danish Competition Authority was requested to take on a more active and initiating role in this respect. The Minister asked the Authority to try to identify on its own initiative assumed violations and examine complaints received regarding violations of the rules.

Thus, the Danish Competition Authority in the field of public procurement has the legal authority to, issue written recommendations in specific complaint cases, provide written informative statements where questions of general interest are raised and provide for ad-hoc oral guidance on the interpretation and application of public procurement law.

Furthermore, in order to increase the possibilities of swift identification of violations of the procurement rules and a correspondingly swift treatment of complaints, the Danish Competition Authority was in 1996 also given formal legal authority to bring cases before the Complaints Board.

Where the Complaints Board in practice in the majority of cases expresses its opinion on the legality of contract award procedures at a stage where the contract has been awarded, the Danish Competition Authority may step in to deal with a complaint during the procurement procedures.

Through discussions with the contracting authority/entity the Danish Competition Authority tries to change the course in order to legalise its procedures before the procurement procedure is closed and the contract is awarded. This way of hearing complaints at the earliest stage possible during an award procedure corresponds exactly to the intentions behind the Remedies Directives in the public procurement area.

The Danish Competition Authority is not legally entitled to make formal decisions or suspend a procedure. It can only issue a recommendation to this effect. Accordingly the objectives for the informal problem solving system are:

- To ensure equal competition conditions in an informal and pragmatic way;
- To intervene at the earliest possible stage – and before contract is signed;
- To reach solutions in a speedy way, at the lowest conflict level possible and with a minimum of costs.

As a consequence the Competition Authority deals primarily with cases, where the contract has not yet been signed and excludes cases already in legal proceeding. Furthermore, the Authority never deals with claims for damages.

In addition to the informal problem solving system, the Danish Competition Authority is, as mentioned above, authorized to provide ad-hoc oral guidance on the interpretation and application of public procurement law.

The Authority has therefore established a telephone hotline service with the specific purpose of answering procurement questions, thereby allowing contracting authorities, tenderers and advisors easy and swift access to guidance in the interpretation and the application of the rules on public procurement.

Furthermore, the Danish Competition Authority is not a supervisory body, and only advises on the understanding of public procurement rules when asked.

4 THE REVIEW SYSTEM

The Danish Complaint Board for Public Procurement is authorised to review public procurement procedures both above EC thresholds and below.

Review bodies

The Complaints Board for Public Procurement is a specialised administrative board, which has been set up by law in 1991 to act as review body as required by the Remedies Directives (Council Directive 89/665/EEC of 21 December 1989 and Council Directive 92/13/EEC of 25 February 1992) now replaced by directive 2007/66/EC.

Detailed rules regarding the functioning of the Board are laid down in a ministerial order issued by the Danish Minister for Economic and Business Affairs.

The Complaints Board is an independent administrative board for the hearing of complaints and settling of disputes concerning alleged violation of the EU rules for the award of public contracts. The competence of the Board relates both to the public procurement directives and the relevant rules of the Treaty on non-discrimination and the free movement of goods and services.

The Complaints Board is composed by a chairman and three vice-chairmen, all of them professional judges, and a number of listed expert members appointed by the Danish Minister for Economic and Business Affairs among persons with knowledge of building and engineering, public procurement, transport and related commercial activities. In review proceedings the Complaints Board is typically consists of one judge and two experts selected from the list.

A decision made by the Complaints Board can be appealed to the ordinary courts no later than 8 weeks following the decision of the Complaints Board.

Review procedure

Pre-contractual review and contractual review

A complaint is submitted to the Complaints Board for hearing of the case at a charge of DKK 4,000 (corresponding to around € 500).

In practice, the Complaints Board deals with a case in much the same way as a court of law does. Invariably, the first step is the exchange of pleadings. Notwithstanding, as a starting point, the statutory rule of the exchange of pleadings taking place in writing, cases are often heard by oral procedure. The procedures are based on the right of confrontation and cross-examination. The decisions of the Complaints Board take the form of so-called orders formulated in the same way as judgements in civil cases dealt with by the ordinary courts.

According to the Danish legislation implementing the Remedies Directive, the power of the Complaints Board are the following: the Board can either reject a case, e.g. if it falls outside its competence, or go into the merits of it. Furthermore, the Board is authorised in specific situations to:

- suspend the procurement procedure or decisions in connection with such a procedure;
- annul unlawful decisions or procurement procedures;
- Impose upon the contracting authority/entity to comply with the rules (legalise its actions);
- Impose an economic sanction;
- Impose a fine;
- Consider a contract ineffective;
- Order the contracting entity to pay the costs to the claimant in connection with the claim;



Estonia

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

The field of public procurement in Estonia is regulated by the Public Procurement Act and supplemented with several regulations of the Government of Estonia. The Ministry of Finance is the responsible institution for public procurement policy, drafting the law, providing supervision and consulting.

Public Procurement notices are published on-line in the central State Public Procurement Register and the information is accessible free of charge for all contracting authorities and suppliers. Additionally it is possible for suppliers to access electronic tendering documents in case the contracting authority has made them available in the register.

Public procurement in Estonia is regulated by the Public Procurement Act (PPA). The PPA transposes the EC directives 2004/17/EC, 2004/18/EC and 2007/66/EC and regulates the procedures for the awarding of public works contracts, public supply contracts and public service contracts both for the contracting authorities in the public sector and contracting entities in the utilities sector.

The Ministry of Finance is the responsible institution for public procurement policy, drafting the law, providing supervision and consulting.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

Public procurement in Estonia is regulated by the **Public Procurement Act (PPA)**. The PPA transposes the EC directives 2004/17/EC, 2004/18/EC and 2007/66/EC and regulates the procedures for the awarding of public works contracts, public supply contracts and public service contracts both for the contracting authorities in the public sector and contracting entities in the utilities sector.

The Ministry of Finance is the responsible institution for public procurement policy, drafting the law, providing supervision and consulting.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

The threshold of the cost of organising the public procurement procedure, granting the works concession and organising the design contest are regulated in Estonian Public Procurement Act.

Estonia has established national thresholds below EC thresholds. The threshold of the cost of organising the public procurement procedure, granting the works concession and organising the design contest for the purposes of Estonian Public Procurement Act is: As to the public procurements started in the year 2008 and later 40,000 Euros in case of the and service contracts and design contest, 250,000 Euros in case of public works contract and works concession. The contracting authority shall fix the time limits for submission of tenders or requests to participate in the procurement procedure based on the object of the public contract, above all its complexity and quantity, volume or amount.

In case of open procedure the date for submission of tenders shall not be shorter than 52 days from the publishing of the contract notice in the register.

In case of restricted procedure, negotiated procedure with prior publication of a contract notice and competitive dialogue the date for submission of the requests to participate in the procurement procedure shall not be shorter than 37 days from the publishing of contract notice in the register.

In case of restricted procedure the date of submission of tenders shall not be shorter than 40 days from the submission of the tender invitation to the candidates.

In case of negotiated procedure with prior publication of a contract notice and competitive dialogue the date of submission of tenders may be specified by the agreement between the contracting authority and the candidates chosen by the contracting authority, provided all chosen candidates have equal time for the submission of tenders. If no agreement is reached, the contracting authority specifies the date for the submission of tenders which shall not be shorter than 24 days from submitting the tender invitation.

Provided the contracting authority has submitted the prior information notice according to the procedure set in § 30, the date for submission of tenders shall not be generally shorter than 36 days in case of procurement procedures mentioned in subsections 2 and 4 of this section. Provided the prior information notice included all obligatory information required in the contract notice and it was submitted to the register 52 days up to 12 months prior to the submission of contract notice, the dates mentioned shall not be shorter than 22 days. When the contracting authority enables the unrestricted and full electronic access to the contract documents beginning from the date of submission of the contract notice to the register and refers to the relevant website in the contract notice, the mentioned dates may be shortened by 5 days.

Provided the estimated value of the public contract is equal to the threshold of public procurement or exceeds it, but is below of the international threshold, the date mentioned in subsection 2 of this section shall be at least 22 days in case of works contract, at least 15 days in case of supply or service contract, the date mentioned in subsection 3 at least 7 days and the date mentioned in subsection 4 in case of works contract at least 22 days and in case of supply or service contract at least 15 days.

Provided the contracting authority submits no contract documents or additional information to the candidates or the persons interested in participating in the procurement procedure within the dates stipulated in the this section, although these were applied in time for or when the tenders may be made only after a visit to the site of performance of the contract or after on-the-spot inspection of the documents supporting the contract documents, first of all documents being the basis for preparing of the technical specification, the contracting authority extends the time limits of submission of tenders if needed by the reasonable date and extends the time of opening the tenders so that all candidates or the persons interested in participation in the procurement procedure received all information needed for submitting the tender.

The contracting authority may extend the date of submission of tenders or the requests to participate in the procurement procedure and, if needed, thus change the time of opening the tenders. The date is not extended when the original date arrives before the publishing of the changed contract notice in the register or before the forwarding of the changed contract documents to all tenderers and to these candidates and interested persons who have received the contract documents.

Time limits

(contract value is equal or above national thresholds and below international thresholds)

Type of PP procedure and object		Minimum number of days for submission of request to participate	Minimum number of days for submission of tender
Open procedure	Goods & Services		15
	Works		22
Restricted procedure	Goods & Services	7	15
	Works	7	22

Estonian Public Procurement Act § 32 and § 33.

Technical specification in the meaning of this act has been established by using the understandable terminology and degree of accuracy for the persons acting in the relevant field to describe the object of the public contract by the contracting authority is:

- A set of the characteristics and technical requirements on public works being the object of the works contract;
- A list of the characteristic and substantial properties of goods or services being the object of the supply or service contract.

The set of technical requirements applicable for the public works shall describe the requirements for materials, or goods in the manner which enables to evaluate their suitability with the purpose of use of the object set by the contracting authority. These requirements may involve among other things environmental requirements and constructional requirements, including the requirement of accessibility criteria for people with disabilities, conformity assessment, requirements to performance, security or measurements, quality assurance means, used terminology, symbols, testing and test methods, requirements for packaging, marking and labelling and production process and technology. The mentioned requirements may also include the prescriptions related to planning and cost of the building, testing, supervision and acceptance terms, requirements for usage instructions and construction methods, technology and all other technical terms which may be described by the contracting authority and which are related to the completed buildings, their materials or parts.

The list of essential characteristics of goods or services may include among other things environmental requirements, requirements for quality and construction, including the requirement of accessibility criteria for people with disabilities, conformity assessment, efficiency, requirements on performance of the product, security or measurements and to the name of the product under which it is distributed, compliance requirements, used terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, also requirements for production process and technology and conformity assessment methods.

Provided the relevant field has no technical standard, the technical specification of the object of public contract is prepared on the basis of the following order:

- Estonian standard transposing a European standard;
- European standard;
- European technical approval established by the approval body appointed by the Member State of the European Union and which confirms that proceeding from the technical viewpoint the product with its features is suitable to fulfil the particular purpose regarding the compliance with the essential requirements set for the public works in compliance with its features and foreseen application use terms;

- Common technical specification established according to the procedure approved by the Member State of the European Union and published in the Official Journal of the European Union;
- International standard;
- Technical control system established by some standard organization of the European Union;
- International standard;
- The original Estonian standard, Estonian technical specification related to the design, accounting methods or implementation of public works or use of goods.

Each reference made by the contracting authority to the basis mentioned in subsection 1 of this section in the technical specification shall be accompanied by the note “or equivalent”.

The technical specification may be also prepared as a whole or as to some feature based on the specification of the performance or functional requirements of the object of the public contract instead of the bases mentioned in subsection 1 of this section which could also include environmental requirements. Such specification should be sufficiently precise for specifying the object of the public contract by the tenderer and for the award of the public contract.

In preparing the technical specification on the basis mentioned in subsection 3 of this section the basis mentioned in section 1 may be referred by the contracting authority as the mean to guarantee the compliance with the performance or functional requirements mentioned in subsection 3.

Provided the basis of technical specification is among other things the environmental requirements mentioned in subsection 3 of this section, these requirements may be also specified as the set of requirements expressed as the term of receiving the European, Estonian or international or other eco-labels or on the basis of single requirements provided that:

- Such requirements are appropriate to define the characteristic of the goods or services that are the object of the public contract;
- Such requirements are drawn up on the bases of scientific information;
- By adopting these eco-labels the procedure open for all interested persons and organizations has been used;
- The application of the usage permit of these eco-labels is accessible to all interested persons.

The technical specifications shall not refer to a specific purchase source, process, trademark, patent, type, specific origin or production with the effect of favouring or eliminating certain tenderers or certain.

Such reference shall be permitted in case, if this is unavoidably necessary resulting from the object of the public contract due to the fact that a sufficiently precise and intelligible description of the object of the public contract pursuant to the subsections 1 and 3 of this section is not possible. Such reference shall be accompanied by the words or “equivalent”.

The technical specification shall afford equal opportunities to all tenderers for submission of tenders and not create unjustified obstacles to the opening up of public procurement to competition.

Whenever technically possible and relevant, the possible usage requirements for people with disabilities need to be taken into consideration in preparing the technical specification related to the object of the public contract or prepare the technical specification so that all people could use the object of the public contract.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

The Ministry of Finance is the responsible institution for public procurement policy, drafting the law, providing supervision and consulting.

Main organisations responsible for procurement within the utilities sector

N.A.

Supervision bodies

The Ministry of Finance advises the contracting authorities regarding the application of the Public Procurement Act, exercises state supervision over carrying out public procurements and extrajudicial proceedings of misdemeanours in the extent and according to the procedure stipulated by law and shall publish on its website up-to-date information necessary for carrying out public procurements.

Main central purchasing bodies

N.A.

4 THE REVIEW SYSTEM

Scope of the review system

There is not different review system for public procurements below the EC thresholds.

Review bodies

According to the Public Procurement Act (PPA) a separate and independent Public Procurement Appeal Committee has been established for solving appeals in the field of public procurement. The member of the appeal committee is independent and proceeds only from law in making its decisions and other legal acts and obligatory foreign contracts for Estonia. The members of the Appeal Committee are appointed and released from office by the Government of the Republic on the proposal of the Minister of Finance. The chairman of the Appeal Committee representing and managing the Appeal Committee is appointed from among the members of the Appeal Committee by the Government of the Republic on the proposal of the Minister of Finance. The members of the Appeal Committee are appointed for five years. The procedure of submission of appeal, application for compensation and appeal procedure is regulated in the PPA.

Review procedure

In Estonia there is one review procedure (it includes pre-contractual and contractual review).

The tenderer, the candidate or the person interested in participation in the procurement procedure which has the possibility to participate in this procurement procedure at the relevant moment (the submitter of appeal), may appeal the activity of the contracting authority, if it finds that the violation of this act by the contracting authority violates its rights, by presenting such appeal to the Appeal Committee located by the Ministry of Finance.

The appeal procedure is carried out by the members of the Appeal Committee. The member of the Appeal Committee is independent and proceeds only from law in making its decisions and other legal acts and obligatory foreign contracts for Estonia. The provisions stipulated in § 47 of the Courts Act are applied to the requirements set for the member of the Appeal Committee. The member of the Appeal Committee is released from office before the prescribed time in case the fact stipulated in § 47 of the Courts Act occurs which precludes the appointment of the person the member of the Appeal Committee according to law. No supervisory control is carried out over the member of Appeal Committee. The member of the Appeal Committee subordinates to the chairman of Appeal Committee in work arrangement and other general questions, the chairman of Appeal Committee subordinates to the Minister of Finance in work arrangement and other general questions.

The Minister of Finance has the right to impose disciplinary punishment.

In applying the provisions of the Employees Disciplinary Punishments Act the rights of the employer belong to the Minister of Finance.

The appeal shall be submitted to the Appeal Committee in the course of seven working days from the day when the submitter of the appeal became aware of or should have become aware of the violation of its rights or damaging of its interests, but not after the award of the public contract. The appeal regarding the procurement source document should be received three working days at the latest before the date of submission of the request to participate in the procurement procedure, tenders, designs or concession applications.

The Appeal Committee shall evaluate the compliance of the appeal with the requirements stipulated in Estonian Public Procurement Act from its receipt within one working day. The appeal will be solely reviewed by the member of the Appeal Committee or at least the three-member panel, if the settlement of appeal collegially is important in the opinion of the chairman from the viewpoint of uniform application of law. The Appeal Committee shall review the appeal whether on the basis of documents submitted in a written procedure or shall organise the review of the appeal at a public session with the participation of the submitter of the appeal, the contracting authority and third person within seven working days from the receipt of the appeal without weaknesses to the Appeal Committee. The Appeal Committee shall organize the review of the appeal at the public session in case at least one of the parties to the appeal procedure requires it or if the Appeal Committee considers this necessary for the settlement of appeal.

The complaint on the decision of Appeal Committee is filed to the administrative court. The date of filing of a complaint is 7 days from the public disclosure of the decision of the Appeal Committee.



Finland

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

Transposition process of EU law into national law is done through legislation process that includes preparation of Government Bill and parliamentary proceedings. After Parliament approval and confirmation from the President, the Act will come into force. More technical issues are dealt with Government decree that is given by the Council of State.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

Act on public contracts¹ (Finnish Statute Series No 348/2007) regulates the award of contracts above and below the EU thresholds.

Act on public contracts by contracting authorities in the water, energy, transport and postal services sectors (Finnish Statute Series No 349/2007) regulates the award of contracts above the EU thresholds.

Government decree (614/2007) specifies publication requirements above and below EC thresholds. Regulation covers public and the utilities sector.

Contracting authorities are under the obligation to publish their contract notices via HILMA². Notices are forwarded to the Supplement to the Official Journal of the European Union and the TED database.

Defence and Security Directive 2009/81/EC is under legislative process.

1 <http://www.finlex.fi/en/laki/kaannokset/2007/en20070348>

2 <http://www.hankintailmoitukset.fi/fi/>

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

Act on public contracts is applicable both for national and EU thresholds. However Act on public contracts by contracting authorities in the water, energy, transport and postal services sectors applies only for contracts above EU thresholds.

It can be characterised that there is not much differences between the award of a contract above national thresholds and award of a contract above EU threshold. Apart from more flexible use of certain procedures and transparency requirements (contracts above national thresholds need not to be advertised in TED, also no exact minimum time limit for tenders does not occur, time limit must be “reasonable”), formulation of tender documents and remedies are the same.

Contracting authorities may use negotiated procedures in public supply and service contracts the estimated aggregated value of which is less than EUR 50,000, and in public works contracts the estimated aggregated value of which is less than EUR 500,000.

In accordance with the provisions laid down in national legislation on public procurement, contracting authorities are under the obligation to publish their contract notices. This single electronic channel, called HILMA is maintained by the Ministry of Employment and the Economy. Via HILMA, which is only eSender in Finland, notices are forwarded to the Supplement to the Official Journal of the European Union and the TED database.

Contracting authorities shall make public any contracts opened to competition through open or restricted procedures, negotiated procedures or the competitive dialogue. These procedures apply also to service concessions and public works concessions. Furthermore contracting authorities shall also make public framework agreements and design contests. Contracting authorities may publish information notices in other media (e.g. newspapers, their own websites) after the contract notice is published in the national web portal.

There are no regulated time limits. Time for bidding and tenders has to be reasonable. A reasonable time limit shall be fixed with respect to the scope and quality of the contract in order for the tenderers to submit tenders.

For qualitative selection and award criteria principles follow those of the contracts above EU thresholds, but written in the Act as described below.

In restricted procedures, negotiated procedures and in the competitive tendering, tenderers shall be selected, and the suitability of the candidates and tenderers assessed in all tendering procedures, following previously indicated criteria linked to the tenderers’ economic or financial standing, technical capacity or professional ability or following other objective and non-discriminatory criteria.

Candidates or tenderers which do not satisfy the technical, financial or other criteria to perform the contract shall be excluded from the competitive bidding.

It’s also possible to exclude from the competition if candidates and tenderers are convicted of certain offences.

The contract shall be awarded to the tenderer whose tender is the economically most advantageous tender from the point of view of the contracting authority, or has the lowest price. The comparison criteria for the assessment of the economically most advantageous tenders shall be linked to the object of the contract and enable impartial assessment of tenders.

In respect of public service contracts or public works contracts where the expertise, professional ability and competency of the persons responsible for providing the service or executing the works bears particular significance, the comparison criteria for performing the contract may include levels of quality control, competence, experience and professional ability that exceed the minimum criteria applied to assess the suitability of tenderers. Hence, here the scope of evaluation criteria is broader compared the contracts above EU thresholds.

Where the criterion for the award is that of the economically most advantageous tender, the assessment criteria shall be specified in only the order of priority in the contract notice or the invitation to tender. Where applicable, contracting authorities may set the comparison criteria in accordance with the provisions laid down in EU rules.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/

Act on Public Contracts covers also II B Services above and below EU thresholds. Basically contracting authorities are obliged to follow the same procedures as above EU thresholds for A Services. Some flexibility is introduced mainly concerning the use of negotiated procedure, possibilities to awards contracts directly. Obligation to advertise is at national level instead of mandatory use of TED.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

Competences in the field of public procurement in Finland are split among different government authorities.

The Ministry of Employment and the Economy is responsible for national legislation governing public procurement (Acts and Decree on public contracts), providing information about the statutes, following the reforms and topical issues relating to public procurement, and ensuring that the internal market mechanisms are working.

The Ministry of Finance has overall steering responsibility in the area of public procurement in the State government, and is responsible for setting general principles and rules. Management and development of the central government procurement system falls within the Ministry of Finance's remit.

Transposition of the Directive 2009/81/EC on defence and security procurement is under the legislation process. Ministry of Defence is the competent authority in this specific field of action. Furthermore, Association of Finnish Local and Regional Authorities³ creates important policy guidelines for local governments.

Main organisations responsible for procurement within the utilities sector

To start with, application of the utilities directive is limited in Finland due to the fact that the Commission has given a Decision on the exemption pursuant to Section 11 of the Act on public contracts in special sectors; production and sale of electricity. This Decision establishes that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the production and sale of electricity in Finland, excluding the Åland Islands. Available in English version at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_168/l_16820060621en00330036.pdf

Furthermore, Commission has given a Decision exempting certain services in the postal sector in Finland, excluding the Åland Islands.

As provided in the Annexes I-X of the Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, in Finland there are laws under which exists several different actors.

Actors may differ depending on the year, so there is no stable list of the main organizations. However, according to statistics 1 January 2009-1 January 2010, there were for example following type of organizations. The list is not exhaustive, but provides some guidance.

Directive 2004/17/EC, Annex I including inter alia transfer of gas or heat: Fortum Power and Heat Oy, Helsingin Energia, KSS Energia Oy, Oulun Energia, Keuruun Lämpövoima Oy

Annex II including inter alia transfer of electricity: Fingrid Oyj, Helsingin Energia, KSS Energia Oy, Fortum sähkönsiirto Oy, Tornionlaakson Sähkö Oy, PKS Sähkönsiirto Oy, Jyväskylän Energia Oy, Lappeenrannan Energiaverkot Oy, Oulun Energia, Vattenfall Verkko Oy, Turku Energia Oy, Järvi-Suomen Energia Oy. Annex III including inter alia production of drinkable water: several local water companies for example from cities of Helsinki, Turku and Tampere. Annex IV including inter alia railway services: VR Osakeyhtiö, The Finnish Transport Agency. Annex V including inter alia urban railway and bus services: The Finnish Transport Agency, Länsimetro Oy. Annex IX including inter alia harbour and terminal services: Rauman kaupunki. Annex X including airport services: Finavia Oyj.

³ http://www.kunnat.net/k_etusivu.asp?path=1;161;279

Supervision bodies

There is no particular supervision body, but inter alia National Audit Office of Finland is supervising the public procurement procedures in some respect.

Main central purchasing bodies

Two central purchasing bodies can be named in this context:

- 1) Hansel Ltd is the central procurement unit of the Finnish Government. Its tasks and roles are defined in the Public Procurement Act and the State Procurement Strategy. Hansel is a non-profit company that operates under the auspices of the Finnish Ministry of Finance. Furthermore, Act 423/1988 requires that certain type of central governmental (Government of Finland) public procurement contracts should be done through Hansel Ltd.
- 2) KL-Kuntahankinnat Oy⁴ is a central purchasing body for the local governments. KL-Kuntahankinnat Oy for example puts procurement contracts and framework agreements out to tender, conducts negotiations and manages contracts as well as offers clients expert services.

Supportive bodies

The Public Procurement Advisory Unit (<http://www.hankinnat.fi>) is maintained by the Association of Finnish Local and Regional Authorities and the Ministry of Employment and the Economy. The Public Procurement Advisory Unit focuses on providing contracting authorities with information and advice on procurement. It also advises businesses on issues relating to the application of procurement legislation;

*The Strategic Group on Government Procurement*⁵ that is appointed by the Ministry of Finance supports and develops the strategic steering of central government procurement as well as the implementation of the state's procurement strategy.

⁴ <http://www.kuntahankinnat.fi>

⁵ Available at: http://vm.fi/vm/en/01_main/index.jsp

4 THE REVIEW SYSTEM

Scope of the review system, review bodies and review procedure

The Market Court is a special court hearing public procurement cases, to which the tenderers may refer in writing matters concerning public contracts. Market Court may upon petition:

Wholly or in part cancel a decision by a contracting authority:

- Forbid the contracting authority to apply a section in a document relating to the contract or otherwise to pursue an incorrect procedure;
- Require the contracting authority to rectify an incorrect procedure; or
- Order the contracting authority to pay compensation to a party who would have had a genuine chance of winning the contract if the procedure had been correct.

Market Court may prohibit or suspend the implementation of the decision or otherwise issue instructions to suspend the contract as an interim measure for the period of the proceedings in the *Market Court*. The court may, in order to emphasise the importance of complying with the prohibition, impose a conditional fine.

Contracting authorities use also undertaking to the Court that they don't enter into a contract before Court's decision.

Market Court decision is appealable to the Supreme Administrative Court.

Decisions concerning the award of contracts of municipality, federation of municipalities and of parish it is also possible to lodge written demand for rectification within authority concerned.

From 1 June 2010 onwards, Finland applies new Remedy Directive 2007/66/EC above EU threshold and as a national sanction in this field, a compensation payment. Compensation payment can be ordered to a party who would have had an actual chance of winning the contract if the procedure had been correct.

For contracts above the national thresholds Finland applies EU remedies as they stood before the reform and introduction of Directive 2007/66/EC as well as compensation payment.



France

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

Pursuant to Article 34 of the French Constitutional Act of October 4, 1958:

“Statutes shall determine the rules concerning:

- *civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties; freedom, diversity and the independence of the media; the obligations imposed for the purposes of national defence upon the person and property of citizens;*
- *Nationality, the status and capacity of persons, matrimonial property systems, inheritance and gifts;*
- *The determination of serious crimes and other major offences and the penalties they carry; criminal procedure; amnesty; the setting up of new categories of courts and the status of members of the Judiciary;*
- *The base, rates and methods of collection of all types of taxes; the issuing of currency.*

Statutes shall also determine the rules governing:

- *The system for electing members of the Houses of Parliament, local assemblies and the representative bodies for French nationals living abroad, as well as the conditions for holding elective offices and positions for the members of the deliberative assemblies of the territorial communities;*
- *The setting up of categories of public legal entities;*
- *The fundamental guarantees granted to civil servants and members of the Armed Forces;*
- *Nationalisation of companies and the transfer of ownership of companies from the public to the private sector.*

Statutes shall also lay down the basic principles of:

- *The general organisation of national defence;*
- *The self-government of territorial communities, their powers and revenue;*
- *Education;*
- *The preservation of the environment;*
- *Systems of ownership, property rights and civil and commercial obligations;*
- *Employment law, Trade Union law and Social Security.*

Finance Acts shall determine the revenue and expenditure of the State in the conditions and with the reservations provided for by an Institutional Act.

Social Security Financing Acts shall lay down the general conditions for the financial equilibrium thereof, and taking into account forecasted revenue, shall determine expenditure targets in the conditions and with the reservations provided for by an Institutional Act.

Programming Acts shall determine the objectives of the action of the State.

The multiannual guidelines for public finances shall be established by Programming Acts. They shall contribute to achieving the objective of balanced accounts for public administrations.

The provisions of this article may be further specified and completed by an Institutional Act”.

Article 37 of the French Constitutional Act of October 4, 1958 provides that:

“Matters other than those coming under the scope of statute law shall be matters for regulation.

Provisions of statutory origin enacted in such matters may be amended by decree issued after consultation with the Conseil d’Etat. Any such provisions passed after the coming into force of the Constitution shall be amended by decree only if the Constitutional Council has found that they are matters for regulation as defined in the foregoing paragraph”.

European Directives are incorporated into French law using statutes or regulations according to the distribution of competences between the Government and Parliament established by these Articles¹.

For the State and the local authorities, public procurement rules are prepared, adopted and monitored by the Government. Specifically, the Ministry of Economy, Industry and Employment is responsible for proposing draft legislation and ensuring law enforcement.

¹ To avoid any problem of translation or misunderstanding in this document, the following rules are adopted : “Statute” is the law enacted by an Act of Parliament (in French: “loi”); “Ordinance” is a Statute enacted by the Parliament following the specific procedure of Article 38 of Constitution of October 4, 1958 (in French “ordonnance”); “Decree” is a national general regulation adopted by the Government (in French “décret”); a decree may be adopted on the basis of Article 37 of the Constitutional Act of October 4, 1958 or be a act of Statute enforcement; “Law” will be used as a general word. Due to the separation between legislation and regulation, arising from Articles 34 and 37 of the French Constitutional Act, in the main existing codes, articles issued from Statutes or Ordinances are named “Article L. xxx” (“L.” for “législatif”) and those issued from Decrees are named “Article R. xxx” (“R.” for regulation (“réglementaire”)).

It collaborates with all other ministries, including those responsible for the implementation of specific policies, such as the Ministry of Ecology, Energy, Sustainable Development and Sea for the green procurement policy. Where rules are the responsibility of the Parliament (rules applicable to private bodies, public enterprises and some public institutions), the Government submits bills for enactment.

The implementing measures of these statutes are adopted by the Government (decrees, circulars, ministerial orders, guidelines etc.).

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

All of the European directives relating to public procurement have been incorporated into French law, apart from Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009, which has to be incorporated into domestic law before August 21, 2011.

Directive 2004/18/EC of the European Parliament and of the Council of March 31, 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of March 31, 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors have been incorporated by the same texts²:

- For persons subject to the Public Procurement Contracts Code, by Decree³ No. 2006-975 Of August 1, 2006, adopting the Public Procurement Contracts Code;
- For persons non-subject to that Code, by the various regulations concerning contracts awarded by contracting authorities not subject to the Public Procurement Contracts Code (amended Decrees No. 2005-1308⁴ and No. 2005-1742⁵ providing enforcing measures of the amended Ordinance⁶ No. 2005-649 regarding contracts awarded by certain public or private persons not covered by the Public Procurement Contracts Code⁷).

² Please note that the quoted texts, except Constitution of October 4, 1958, are only available, in their updated version, in French on the "Légifrance" Website: <http://www.legifrance.gouv.fr/home.jsp>. "Partnership contracts", a leaflet which gathers every statute and regulation relating to partnership contracts ever promulgated since 2004, in French and in English, should anyway be edited by Les Editions des Journaux Officiels, Paris, in 2010.

³ In France, a "decree" is a national regulation adopted by the Government (see foot note No.1).

⁴ Decree No. 2005-1308 of October 20, 2005 regarding the contracts awarded by contracting entities mentioned by Article 4 of Ordinance No. 2005-649 of June 6, 2005 regarding the contracts awarded by certain public or private persons non-subject to the Public Procurement Contracts Code.

⁵ Decree No. 2005-1742 of December 30, 2005 establishing the relevant rules relating to contracts awarded by contracting authorities mentioned by Article 3 of Ordinance No. 2005-649 of June 6, 2005 regarding the contracts awarded by certain public or private persons non-subject to the Public Procurement Contracts Code.

⁶ A specific procedure to enact statutes, according to Article 38 of Constitution of October 4, 1958 (see foot note No. 1).

⁷ Ordinance No. 2005-649 of June 6, 2005 regarding contracts awarded by certain public or private persons non-subject to the Public Procurement Contracts Code.

Public-private partnership contracts are mainly subject to amended Ordinance No. 2004-559 of June 17, 2004 on partnership contracts and its subsidiary legislation, Decree No. 2009-242 of March 2, 2009 supplementing the provisions relating to the award of certain public contracts and reports on their performance and Decree No. 2009-243 of March 2, 2009 relating to award procedures and to certain performance requirements for partnership contracts awarded by the State, State-run public bodies and those persons mentioned in Articles 19 and 25 of Ordinance No. 2004-559 of June 17, 2004 on partnership contracts⁸.

The European Directives 89/665/EEC and 82/13/EEC organising coordination of national provisions of Member States relating to procedures for public procurement, amended by Directive 2007/66/EC aiming to improve the effectiveness of those procedures have been incorporated into domestic law. Without distinguishing between persons subject or not subject to the Public Procurement Contracts Code, this EU legislation has been incorporated by Ordinance of January 4, 1992 and by Decree n. 92-964 of September 7, 1992 amending the Administrative Justice Code and the Civil Procedure Code. Ordinance No.2009-515 of May 7, 2009 concerning review procedures regarding public procurement contracts and Decree No. 2009-1456 of November 27, 2009 implementing this ordinance, have incorporated Directive 2007/66/EC.

Other important legislation governing public procurement which are worth quoting are:

- Statute No. 75-1334 of December 31, 1975 on subcontracting;
- and Statute No. 85-704 of July 12, 1985.

Directive 2009/81/EC of the European Parliament and of the Council of July 13, 2009 is currently being incorporated into domestic law by the amendment of the Public Procurement Contracts Code. That is to say that the directive will be incorporated using decrees (regulation).

⁸ Ordinance No. 2004-559 has amended the Local Authority Code (Articles L. 1414-1 to L. 1414-16). Enforcing measures have been adopted to modify Articles D1414-1 to D. 1414-3 (as amended by Decree No. 2009-244 of March 2, 2009 taken for enforcement of the Local Authority Code and Article 48 of Statute No. 2008-735 of July 28, 2008 on partnership contracts), Article D. 1414-4, Articles D. 1414-5 to D. 1414-7 (as added by Decree No. 2009-244 of March 2, 2009 taken to enforce the Local Authority Code and Article 48 of Statute No. 2008-735 of 28 July 2008 on partnership contracts), Article R. 1414-8 (as added by Decree No. 2009-242 of March 2, 2009 supplementing the provisions relating to the award of certain public contracts and reports on their performance) of the Local Authority Code. Miscellaneous provisions are also relevant to be quoted: Article 30 of Statute No. 80-531 of July 15, 1980 relating to energy savings and heat use, Article L. 242-1 and L. 243-9 of the Insurance Code, Article L. 422-2 of the Construction and Housing Code, Article 39 quinquies I, Article 234 nonies and Article 1048 ter of the General Tax Code, Article L. 554-2 of the Administrative Justice Code, article L. 313-29-1 of the Monetary and Financial Code, Article L. 524-7 of the Heritage Code, Article L. 112-2 and Article L. 5207 of the Urban Planning Code, Decree No. 2004-1119 of October 19, 2004 relating to the creation of a Partnership Contract Support Commission, Decree No. 2009-245 of March 2, 2009 relating to the definition of small and medium-sized enterprises in the regulations applying to public procurement and Ministerial order of March 2, 2009 relating to needs assessments prior to implementing partnership contract awards procedures.

Directive 2009/33/EC of the European Parliament and of the Council of April 23, 2009 on the promotion of clean and energy-efficient road transport vehicles will be incorporated into domestic law, with regards to contracting authorities and entities, by amending the existing relevant legislation (for persons subject to the Public Procurement Contracts Code, amended Decree⁹ No. 2006-975 Of August 1, 2006, adopting the Public Procurement Contracts Code, for persons non-subject to that Code, amended Decrees No. 2005-1308¹⁰ and No. 2005-1742¹¹ providing implementation measures of the amended Ordinance¹² No. 2005-649 regarding contracts awarded by certain public or private persons not covered by the Public Procurement Contracts Code¹³).

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

Below European thresholds, national legislation is defined by other relevant provisions in the same texts.

The procedure below the European threshold is called “adapted procedure”. Contracts awarded pursuant to the adapted procedure are awarded using publication and competitive tendering obligations set by the person in charge of the contract, commensurate with the object and particulars thereof.

In France, the only threshold below EU’s ones is provided by the Public Procurement Contracts Code (the French regulation regarding public procurement is mainly the aforementioned Code and the Ordinance regarding public contracts awarded by certain private and public persons non-subject to the Public Procurement Contracts Code, which does not provide specific thresholds below EU’s ones). From 90 000 Euros VAT:

- It is compulsory to edit a contract notice using specific media:
 - The Official Bulletin of Public Procurement Contracts Announcements (“Bulletin Officiel des Annonces de Marchés Publics – BOAMP” which is the national and official newspaper dedicated to the publication of contracts notice); or
 - one of the newspaper authorised to publish legal announcements.
- the procuring authority or entity may also decide whether, taking into account the nature and the value of the goods, works or services concerned, publication of the same contract notice in a journal specialised in the concerned economic sector is needed in addition, so to ensure a sufficient transparency.

⁹ In France, a “Decree” is a national regulation adopted by the Government.

¹⁰ Decree No. 2005-1308 of October 20, 2005 regarding the contracts awarded by contracting entities mentioned by Article 4 of Ordinance No. 2005-649 of June 6, 2005 regarding the contracts awarded by certain public or private persons non-subject to the Public Procurement Contracts Code.

¹¹ Decree No. 2005-1742 of December 30, 2005 establishing the relevant rules relating to contracts awarded by contracting authorities mentioned by Article 3 of Ordinance No. 2005-649 of June 6, 2005 regarding the contracts awarded by certain public or private persons non-subject to the Public Procurement Contracts Code.

¹² A specific procedure to enact statutes, as organised by Article 38 of Constitution of October 4, 1958.

¹³ Ordinance No. 2005-649 of June 6, 2005 regarding the contracts awarded by certain public or private persons non-subject to the Public Procurement Contracts Code.

Rules for publication

For persons subject to the Public Procurement Contracts Code

Below the threshold of 89 999.99 Euros VAT, modalities for publishing notices are determined by the procurement officer depending on the subject-matter of the contract, its amount and the degree of competition (see above). Between 90 000 € and the EU thresholds, the contract notices are to be published in the Official Bulletin of Public Procurement Contracts Announcements or a newspaper entitled to publish legal notices (see above). Contracts notices are to be completed using specific standard forms defined by Ministerial order.

For persons subject to Ordinance No. 2005-649 concerning contracts awarded by certain public or private persons not covered by Public Procurement Contracts Code.

Between 90 000 € and the EU thresholds, the contract notices are to be published in the Official Bulletin of Public Procurement Contracts Announcements or a newspaper entitled to publish legal notices (see above). Contracts notices are to be completed using specific standard forms defined by Ministerial order.

Time-limits for submission of applications and tenders

Pursuant to the adapted procedure rules, without distinguishing between persons subject or not subject to the Public Procurement Contracts Code, the time-limits are laid down by the contracting authority/entity, commensurate with the object and particulars of the contract and any relevant circumstances.

Rules for qualitative selection and award criteria

Both Article 53 of the Public Procurement Contracts code, Article 29 of the Decree No. 2005-1308 (contracting entities subject to the Ordinance No. 2005-649) and Article 24 of the Decree No. 2005-1742 (contracting authorities subject to the Ordinance No. 2005-649) provide that contracting authorities and entities should rely on various criteria which may vary in accordance with the subject-matter of the contract, including “its performance in terms of environmental protection”, providing that the used criteria are linked to the subject-matter of the contract and that none of them shall introduce discriminatory effect to potential bidders. The said criteria are to be weighted only above the EU thresholds. If, given to the object of the contract, the contracting authority or entity bases itself on a single criterion, that criterion must be the price of the contract.

The criteria must be indicated in the contract notice or in the tender documentation.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

Both Article 30 of the Public Procurement Contracts code, Article 9 of the Decrees No. 2005-1308 (contracting entities subject to the Ordinance No. 2005-649) No. 2005-1742 (contracting authorities subject to the Ordinance No. 2005-649) provide that procurement contracts relating to services of Annex II B of Directives 2004/18/EC and 2004/17/EC are awarded using the adapted procedure already described.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

Are subject to the Public Procurement Contracts Code:

- The State;
- Any State-run public bodies (“établissements publics de l’Etat”) other than those of an industrial and commercial nature (universities, public hospitals etc.);
- The local authorities (“régions”, “départements” and “communes”) and their public bodies (“établissements publics locaux”) (public local schools etc.);
- The procuring authorities acting as network operators covered by Directive 2004/17/EC.

Are subject to the aforementioned Ordinance No. 2005-649:

- The public entities acting as network operator covered by Directive 2004/17/EC, that is to say mainly public enterprises which are active in the fields of electricity, water, transport and postal services (EDF, GDF, “La Poste” (national postal operator) etc.)
- The public institutions like the Bank of France, the Deposit and Consignment Office, etc.;
- The private persons in charge of a mission of public service.

In France, any procuring authority or entity is free to organise its means to satisfy its requirements. It could appoint some of its civil servants or employees to be responsible for public procurement procedures, create a specific department dedicated to that, gather with other procuring authorities or entities to organise joint procurement, or satisfy its requirement through a central purchasing body.

As regards the State, a special purchasing department has been created (see below point 3.1.3). It is in charge of fulfilling State’s ministries and departments’ regular requirements. For more specific needs, the departments and ministries organise their own procurement procedures. But, in any case, contracts can only be concluded by either the political authority or specifically appointed delegates.

Regarding local authorities, given that France has a particularly dense fabric of local and regional authorities¹⁴, the reference element is the size. Small or medium-sized communities can assign to one or some of their civil servants the task of identifying needs and to make purchases. But very often they use the services of a purchasing grouping which prevents them from training civil servants in public procurement procedures and from supporting the costs of a dedicated department. Larger communities often have dedicated department, under the authority of the CFO. They have adopted internal regulations that set a general framework and relatively uniform procedures for the procurement of a value below the EU thresholds.

¹⁴ 36,569 municipalities (“communes”, 212 of them being overseas), which could be city of more than two million inhabitants as in Paris, a town of ten thousand people, or just a ten-person hamlet, 100 “départements” (including 4 overseas one; Corsica is a territorial collectivity (“collectivité territoriale”) but is considered a region in mainstream usage) and 26 “régions” (including 4 overseas).

In France, it is possible to evaluate that nearly 200,000 civil servants are responsible for conducting procurement procedures. The trend toward centralization of procurement is relatively recent and more specifically implemented by the State.

However a very recent phenomenon of sharing resources and know-how appeared in local authorities, with the increasing use of dematerialization for procurement. Some “régions” offer to local authorities under their jurisdiction, a free access to their dematerialisation platform (regions of Burgundy, Brittany and Auvergne in particular). But it is not possible to say so far whether and how this phenomenon will have widespread repercussions in the organisation of local authorities’ procurement processes.

The procurement procedures are usually initiated by homogeneous types of requirements (e.g. phone and telecommunications, cleaning services...). If the public procurement rules prohibit the artificial splitting of the same need to go below the EU thresholds, it is nevertheless compulsory, in order to generate the widest competition, and apart if the subject matter of the contract do not allow separated deliverables, for the contracting authority/entity to award the contract in separated batches. This allows enterprises, which would be too small to tender for the whole, to tender only for a slice of the contract.

Main organisations responsible for procurement within the utilities sector

According to the Annexes of Directive 2004/17/EC of the European Parliament and of The Council of March 31, 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, the main French organisations responsible for procurement within the Utilities sector are the following (indicative list)¹⁵:

- Contracting entities in the sectors of transport or distribution of gas or heat
“Gaz de France”¹⁶, “Gestionnaire du réseau de transport de gaz” (“GRTgaz”)¹⁷, gaz distribution entities¹⁸ etc.

¹⁵ For a more important list, see the said annexes to Directive 2004/17/EC, taking into consideration the update by Commission Decision of December 9, 2008 amending the Annexes to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards their lists of contracting entities and contracting authorities (notified under document number C(2008) 7871), even if it is also an indicative list and not a limitative one.

¹⁶ Statute No. 46-628 of April 8, as amended, relating to the nationalisation of electricity and gas and Decree No. 2004-1223 of November 17, 2004, as amended, establishing the status of “la société anonyme Gaz de France”

¹⁷ Statute No. 2004-803 of August 9, 2004, as amended, regarding the public service of electricity and gas and concerning companies acting in the electricity of gas sector.

¹⁸ Article 23 of Statute No. 46-628 of April 8, 1946, as amended relating to the nationalisation of electricity and gas (e.g. “Gaz de Bordeaux”, “Gaz de Strasbourg” etc.).

- Contracting entities in the sectors of production, transport or distribution of electricity “*Électricité de France*”¹⁹, “*Réseau de transport d’électricité*” (“*RTE EDF Transport*”)²⁰, various entities distributing electricity mentioned in article 23 of Statute No. 46-628 on nationalisation of electricity and gas of April 8, 1946, as amended, “*Compagnie nationale du Rhône*”²¹, “*Électricité de Strasbourg*” etc.
- Contracting entities in the sectors of production, transport or distribution of drinking water “*Régies des eaux*”²², water transport, delivery and production bodies²³ etc.
- Contracting entities in the field of rail services “*Société nationale des chemins de fer français*” and other rail services for the public²⁴, “*Réseau ferré de France*”²⁵ etc.
- Contracting entities in the field of urban railway, tramway, trolleybus or bus services Entities providing transport services to the public pursuant to Article 7-II of Statute No. 82-1153 of December 30, 1982 on inland transports, “*Régie des transports de Marseille*”, “*Régie départementale des transports des Bouches du Rhône*” (“*RDT 13*”), “*Régie départementale des transports du Jura*”, “*Régie départementale des transports de la Haute-Vienne*” (“*RDTHV*”), “*Régie autonome des transports parisiens*” (“*RATP*”), “*Société nationale des chemins de fer français*” (“*SNCF*”) and other entities providing transport services on the basis of an authorisation granted by the “*Syndicat des transports d’Ile-de-France*”, pursuant to Ordinance No.59-151 as amended, “*Réseau ferré de France*”²⁶, regional or local authorities or groups of regional or local authorities being an organisational authority for transports²⁷ etc.
- Contracting entities in the postal services sector “*La Poste*”²⁸ and “*La Poste interarmées*”²⁹

19 Statute No. 46-628 of April 8, 1946, as amended, relating to the nationalisation of electricity and gas.

20 Statute No. 46-628 of April 8, 1946, as amended, relating to the nationalisation of electricity and gas, Statute No. 2004-803 of August 9, 2004, as amended, regarding the public service of electricity and gas and concerning companies acting in the electricity of gas sector.

21 Statute No. 80-3 of January 4, 1980, as amended, concerning the “*Compagnie nationale du Rhône*” and Decree No. 2003-512 of June 16, 2003 approving the new status of “*la Compagnie nationale du Rhône*” and modifying Decree No. 59-771 of June 26, 1959 regarding the organisation and operation of “*la Compagnie nationale du Rhône*”

22 Régie des eaux de Grenoble, Régie des eaux de Megève, Régie municipale des eaux et de l’assainissement de Mont-de-Marsan, régie des eaux de Venelles) etc.

23 Syndicat des eaux d’Ile de France, Syndicat départemental d’alimentation en eau potable de la Vendée, Syndicat des eaux et de l’assainissement du Bas-Rhin, Syndicat intercommunal des eaux de la région grenobloise, Syndicat de l’eau du Var-est, etc.

24 Statute No. 82-1153 of December 30, 1982, on inland transportation, also known as “*loi d’orientation des transports intérieurs*” (LOTI), Titre II, Chapitre 10.

25 State-owned company set up by Statute No. 97-135 of February 13, 1997, as amended, establishing the public body called “*Réseau ferré de France*” for the renewal of rail transportation and Decree No. 94-444 of May 5, 1997, as amended, relating to missions and status of “*Réseau ferré de France*”.

26 Set up by Statute No.97-135 of February 13, 1997.

27 e.g. Communauté urbaine de Lyon etc.

28 Statute No. 90-568 of July 2, 1990, as amended, regarding the operation of the public service of “*La Poste*” and “*France Télécom*”.

29 Article R. 3127-1 of the National Defence Code.

▪ Contracting entities in the sectors of exploration for and extraction of oil or gas
 Entities responsible for the exploration for, and the extraction of, oil or gas, pursuant to the Mining Code and its implementing rules, particularly Decree No.95-427 of 19 April 1995 and Decree No.2006-648 of 2 June 2006³⁰ etc.. Contracting entities in the sectors of exploration for and extraction of coal and other solid fuels. Entities exploring for or extracting of coal or other solid fuels pursuant to the Mining Code and its implementing rules, particularly Decree No. 95-427 of April 19, 1995 and Decree No.2006-648 of June 2, 2006³¹.

▪ Contracting entities in the field of maritime or inland port or other terminal facilities
*“Port autonome de Paris”*³², *“Port autonome de Strasbourg”*³³, *“ports autonomes”* of Bordeaux, Dunkerque, La Rochelle, Le Havre, Marseille, Nantes-Saint-Nazaire, Pointe-à-Pitre (Guadeloupe), Rouen, Fort de France (Martinique), Dégrad des Cannes (Guyane)³⁴, Port-Réunion (île de la Réunion)³⁵, Saint-Pierre et Miquelon, Calais, Boulogne-sur-Mer, Nice, Bastia, Sète, Lorient, Cannes, Villefranche-sur-Mer³⁶, and *“Voies navigables de France”*³⁷ etc.

▪ Contracting entities in the field of airport installations
 Airports operated by State-owned companies³⁸, airports operating on the basis of a concession granted by the State³⁹, airports operating pursuant to an *“arrêté préfectoral portant autorisation d’occupation temporaire”*, airports set up by a public authority and which are the subject of a convention as laid down in Article L. 221-1 of the Civil Aviation Code, aerodromes of Ajaccio Campo-dell’Oro; Avignon, Bastia-Poretta, Beauvais-Tillé, Bergerac-Roumanière, Biarritz-Anglet-Bayonne, Brest Bretagne, Calvi-Sainte-Catherine, Carcassonne en Pays Cathare, Dinard-Pleurthuit-Saint-Malo, Figari-Sud Corse, Lille-Lesquin, Metz-Nancy-Lorraine, Pau-Pyrénées, Perpignan-Rivesaltes, Poitiers-Biard, Rennes-Saint-Jacques⁴⁰, Marseille-Provence, Aix-les-Milles et Marignane-Berre, Nice Côte-d’Azur et Cannes-Mandelieu, Strasbourg-Entzheim, Fort-de France-le Lamentin, Pointe-à-Pitre-le Raizet, Saint-Denis-Gillot⁴¹, Saint-Pierre Pointe Blanche, Nantes Atlantique et Saint-Nazaire-Montoir, Airports of Paris⁴² and other airports, aerodromes and airfields as listed by Article. L. 251-2 of the Civil Aviation Code⁴³ etc.

30 Mining Code and implementing acts, including Decree No. 95-427 of April 19, 1995 and Decree No. 2006-648 of June 2, 2006 concerning mining titles and underground storage.

31 Mining Code and implementing acts, including Decree No. 95-427 of 19 April 1995 and Decree No. 2006-648 of June 2, 2006 concerning mining titles and underground storage.

32 Statute No.68-917 of October 24, 1968 regarding the autonomous port (“port autonome”) of Paris.

33 Agreement between the State and the city of Strasbourg on the construction of the Rhine Port of Strasbourg and the execution of works to extend the port of May 20, 1923, as approved by the Statute of April 26, 1924 on the establishment of the Rhine Port in Strasbourg.

34 Article L. 111-1 of the Code of Autonomous Ports (“Code des ports autonomes”).

35 Decree No. 2006-330 of March 20, 2006, as amended, listing the ports of overseas departments excluded from transfer under Article 30 of the Statute of August 13, 2004 on local freedoms and responsibilities.

36 Article 30 of the Statute No. 2004-809 of August 13, 2004, as amended, on local freedoms and responsibilities.

37 Article 124 of Statute No.90-1168 of December 29, 1990, as amended, establishing the Finance Act for 2001.

38 Article L. 251-1, L. 260-1 et L. 270-1 of Civil Aviation Code.

39 Article R. 223-2 of Civil Aviation Code.

40 Article 28 of the Statute No. 2004-809 of August 13, 2004, as amended, on local freedoms and responsibilities.

41 Article 7 of Statute No. 2005-357 of April 21, 2005 relating to airports and Decree No. 2007-444 of February 23, 2007 on State-owned airports.

42 Statute No. 2005-357 of April 21, 2005 relating to airports and Decree No. 2005-1070 of August 24, 2005, as amended, listing the State-owned civil airports and airfields excluded from the transfer to local authorities or their associations.

43 Airfields/airports of Paris-Charles-de-Gaulle, Paris-Orly, Paris-Le Bourget and civil airfields and aerodromes located in the Région Ile-de-France listed by several decrees (including Decree No. 2005-1070: airfields of Bordeaux-Mérignac, Lyon-Saint-Exupéry, Lyon-Bron, Marseille-Provence, Aix-Les Milles, Marignane-Berre, Montpellier-Méditerranée, Nantes-Atlantique, Saint-Nazaire-Montoir, Nice-Côte d’Azur etc.); Statute No. 2005-357 of April 21, 2005 relating to airports and Decree No. 2005-1070 of August 24, 2005, as amended, listing the State-owned civil airports and airfields excluded from the transfer to local authorities or their associations; airports and airfields listed by Article L. 260-1 of the Civil Aviation Code etc.

Supportive bodies

The main supervisory and advisory bodies specific to the French system all report to the Ministry of Economy Industry and Employment. They are as follows.

- For the central government public buyers and local authorities, the Advisory Commission on Public Procurement (“*commission consultative des marches publics*”)⁴⁴ is responsible for providing to the State, its departments, to the State-owned public bodies and to the local authorities with advices when required to. Their opinions and observations relate to the application of regulations regarding the suitable expression of the need, the sound definition of the purpose of the contract, the choice of procurement procedure and its implementation, the method for choosing the successful tenderer
- The Supporting Mission for the Achievement of Public-Private Partnership Contracts (“*Mission d’appui à la réalisation des contrats de partenariat public-privé*” MAPPP) is an expert organization providing to the State, its departments, to the State-owned public bodies and to the local authorities with support in the preparation, negotiation and monitoring of partnership contracts. As such, it may, depending on each application, provide an expertise on the general contract projects and/or assist in the development of projects. This assistance can be in contract negotiations⁴⁵. After France enacted a new PPP procedure in June 2004, the Ministry of Finance felt that the mission to support the achievement of partnership contracts is an expert organization provides to people who request public support in the preparation, negotiation and monitoring of partnership contracts. As such, he may, depending on each application: - make an expert on the general contract projects - assisting people in the public part of the development projects. This assistance can be in contract negotiations. This body was officially set up in May of 2005 .MAPPP sits in the Ministry of Finance as a task force and is completely government funded. MAPPP’s primary role is assessing PPP projects before they receive approval from the Ministry of Budget. MAPPP provides the methodology for evaluating PPP projects and validates feasibility studies prepared by the procuring authorities for governmental approval. Once a project has been proposed as a PPP, MAPPP’s role is to review the preliminary assessment to ensure that it has been completed correctly, from a legal, financial and qualitative perspective. For any project at the central government level to be approved, it must first get the go-ahead from MAPPP in terms of the PPP format providing legal and financial advantage to traditional procurement. Many other jurisdictions call this type of review a value for money analysis (‘VFM’). MAPPP does not conduct this analysis itself, but reviews the work of line ministries and issues a detailed opinion on the case for using a PPP. The project must then be approved by the Ministry of Budget, to ensure that it is sustainable in the government’s budget. Projects at the regional and local level do not require these approvals, but may benefit from MAPPP’s technical support if they choose.

MAPPP also provides support in the preparation and negotiation of procurement and contract documents. It helps the service agency to select a private sector advisor to assist in the process.

⁴⁴ Decree No. 2009-1279 of October 22, 2009 regarding the advisory committee on public procurement and Ministerial order of October 22, 2009 relating to the advisory committee on public procurement.

⁴⁵ Ordinance No. 2004-1119 of October 19, 2004 19 October 2004 establishing the mission to support the implementation of partnership agreements supporting and regulating public-private partnership projects.

In addition, it has created user guides and methodological tools to assist the line ministries in conducting the PPP process. However, MAPPP is not involved in the day-to-day management of the procurement process. MAPPP is also responsible for promoting the PPP market in France. It does this through publication of newsletters, participation in conferences, and establishment of a Public-Private Partnership contracts Observatory (“Observatoire des PPP”) to retain knowledge and lessons learned from past projects. It is increasingly involved in bilateral and multilateral cooperation, through sharing of experience and good practices within the framework of the World Bank Institute, UNECE, OECD or the European PPP Expertise Centre sponsored by EIB & the European Commission.

- The representatives of the Public Accounting General Directorate (“*Direction générale de la comptabilité publique*” DGCP), located in the city of Lyon, give advice to local authorities on questions regarding public procurement and questions calling for an interpretation of public procurement legislation.

- The State departments can obtain advice from the Directorate of Legal Affairs (DAJ), public buyers’ advisory office (Division for Public Procurement Policy of the Directorate of Legal Affairs). Directorate of legal affairs is in charge of analysing and elaborating the regulations regarding public contracts, mainly Public Procurement Contracts Code and Ordinance regarding public contracts awarded by certain public and private persons non subject to Public Procurement Contracts Code.

Supervision bodies

In France, the main supervision bodies are the following one.

- The central comptrollers (“*contrôleurs d’Etat*”) were created by Ordinance of November 23, 1944. It is a continuation of the financial control established by Decree of October 25, 1935. Successive decrees (May 26, 1955, May 21, 1973 and December 26, 2002⁴⁶) gradually changed its mission. Service of State Control’s mission is to control public corporations, mixed enterprises, organisations or businesses that have benefited from financial assistance (loans or grants), central agencies and various national companies. This control is provided either by State inspectors responsible for one or two agencies, either by control missions where the economic and financial importance of the topic requires it (for example, the mission of economic and financial control with “*Charbonnages de France*” and the coalfields). It covers all economic activity and financial management of the companies. They report to the Minister of their business and inform them in an annual report of the economic and financial companies. They carry out budgetary controls on transactions with financial ramifications by central administrations, but also by national public administrative establishments. The devolved comptrollers⁴⁷ control the transactions of the devolved services. The financial control applies to all transactions charged to the State budget.

⁴⁶ Decree No. 2003-639 of July 9, 2003 on financial controls in central administrations and its implementing measures.

⁴⁷ Ordinance of December 21, 2001 amending the Ordinance of July 29, 1996 defining the methods for devolved financial controls and its appendix, as amended.

- The General Directorate for Competition Policy, Consumer Affairs and Fraud Control (“*Direction générale de la concurrence, de la consommation et de la répression des fraudes*”, “DGCCRF”) staff operates in keeping with one of their fundamental duties, which is to ensure fair trading⁴⁸.

- The Public Accounting General Directorate (“*Direction générale de la comptabilité publique*” “DGCP”) staff perform documentary audits of public procurement in keeping with the well-defined accounting staff responsibilities⁴⁹ conferred on them by the legislation on public spending audits⁵⁰: checking of the extrinsic conformity of expenditure vouchers, commonly called a formal or external legality audit to differentiate it from the internal legality audit that is the prefect’s (the State representative agent at local level) responsibility for the local public sector.

- The local and regional authority contracts are moreover submitted to a legality control by the Government representatives at the local level (“*préfets de région*” or “*de département*” or “*sous-préfets*”⁵¹) before they can become binding. If irregularities are found, the prefect or sub-prefect may refer the contracts to the administrative judge for annulment. Local authorities are bound to transmit the public contract documentation and any decisions regarding every contract to the “*préfet*”, so that its services can control the awarding procedure before the contract is signed.

- The State Audit Court and the regional audit offices are courts that check the public bodies operating conditions and may report irregularities in these bodies’ public procurement.

- The French Court of Auditors sometimes chose on the basis of specific chosen problems, for example public contracts regarding travel agencies and business expenses.

- Specific ministry departments, in charge of inspecting accountants having the official ability to handle public funds or dedicated to control some specific public bodies also check public contracts during their inspections. But they do not have specific criteria for selecting them.

48 General instruction of 13 December 2001 on the duties and organization of the DGCCRF’s services and circular of 23 February 2000 on controlling the legality of public procurement and public service delegation.

49 See, for example, the State Audit Office, Marillier ruling of May 28, 1952; and the Conseil d’Etat, Balme ruling of February 5, 1971.

50 Decree No. 62-1587 of December 29, 1962 on general public accounting regulations; for the local and regional authorities, Article 15 of Statute No. 82-213 of March 2, 1982, which became Article L. 1617-2 of the Local Authorities Code.

51 See foot note No. 14.

Main central purchasing bodies

The French Public Procurement Code, the Ordinance regarding contracts awarded by certain public or private bodies that are not covered by Public Procurement Code, and their implementing enactments, do not include article providing mandatory purchase through a central purchasing body. However, they organise non-mandatory mechanisms like coordinated or joint purchase or central purchasing body. Any procuring authority or entity and private bodies in charge of public services may purchase through a central purchasing body but it is never compulsory for them to do so.

To become a central purchasing body, certain conditions must be met. It must be a contracting authority subject to Public Procurement Contracts Code or to Ordinance of June 6, 2005. It is compulsory to comply with this public procurement rules (while purchasing for their own requirements as while purchasing as a central purchasing body).

In France, there are few central procurement bodies. The largest one is called "UGAP" ("*Union des Groupements d'Achat Public*", Union for Grouping Procurements).

Within the State, which is a single procuring authority, a similar system has been lately organized by Decree No. 2009-300 of March 17, 2009 establishing the State Purchasing Department ("*Service des achats de l'Etat*"). It must be noted that it is only a regulation regarding internal organization of a procuring authority.

The new department is in charge of setting and implementing the State's regular purchases. Regular purchases means, pursuant to this Decree, non-specific purchases falling within one of the following categories:

- supplies, furniture and office equipment;
- Hardware, software and associated services;
- Equipment and telecommunication services;
- Transport services of goods and people;
- Maintenance of technical installations;
- Non specialized vehicles, fuels and lubricants;
- Equipment and printing services, shipping, postal and routings;
- Energy and fluids;
- Financial services, insurance and banking services with exclusion of services mentioned in Article 3 (5) of the French Public Procurement Code (which refers to the exclusions from the scope of Directives 2004/17/EC and 2004/18/EC).

Once this new department has awarded a public procurement, a framework agreement or another related contract, the State central departments lose their own ability to award public contracts for the same needs.

Pursuant to this Decree, the State Purchasing Department will ensure that the purchases are carried out at the most economically advantageous conditions, with objectives of sustainable and social development, achieved in conditions which are conducive to the widest access of SMEs.

Furthermore, Article 10 of French Public Procurement Code provides a mandatory principle relating to split contracts: “In the interest of the broadest possible competition, and unless the object of the contract does not lend itself to the identification of distinct lots, the contracting authority must award the contract in separate lots. The contracting authority is free to determine the number of lots, taking into account the technical characteristics of the work requested, the structure of the economic sector concerned and, where appropriate, the rules governing certain professions. The contracting authority may however award a global contract with or without the identification of distinct lots if it considers that splitting the contract into several lots will lead to a minor competition, a more difficult and expensive technical performance or if it is not in a position to carry out the necessary tasks of organization, steering and coordination”. The State Purchasing Department must comply with this provision.

This new department may, where appropriate, give to another State department the duty to award such contracts on its behalf. Where appropriate, it may also purchase through the aforementioned existing central purchasing agency named UGAP.

4 THE REVIEW SYSTEM

Scope of the review system

In France, one of the core specificity is that the judge, and the judge alone, is responsible for ruling on appeals relating to the award of public contracts.

The rules are quite the same for private and public contracts awarded by contracting authorities. They are strictly the same for the contract with an amount below or above the EU thresholds.

Review bodies

Judicial review bodies (administrative or other courts)

Depending on the nature of the contract (which depends mainly on the status of the parties to the contract and on the purpose of the contract), the judicial judges or the administrative ones are responsible for enforcing the provisions of the “remedies” EU Directives.

The French legislation incorporating these Directives⁵² provides for referral to a single judge (the president of the court or his representative) responsible for deciding, before the contract is signed, whether the contract was awarded in compliance with the advertising and competitive tendering obligations. The judge acts solely on failures to comply with the advertising and competitive tendering obligations. This may lead him to examine the reasons behind the exclusion of a tenderer⁵³ and the conformity of the composition of the bidding commission⁵⁴, but not the respective merits of the tenderers⁵⁵ or their statutory capacity to bid for a contract⁵⁶.

The judge's ruling may be appealed before the relevant Appellate Court. Then, it may be appealed before the supreme court of the structure concerned ("*Conseil d'Etat*", which is the supreme court of the administrative jurisdiction or Final Court of Appeal, "*Cour de cassation*", for the judicial one).

The judge in question may use other dispute proceedings to declare null and void any contract awarded irregularly and, in certain cases, to compensate the irregularly rejected tenderer, providing he proves that he has been deprived of a real chance of winning this contract, or to sanction the perpetrator of the irregularity.

Moreover, all parties to the contract and all third parties with an interest in the contract are entitled to request the annulment of acts relating to the award or performance of the contract (remedies for excessive power). This annulment is likely, in principle, to render the said contract null and void and entitle the plaintiff to financial compensation (full review).

The Fiscal and Financial Disciplinary Court ("*Cour de discipline budgétaire et financière*") with jurisdiction for all bodies subject to State Audit Office control may be called on to impose sanctions on public officials responsible for irregularities in the awarding of contracts.

The criminal judge may be called on to impose sanctions on the perpetrators of an offence termed by the Penal Code as granting an unwarranted advantage when the principles of transparency and equality of access have been prejudiced in a contract award procedure.

Non judicial review body specific on public procurement

Article 131 of the Public Procurement Code and its implementing decree provide for an amicable settlement procedure at the initiative of the contracting authority or the contractor. This procedure has the merit of interrupting the period of limitation. The choice of this dispute settlement method is therefore unlikely to compromise the parties' right to appeal.

The composition of the national amicable settlement advisory committee and the regional and interregional advisory committees is based on the tripartite principle, as defined by Decree No. 2001-797 of September 3, 2001, as amended⁵⁷.

⁵² Details can also be found in «*Contribution de la France relative au questionnaire sur les Directives "recours"*» (Contribution of France concerning the Questionnaire on the "Remedies" Directives) CC/2003/30, to the Advisory Committee on Public Procurement.

⁵³ Conseil d'Etat, July 29, 1998, Genicorp ruling (available on Internet).

⁵⁴ Conseil d'Etat, July 27, 2001, Degremont ruling.

⁵⁵ Conseil d'Etat, July 29, 1998, Syndicat Mixte des Transports en Commun de l'Agglomération Clermontoise ruling (available on Internet).

⁵⁶ Conseil d'Etat, October 16, 2000, Compagnie Méditerranéenne d'Exploitation des Services d'Eau ruling (available on Internet).

⁵⁷ Decree No. 2001-797 of September 3, 2001 on advisory committees for the amicable settlement of public procurement disputes, as amended.

Review procedure

France have developed a “complete” arrangement on disputes procedures regarding the public contracts since a long time ago:

- Procedures for disputes regarding the awarding procedures;
- Disputes regarding the performance of the contract;
- Processes like transactions, arbitration and other alternative non-judicial ways if dispute settlement.

Before implementation of Directive 2004/7/66/EC aiming to improve the effectiveness of those procedures, in France, as in all Member States, the domestic review procedures are organised following the principles set forth in EU “Remedies” Directive⁵⁸. The arrangement is “complete”, meaning there are procedures for disputes regarding the awarding procedures, disputes regarding the performance of the contract and processes of settlement.

- Remedies for excessive power”

All parties to the contract, all third parties with an interest in the contract, as well as any natural or juridical person interested in the cancellation of the contract or of decision taken during the awarding procedure, are entitled to request the annulment of acts relating to the award or performance of the contract (remedies for excessive power).

The limitation-period to do so is 2 months from the date of the relevant advertising measures regarding the awarding of the contract. If there was no relevant advertising measure (or insufficient advertising measures) there is no limitation period to submit this challenge.

- “Full review procedures”

All parties to the contract, all third parties with an interest in the contract, as well as any natural or juridical person interested in the cancellation of the contract or of decision taken during the awarding procedure, are entitled to request the annulment of acts relating to the award or performance of the contract.

This annulment is likely, in principle, to render the said contract null and void and to entitle the plaintiff to financial compensation (full review).

⁵⁸ Directives 89/665/EEC and 82/13/EEC organising coordination of national provisions of Member States relating to procedures for public procurement.

- “Tropic” case-law review procedure

There is also a specific review procedures created by case-law referred to as being *Société Tropic Travaux Signalisation* of the Conseil d’Etat⁵⁹. This is a full review procedure only unsuccessful candidates or tenderers are entitled to submit. The limitation-period to do so is 2 months from the date of the relevant advertising measures regarding the awarding of the contract. If there was no relevant advertising measure (or insufficient advertising measures) there is no limitation period to submit this challenge. The plaintiff could rely on any breach of the law regarding any clause of the contract or the contract itself:

- Any defect regarding the formation or the legality of the contract (e.g., lack of ability of the public purchaser to conclude this type of contract due to its subject-matter, any acceptance of a consortium which is breaking the fair competition law (abuse of dominant position for instance)...))
- Any defect affecting the content of a contractual obligation clause (clause limiting free and trade competition, etc.)

French review procedures regarding public contract were constantly improved by case-law, enhancing the opportunities for any concerned person to submit a challenge. But those procedures are slow. Even if the challenger can easily submit an injunction for suspension of the performance of the contract, this was not seen as sufficient. This is why France supported the new “Remedies” Directive 2009/66/EC.

The French legislation incorporating the “Remedies” Directives provides for referral to a single judge (the president of the court or his representative) responsible for deciding, before the contract is signed, whether the contract was awarded in compliance with the “public procurement” Directives, i.e. with the advertising and competitive tendering obligations set forth in those Directives.

The rules are simple and are the same for judicial and administrative judges:

- To be an effective review, the signature of the contract will be automatically suspended or, if the contract was signed, the performance should be easily suspended;
- Where a judge considers there is a problem regarding the obligations of prior publication or open competition arising from the EU directives, everything is organised so that there is no solution but to launch a new and lawful award procedure;
- The judge is bound to give his ruling as quick as possible; the procedure will be an interlocutory procedure;
- The judge has specific abilities allowing him to take any decision to solve the problem.

Two new different procedures are available, depending if the contract is or not yet signed.

⁵⁹ Conseil d’Etat, Ass., July 16, 2005 req. No. 291545 (available on Internet).

The articulation between the two new “remedies” is simple:

- The first one will provide sanction in case of violation of the “public contracts” Directives, before the contract is signed. It is called “ante contractual interlocutory procedure”.
- The second one will sanction any public buyer who tried to preclude to the opportunity for bidders to submit the fist new remedies by providing insufficient information on the award decision or signing the contract before the end of the stand-still period. It is called “contractual interlocutory procedure”.

To present them, it is useful to explain the rules governing the information of the rejected candidates or tenderers.

Rules governing the information of the rejected candidates, applicants or tenderers

- *If the contract is subject to mandatory publication in the OJEU*

Pursuant to the EU Directives, once the public buyer has elected a successful tenderer or eliminated a candidate, he must inform the unsuccessful one of the contract award decision by sending it to them in writing.

- This decision must contain, at least, the following statements:
 - information about the rejection of the tenderer or candidate;
 - non stereotypical and relevant reasons justifying this rejection;
 - the name of the successful tenderer;
 - information about the review procedures available and the relevant time-periods to submit a challenge;
 - the name, address, zip code and telephone number of the person in charge of the awarding procedure of the contract;
 - the stand still period the procuring authority/entity will respect before signing the contract. It is mandatory to respect at least a stand still period of a minimum 16 calendar day following the date on which the decision is send to the tenderers or candidates concerned (11 calendar days is the decision is send by electronic means (email or fax)).

Any statement missing automatically will lead any judge to recognize the procedure does not comply with the advertising and competitive tendering obligations.

The stand still period will allow the unsuccessful bidders to examine whether or not it is justified to submit a challenge.

If the contract is not subject to mandatory publication in the OJEU

Pursuant to the different French public contracts regulations, once the public buyer has rejected a tender or a request to participate, he must inform the unsuccessful tender/candidate of this rejection decision by sending it to them in writing. This decision must contain the following statements BUT there is no mandatory stand-still period.

Problem:

Using some specific award procedure, contracting authority/entity is not in a position allowing them to warn all the potential bidders:

- Some contracts are not subject to mandatory prior advertising in OJEU;
- Some contracts are subject to specific awarding procedure:
 - Contracts to be awarded under a framework agreement;
 - Contracts awarded through a dynamic purchasing system.

Solution:

Organise the opportunity for potential bidders to introduce an “ante contractual” interlocutory procedure, by editing a relevant information notice to be published in the OJEU and respecting a stand-still period before signing the contract.

How to do so?

- The contracting authority, before awarding the contract, can publish a “voluntary ex ante notice” to inform any person interested of his intents to award the contract;

This notice must indicate the main characteristics of the contract, the reasons governing the use of a procedure without prior contract notice, the name of the party, the amount of the contract, the reason governing the selection of this tender, the stand-still period to be respected before signing the contract, the name address, fax number of the contracting authority and the available review procedures and relevant time-periods to submit them.

- AND the contracting authority must have respected the indicated stand still periods which cannot be less than 11 days from the date this notice has been submitted.

If they do so, the potential bidders have the opportunity to submit an “ante contractual” interlocutory procedure.

- The “ante contractual” interlocutory procedure

What kind of contract should you challenge using this type of review?

Any contract regarding the performance of works or the delivery of supplies or the provision of a service, for pecuniary interest or with a counterpart being the right to exploit the service/work or in this right together with payment.

Who could submit this type of challenge?

Any person who has or has had an interest in the awarding of the contract and whose interest has been or should have been precluded.

Time-periods to submit this challenge?

Before the contract is signed.

Pursuant to that rule, challenger are advised to inform the contracting authority that he is submitting a challenge to avoid any signature of the contract before the judge warn him an interlocutory procedures has been submitted. But it is never compulsory (if the contract is signed, a “post contractual” interlocutory procedure can be submitted).

What are the arguments you could rely on?

The judge acts solely on failures to comply with the advertising and competitive tendering obligations. E.g., errors in the contract notice, insufficient time-period, lack of indication of the award criteria, lack of indication of the financing and payment conditions of the contract, unjustified exclusion of a bidder, lack of independence of the committee for tenders, any missing mandatory statement of the award decision send to the unsuccessful bidders...

This may lead him to examine the reasons behind the exclusion of a tenderer and the conformity of the composition of the bidding commission, for example, but not the respective merits of the tenderers or their statutory capacity to bid for a contract.

What is the effect of submitting of this interlocutory procedure?

The signature of the contract is automatically suspended until the judge will have taken a decision on the application.

What could do the judge?

If the procedure regards a procuring authority, the judge may:

- declare the awarding procedure null and void;
- order the procuring authority to comply with its obligations;
- declare null and void certain provisions of the contract;
- impose the payment of a particular sum, in cases where the infringement has not been corrected or prevented (only solution if the contracting party is a procuring entity).

The judge rules in summary proceedings, i.e. expedited, so as not to undermine the progress of negotiations prior to the awarding of the contract. If a contract is signed before the announcement of the ruling, the case is deemed removed from the judge. French law therefore authorizes the judge to suspend the procedure for a maximum period of 20 days as of when the case is referred to him. If that occurs, the concerned person can introduce a “contractual” interlocutory procedure, as we will see.

What are the time-periods for the judge?

The judge must wait 16 days from the date on which the award decision was send to the tenderers/candidates concerned. This is to be sure he has received any challenge that could be submitted. He must pronounce the ruling in the 20 days following that date.

The judge must hear the participants to the proceeding prior to any decision. They shall have the right to be represented, and other rights issued from the GPA are guaranteed.

What are the available appeal procedures?

The judge's ruling may be appealed only before the supreme court of the structure concerned (Conseil d'Etat or the Final Court of Appeal).

- The "contractual" interlocutory procedure

What kind of contract should you challenge using this type of review?

The same than the one you could challenge using the "ante contractual" interlocutory procedure, this is to say any contract regarding the performance of works or the delivery of supplies or the provision of a service, for pecuniary interest or with a counterpart being the right to exploit the service/work or in this right together with payment

Two exemptions:

- If the award procedure of the contract is not subject to a mandatory advertising procedure in OJEU, no one could submit a contractual interlocutory procedure provided that the two following conditions are met:
 - The contracting authority has, before awarding the contract, published a "voluntary ex ante notice" to inform any person interested of his intents to award the contract; This notice must indicate the main characteristics of the contract, the reasons governing the use of a procedure without prior contract notice, the name of the party, the amount of the contract, the reason governing the selection of this tender, the stand-still period to be respected before signing the contract, the name address, fax number of the contracting authority and the available review procedures and relevant time-periods to submit them;
 - AND the contracting authority must have respected the indicated stand still periods which cannot be less than 11 days from the date this notice has been submitted.

- Public contracts arising from a framework agreement or following the dynamic purchasing system procedure, provided that the contracting authority has:
 - Send to the others parties to the framework-agreement or to the dynamic purchasing system the awarding decision, containing the information explained before;
 - AND the contracting authority has respected a stand-still period of 16 days from the date this decision was send to the others bidders, 11 where this decision was send through an electronic mean.

The grounds justifying these exemption is that the potential bidders should them submit an “ante contractual” interlocutory procedures.

Who could submit this type of challenge?

Any person who has or has had an interest in the awarding of the contract and whose interest has been or should have been precluded is entitled to submit this challenge.

Time-periods to submit this challenge?

One month from the date of publication of the contract award notice in the Official Journal of the EU.

If there was no publication of such a contract award notice, six months from the signature of the contract.

What is the effect of submitting of this interlocutory procedure?

The signature of the contract is not automatically suspended; the judge decides on the grounds of the case, even if the challenger did not ask for a suspension of the performance of the contract.

What could do the judge?

It depends of the importance of the supposed violation:

- he judge is bound to declare the contract null and void:
 - Where the was no advertising at all or no publication of a contract notice in the Official Journal of the UE, while it was compulsory;
 - Where there is a breach of the awarding process of a contract arising from a framework agreement or following the dynamic purchasing system procedure.

BUT, relying on overriding reasons of general interest requiring the contract to be maintained, the judge may decide only to order the immediate termination of the contract, the shortening of the duration of the contract or to impose fines on the contracting authority.

- The judge is not bound to declare the contract null and void but he may decide only to order the immediate termination of the contract, the shortening of the duration of the contract or impose fines on the contracting authority, where:
 - The minimum stand still period between the award decision was send and the signature of the contract has not been respected;
 - The stand still period applicable due to the submission of an “ante contractual” interlocutory procedure has not been respected.

BUT the judge is bound to declare the contract null and void where the plaintiff was unable to submit an “ante contractual” interlocutory procedure because of the signature of the contract AND where there is a violation of the advertising and competitive tendering obligations.

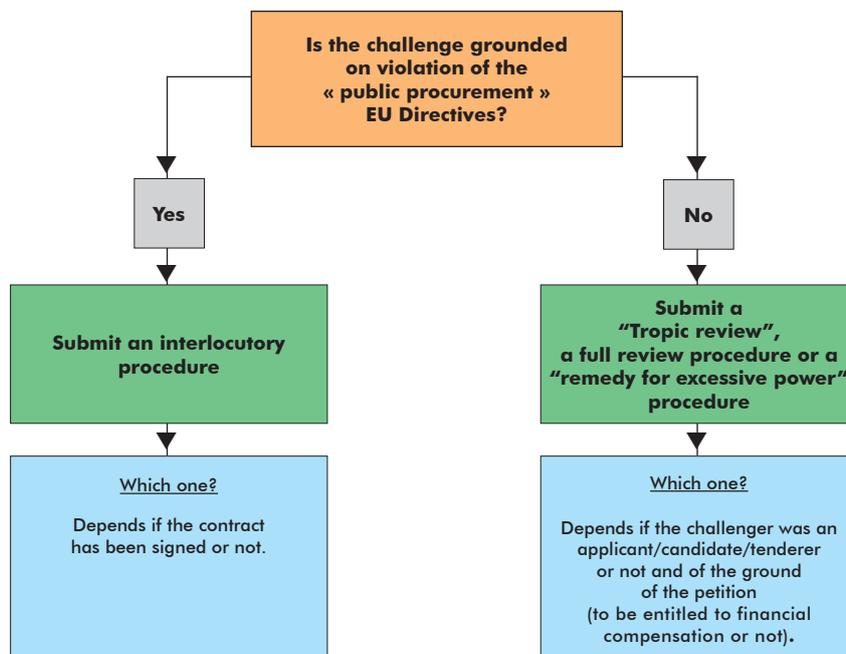
What are the rules governing this procedure?

The judge must hear the participants to the proceeding prior to any decision. They shall have the right to be represented, and other rights issued from the GPA are guaranteed.

What are the available appeal procedures?

The judge’s ruling may be appealed only before the supreme court of the structure concerned.

Nowadays, the available review procedures for a challenger regarding the award of a contract could be summarised as follows:





Germany

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

Due to the federal system of Germany the Constitutional Law in Articles 70 et seq. differs between an exclusive legislative power of the Federation which solely grants the Federation the competence to pass laws and concurrent legislative powers which allow the *Bundesländer* (Federal States) to legislate so long and to the extent that the Federation has not exercised its legislative power by enacting a law itself. Public procurement is a matter of concurrent legislative power, coming under economic matters (Article 74 I No. 11 Constitutional Law).

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

The German Act Against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB), which is the legal core in the matter of public procurement, as well as the German Regulation on the Award of Public Contracts (Vergabeverordnung - VgV) have been subject to various legislative adoptions to implement EU law. The 2009 dating Law to Modernise the Public Procurement Law has changed large parts of the GWB and the VgV, adjusting the German legal situation according to the requirements set up by the Directives 2004/18/EC and the Public Procurement Remedies Directive (2007/66/EC). In order to implement the Directive 2004/17 the German government has enacted the Sector Regulation (Sektorenverordnung - SektV).

All the details of procurement procedures are laid down by delegated legislation in the Procurement Regulations (Procurement Regulation for Public Works: Vergabe- und Vertragsordnung für Bauleistungen, VOB/A; Procurement Regulation for Public Supplies and Services: Vergabe- und Vertragsordnung für Leistungen, VOL/A; Procurement Regulation for Professional Services: Vergabeordnung für freiberufliche Leistungen, VOF). They were substantially reformed in 2009 and are put into force in June 2010.

The transposition of the Directive 2009/81/EC on defence and sensitive security procurement (2009/81/EC) and of the Directive on the promotion of clean and energy-efficient road transport vehicles (2009/33/EC) is still in process.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EC Thresholds:

Below the EC thresholds, variable national legislation – mainly budget law - deals with public procurement; the GWB and the VgV do not apply. The rules on public procurements below the threshold are stated in the first sections of the above mentioned VOL/A and VOB/A. Furthermore, on the federal level as well as on the state level (*Bundesländer*) the respective budget law applies.

As mentioned above, for procurements below the EC thresholds the first sections of VOB/A and VOL/A apply.

The following procurement procedures exist:

- public tendering
- selective tendering
- single tender action.

Tenders have to be published in sources with public access such as daily newspapers, official announcements, professional journals or internet websites.

Neither VOL/A nor VOB/A have specified a certain time limit for submission of applications, however, an “adequate” time limit has to be granted. In the case of urgency, the submission time frame can be restricted to ten days.

The economically most advantageous tender shall be accepted. Hence, the price is not the only decisive criteria; other order-related criteria - such as quality, aesthetics, advisability, environmental features or operating costs - may be taken into account as well.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

For services of annex II A, the rules of the Directive 2004/18/EC are implemented in the second chapter of the VOL/A, whereas for procurement of services of annex II B only the first section of VOL/A (basic procurement rules) and the rules corresponding to Art. 23 and Art. 35 (4) of the Directive 2004/18/EC apply.

The Directive 2004/17 is implemented in the Sector Regulation. In § 4, the Sector Regulation also differs between services of annex II A and services of annex II B. The Sector Regulation is entirely applicable for services of annex II A. For services of annex II B only § 7 (technical requirements) and §§ 12, 15 (publication of awarded contracts) apply. Contracts which have as their object services listed both in annex II A and B will be awarded in accordance with the rules of the service where the value of the service is greater.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

Several thousand awarding authorities are responsible for public procurement at federal, local and regional level.

For example, awarding authorities are:

- at federal level: purchasing bodies of federal ministries and federal agencies
- at regional/state level (*Bundesländer*): purchasing bodies of state ministries and state agencies
- at local level: municipalities, counties, local authorities.

Main organisations responsible for procurement within the utilities sector

In the utilities sector, public responsibility is mainly attached to the local level. Therefore, local contracting authorities are responsible for procurement for example in the field of sewage, water supply, waste management or electricity supply. Local contracting authorities are, for example:

- communities
- associations of local authorities
- special assets such as municipal corporations.

Supervision bodies

Most of the Federal States have institutionalized bodies, the so-called VOB-Stellen, which are in charge of supervising tenders and giving advice to public awarding authorities in the field of construction below the EC threshold.

The federal commissioner for administrative cost effectiveness, whose office traditionally is carried out by the President of the German Federal Court of Auditors, gives remarks about public procurement procedures in his reports and surveys, such as on the Federal budget management.

Similar to that, the State audit courts supervise cost effectiveness and public procurement procedures on the State and local level.

Main central purchasing bodies

The Federal Office of Defence Technology and Procurement (Bundesamt für Wehrtechnik und Beschaffung, BWB) is the largest central purchasing body. It represents, together with the Federal Office for Information Management and Information Technology of the Bundeswehr (Bundesamt für Informationsmanagement und Informationstechnik der Bundeswehr, IT-AmtBw), the armament sector below the ministerial level. Within the Federal Defence Administration, the armament sector is responsible for satisfying the armed forces' requirements for material.

The second main central purchasing body is the Procurement Agency of the Federal Ministry of the Interior (Beschaffungsamt des Bundesministeriums des Innern) which is in charge of all purchases with regard to the ministry's area of operations including 26 federal authorities and public-law foundations and international organisations which are financed and supported by the Federation. In 2009, the Procurement Agency of the Federal Ministry of the Interior awarded about 1.000 contracts with a capacity of 956,8 million €.

Supportive bodies

In order to support public procurement procedures and to intermediate between public awarding authorities and the industry, the Chamber of Industry and Commerce and the Chamber of Crafts maintain consulting centres. These centres give advice to potential contractors by training employees, support companies which plan to participate in procurement procedures or certify proof of suitability.

4 THE REVIEW SYSTEM

Scope of the review system

In Germany, the review system applies only to contracts above the EC thresholds.

The public procurement tribunals (first instance) as well as the Court of Appeal (appellate instance) cannot be addressed to review a procurement procedure below the EC threshold.

Review bodies

First instance and appeal:

The review system consists of two stages: the public procurement tribunals as the first instance and the Court of Appeal (Oberlandesgericht) as appellate instance.

Public procurement tribunals are institutionalized on federal level as well as on state level (*Bundesländer*). The public procurement tribunal on federal level is dedicated to the Federal Cartel Office (Bundeskartellamt). It is in charge of reviewing contracts which were awarded by a public authority on federal level. In the case of a contract awarded by a Federal State (*Bundesland*), the public procurement tribunal of this State (*Bundesland*) is the review body. In contrast to the public procurement tribunals which belong to administrative bodies, the Court of Appeal is part of the jurisdiction.

Review procedure

Pre-contractual review

- First instance: procedure at the public procurement tribunals

The public procurement tribunal may be addressed if a competitor wants to interfere with an ongoing procurement procedure.

The public procurement tribunal's decision, issued after an oral hearing, has the legal character of an administrative act (Verwaltungsakt).

- Appeal Procedure at the Court of Appeal

Within a period of two weeks, the parties have the possibility to file an immediate complaint to the Court of Appeal. The review procedure at the Court of Appeal also leads to a suspensive effect upon the decision of the public procurement tribunal and its decision must not be executed for the duration of the Court of Appeal's review. The Court of Appeal's decision is a court order and may not be appealed.

The public procurement tribunal has the competence to instruct the contracting entities to proceed in a certain way: it may issue the order to stop the awarding procedure or alter the statutes of the proceedings, e.g. by excluding one of the candidates.

The Court of Appeal has the competence to take decision in the matter itself and therefore to overrule the public procurement tribunal's decision or to confirm it. It may also issue the order to the public procurement tribunal to decide again with due consideration of the Court of Appeal's legal opinion.

Contractual review

As above, procedures at the public procurement tribunals and the Court of Appeal.

After the conclusion of the contract, the public procurement tribunals may just rule contracts to be ineffective. (Condition therefore is, that the awarding authority has violated its duties to inform rejected bidders and to wait for the conclusion of a contract or that the contract was awarded without including other candidates in the procedure.)

The public procurement tribunal has no competence to rule claims for compensation. They have to be brought to civil court.



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

The community law may be transposed in the national legislation via laws, presidential decrees (usually) or ministerial decisions according to the article 4 of Law 1338/83 “Implementation of community law”.

The Directives 2004/18/EC and 2004/17/EC have already been transposed in the national legislation via presidential decrees (PD).

The procedure is as follow: The administration draws a Draft which is wherefore approved (signed) by the competent ministers and then it is submitted to the state council (*Conseil d' Etat*) in order to be controlled for its legality (any comments made by the state council on the draft should be taken into account by the administration), and it is signed by the president of the republic and it is published in the national Gazette.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

The Directives 2004/18/EC and 2004/17/EC have been transposed in the national legislation via Presidential Decree 60/2007 and PD 59/2007 respectively.

The Directive 2007/66/EC has been transposed via law 3886/2010.

The provisions of PD 60/2007 which are related to public works have been included in the Code of Public Works (CPW) (Law3669/2008) and are implemented for contracts above the thresholds.

For contracts of services of category 12 Law 3316/2005 is implemented for all contracts above as well as below the thresholds.

According to the above legislation, mandatory contracts notice has been issued in which the whole award procedure is in detail described step by step.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

In Public Works Contracts is applied the Code of Public Works which also includes the relevant provisions of PD 60/2007 for Contracts above the threshold.

For contracts of services of category 12 Law 3316/2005 is implemented for all contracts above as well as below the thresholds.

The award procedure for public works is almost identical for contracts below and above the thresholds.

For contracts below thresholds the open and restrictive procedure is used.

The direct award, the tender among limited number of participants, the “informal fast” procedure as well as the “oral” procedure are exceptional procedures which are allowed under specific pre-conditions similar or identical to those provided for in the articles 30 and 31 of Directive 2004/18/EC. Contracts up to 20.000 Euros (annually) can be awarded directly and contracts up to 60.000 Euros (annually) can be awarded by “informal fast” procedure.

The award by concession is also provided for (article 11&12 of CPW), though it is rarely implemented. Also, in the law 3389/2005 is regulated the Public-Private Partnership for contracts up to 200.000.000 Euros without VAT.

The award procedure for contracts of services of category 12, as mentioned before, is the same for contracts above and below the thresholds. For contracts up to 30.000 euros the use of the negotiation procedure is allowed without publication for emergency cases. The award decision is published in the website of Technical Chamber of Greece (www.tee.gr).

Rules for publication and time limits for submission of applications and tenders

- *For public works contracts:* contract notices for public works are published in the National Gazette (special issue for tenders), in two (2) daily and one or two (2) weekly local newspapers. The publication should take place at least 15 days before the competition or at least 40 days before the competition if it concerns the design – construction system (as it is mentioned in detail in article 15 of CPW). In case of restricted procedure contract notice is published at least 15 days before the last Date of receipt of request to participate (article 23 of CPW).
- *For service and supplies contracts:* for contracts of services of category 12 contract notices for services of category 12 are published in the bulletin and the website of the Technical Chamber of Greece as well as in two daily and one weekly newspapers (as it is mentioned in detail in article 12 of Law 3316/2005 and in law 3548/2007). This publication should take place at least 30 days from the day on which the contract notice was sent for publication in the bulletin and in the Website of Technical Chamber of Greece or from the day in which it was published in the newspapers.

For the personal situation of the candidate or tenderer, the documents mentioned in the article 45 of the Directive 2004/18/EC are submitted. As far as the technical and economic capacity is concerned, official lists of approved economic operators have been introduced.

The registration in the above mentioned lists constitutes a presumption of suitability according to paragraph 3 article 52 of the Directive. In the contract notices are mentioned in detail all the documents that should be submitted as well as these that can be replaced by declaration on oath. The declaration on oath will be submitted only by the contractor.

For the services of category 12 the documents are replaced by declaration on oath and are also submitted only by the contractor.

Award criteria

The award criteria for public works are the lowest price only. For the design-construction system the award criteria is the most economically advantageous tender. In the contract notice must be included the award criteria and the relative weightings.

For the services of category 12 the award criteria is the most economically advantageous tender. The award criteria and the relative weightings are provided for in law 33165/2005.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

The Ministry of Infrastructure, Transport and Networks (General Secretariat of Public works) is the state administrative entity in the sector of implementing public works and it has the supervision of the entire construction activity of the country. The Ministry particularly proposes laws and regulations related to the public works contracts, approves technical specifications and issues explanatory circulars and guidelines of mandatory implementation for all the Contracting Authorities. It also imposes fines to contractors for any violation of the contract obligations or the technical specifications.

Main organisations responsible for procurement within the utilities sector

N.A.

Supervision bodies

Before the conclusion of a contract of estimated value greater than 1.000.000 € the Contracting Authority must submit to the Court of Auditors the “whole dossier” (with all the relevant documents and elements), in order to be checked the legality of the contract, otherwise the concluded contract is ineffective.

All the payments carried out by the Contracting Authorities during the execution of the contract are subject to the legality check/control by the services of Court of Auditors.

Additionally, decisions taken by Local Authorities during the award procedure are checked for legality by the Government Representatives at Regional Level (“Secretary General of Region”).

Finally, in cases that there are reports or information about problems or “irregularities” during the performance of the contract the Contracting Authorities are controlled by the Body of Inspectors of Public Works.

Main central purchasing bodies

N.A.

4 THE REVIEW SYSTEM

Scope of the review system, review bodies and procedures

N.A.



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

In Hungary PP directives (18/2004/EC; 17/2004/EC; 89/665/EEC and 66/2007/EC) are transposed by Act CXXIX of 2003 on Public Procurement (hereinafter, PPA), the transposition has not affected any other lower legal regulation. Before the change of government in May 2010 the Ministry of Justice and Law Enforcement was responsible for the legislation relating to public procurement and at the moment the Ministry of National Development is responsible for it. In Hungary laws are enacted by the Parliament, and for the preparation of codification the designated minister and the undersecretary of state is responsible. The Public Procurement Council is not responsible for the legislation relating to public procurement, but the Council reviews draft legislation and concepts and with the competent persons can initiate the amendment of the legislation.

Transposing directives are executed according to general rules, before a new law is adopted an administrative consultation precedes it. Ministers, professional organizations, representative organizations, chambers can make their remarks and suggestions about draft legislation. Other lower legal regulations are adopted by the government, ministers, or by the head of organizations with national competence, but before adoption an administrative consultation is also a must.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

Before joining the EU in Hungary the previous PP directives and the 89/665/EEC were implemented by a new public procurement act (Act CXXIX of 2003 on Public Procurement), which has replaced the old, partial harmonized public procurement act, the Act XL of 1995.

The transposition of the directives 2004/18/EC, 2006/17/EC and 2007/66/EC are adopted mainly by the modification of our PPA, but the transposition of Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles and the new Defense and Security Directive 2009/81/EC shall modify other legal regulations as well, these are the followings:

- The transposition of Directive 2009/81/EC will modify two Government Decrees:
- Government Decree 143/2004 (IV. 29) on defence procurement;
- Government Decree 228/2004 (VII. 30) on national security procurement.

The transposition of Directive 2009/33/EC will modify the following legal regulations:

- PPA;
- Act XXXIII of 2004 on passenger transport executed by bus

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

Act CXXIX of 2003 on Public Procurement.

Below the EC thresholds (similarly to procurements above the EC thresholds) the related legislation can be found also in our PPA.

In accordance with the value of procurements our PPA separates two regimes (the national regime and the community regime); rules have to be applied for procedures which value fall below EU thresholds are in the third part of our PPA. In national regime as a main rule the contract award procedure starts with the publication of a tender notice, and up to the CA's decision it can be negotiated procedure. In case conditions meet the legal requirements for negotiated procedure without a notice CA has the right to use this, and the rules are the same as at the procedures above the EC thresholds. As for the subject-matters of public procurement in comparison with community regime the difference is that the acquisition of real property and also the service concession have to be included as subject-matters.

The Hungarian PPA provides special rules for publications and time limits in accordance with the relevant regime, and with the type of the procedure. In case the value of procurement reaches the community thresholds CA has to send notices via the Public Procurement Council to the Office for Official Publications of the European Communities. The notice is dispatched by the Public Procurement Council for publication.

Before forwarding the notice the Council has to examine the notice to ensure that it complies with the legal provisions. In case the procedure falls below EU thresholds the notice also has to be sent to the Public Procurement Council, but it will be published in the Official Journal of the Public Procurement Council in the Public Procurement Bulletin. Before publication of notices both below and above the EC thresholds an examination of the notice is a must.

The time-limit to submit tenders has to be always set leaving sufficient time for the preparation of appropriate tenders. In community regime the time-limit is defined according to the directives (usually CA-s prescribe the minimum of it), and in national regime the time-limit is minimum 25 days from the date of dispatch of the notice.

Both cases the time-limit can be shortened by not more than 5 days, if CA fully and without any charge make the tender documentation accessible via electronic means for tenderers.

To make sure that tenderers are given equal opportunities and equal treatment CA has to set up requirements for selection and award criteria if these requirements are relating only to the subject-matter of the procurement. Qualitative selection and award criteria both in procurements below and above the EC thresholds defined according to the PP directives, so the economic, financial standing, technical and professional abilities of the tenderer have to be prescribed in the same way as is prescribed in directives.

As for the award criteria the contract may be awarded based on either of the following two criteria:

- The lowest price tender;
- The most economically advantageous tender.
- If CA wishes to select the most economically advantageous tender, it has to specify the constituent factors, the rated multiplier of each constituent factor to determine its weight (weights), the lowest and the highest scores when evaluating according to constituent factors, and the method that has to provides scores in the range between the limits of scores.

Procurement of services in Annex II B of Directives 2004/18/EC and 2004/17/EC

Services listed in annex II B are equal with services listed in annex 4 of our PPA, for these procurements the third part of our PPA has to be applied.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

The Ministry of National Development is responsible for the legislation related to public procurement and Public Procurement Council is responsible for the public procurement policy. For managing public procurements other organizations, authorities are responsible. For central public procurements the Central Service Directorate General, and for the proper use of aids the National Development Agency is responsible.

Apart from central purchasing each CA is responsible for its own procurement. Local governments are entitled to use central purchasing in their territory.

Main organisations responsible for procurement within the utilities sector

Within the utilities sector each CA is responsible for its procurement.

Supervision bodies

State Audit Office, Government Audit Office

Main central purchasing bodies

In Hungary there's only one central purchasing body, which is the Central Service Directorate General. Besides local governments are entitled to use central purchasing in their territory.

Supportive bodies

The Public Procurement Council, and in case of EU funds governing authorities and contributor organizations; the National Development Agency.

4 THE REVIEW SYSTEM

Scope of the review system

The same review system is envisaged for procurements below the EU thresholds and above EU thresholds.

Review bodies

In case of reviews related to public procurements the first instance review body is the Public Procurement Arbitration Board. The jurisdiction of the Arbitration Board shall extend to the whole territory of the state. Anyone whose right is being harmed by the decision of the Arbitration Board has to be entitled to bring an action before the court for its judicial review.

The Metropolitan Court of Budapest may change the decision of the Arbitration Board. Decisions of the court has to be open to appeals to be lodged within eight days from the delivery of the decision. Furthermore the Supreme Court reviews decisions of the court of second instance if these are challenged through an extraordinary remedy.

Review procedure

Pre-contractual review

Proceedings initiated against any infringement of the legislative provisions applicable to public procurement and contract award procedures has to fall within the competence of the Public Procurement Arbitration Board. The jurisdiction of it has to extend to the whole territory of the state.

The Arbitration Board has to act in a panel consisting of three public procurement commissioners, passing its decision by a majority vote. At least two of the appointed members of the panel should be qualified for the Bar, and wherever possible, one of the members should have a degree in higher education closely related to the subject-matter of the case.

The Arbitration Board shall proceed upon application or ex officio. The application has to be submitted within 15 days. If no hearing is held in the case the Arbitration Board has to be required to finish the case within fifteen days, if a hearing is held it has to finish the case within thirty days. In its decision the Arbitration Board:

- Shall state an infringement has occurred;
- Impose a fine;
- Shall prohibit the tenderer for a period from participating in any public contract award procedures;
- Order the removal of the tenderer from official list of approved tenderers;
- Declare void any decision made by the CA either during the contract award procedure or a decision closing the procedure.

Contractual review

As a main rule contractual review falls within the scope of courts, only court are allowed to state that a contract is void. Where the Arbitration Board states in its decision that infringement has occurred which legal consequences can be to annul the contract, it has to bring an action with a view to annul the contract. The Arbitration Board has to initiate the action within 30 days counted from the date of making its substantial decision.



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

In Ireland EU public procurement law is transposed into national law by a series of regulations (statutory instruments) promulgated by the Minister for Finance pursuant to the European Communities Act 1972, as amended, authorising a Minister of the Government to enact such regulations in order to give effect to an obligation of EU law.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

The 2004 Directives (Directive 2004/18/EC, coordinating the procurement procedures for the award of public works contracts, public supply contracts and public service contracts, (the Classic or Public Sector Directive) and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (the Utilities Directive)) have been transposed into national law by the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (SI No. 329 of 2006) and by the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (SI No. 50 of 2007) respectively.

Directive 2007/66/EC of 11 December 2007, amending Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, has been transposed into national law in Ireland by the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010, and by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010, each made on 25 March 2010.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

There is no specific law or regulation covering below threshold procurement other than certain requirements:

Guidelines (observance is required, authorities are accountable, audited and reported on)

It is a basic principle of public procurement that a competitive process should be used unless there are justifiably exceptional circumstances. The type of competitive process can vary depending on the size and characteristics of the contract to be awarded and the nature of the contracting authority.

Low Value Requirements

For contracts or purchases below the EU threshold values and not part of a 'draw down' or framework contract, less formal procedures may be appropriate. For example:

- Supplies or services less than €5,000 in value might be purchased on the basis of verbal quotes from one or more competitive suppliers;
- Supplies or services contracts between €5,000 and to €50,000 in value might be awarded on the basis of responses to specifications sent by fax or email to at least three suppliers or service providers.

Values and procedures outlined above are indicative only and should be adapted as appropriate to suit the type of contracting authority and the nature and scale of the project. Reasons for procedures adopted, including procedures where a competitive process was not deemed appropriate, should be clearly recorded. All contract award procedures should include a verifiable audit trail.

While contracting authorities are not required to advertise on the *national public procurement website* etenders.gov.ie for requirements below €50,000 they are encouraged to do so if the anticipated response would not be disproportionate, having regard to the value of the requirement.

Advertising

Contracts above €50,000 and up to the value of EU thresholds for advertising in OJEU, not part of a 'draw down' or framework contract, should normally be advertised as part of a formal tendering process. Publication on the www.etenders.gov.ie website generally meets national advertising and publicity requirements and significantly reduces the need for expenditure on advertising. Notices can be placed by registering online.

The site is a key reference point for potential suppliers and service providers and the service is currently provided at no cost to contracting authorities.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

Subject to national rules /guidelines re advertising, competition etc.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

National Public Procurement Policy Unit (NPPPU - within the Department of Finance) is responsible for public procurement policy, regulation and general guidance. It is also responsible for contracting standards, procedures and general policy on public construction. NPPPU is composed by a Head of Unit, Principal Quantity Surveyor, three staff at mid – management level and one as administrative / secretarial backup.

Recently established, *National Procurement Service* (NPS - within the Office of Public Works) responsible for promoting and implementing a national procurement strategy for supplies and services procurement in co-operation with the various sectors. Also manages and develops the national public procurement website. NPS is composed by a Director, two Deputy Directors and 23 operational and administrative staff (more resources currently being sought). Both bodies performing functions of the Department of Finance in accordance with the Ministers and Secretaries Act.

Main organisations responsible for procurement within the utilities sector

Many entities in the water, energy, transport and postal sectors have collaborated to put in place a pre-qualification system for contractors which is managed by a dedicated service provider. Contracting entities and registered suppliers pay a fee to maintain this service.

Supervision bodies

Boards and Management of contracting authorities, Internal Audit of contracting authorities, Office of the Comptroller and Auditor General and the national Courts under the Remedies Directives. C&AG - States national auditing authority

Main central purchasing bodies

N/A

Supportive bodies

As above, the NPPPU and NPS and the national public procurement website:
www.etenders.gov.ie

4 THE REVIEW SYSTEM

Scope of the review system

Legal actions are brought in the High Court

Review procedure

Pre-contractual review and Contractual review

In general, enforcement is by action in the courts pursuant to the Regulations transposing the Remedies Directives and pursuant to the Rules of the Superior Courts which provide a judicial review procedure in respect of the Remedies Directives governing the Public Sector Directive and the Utilities Directive.

As indicated above, public bodies are also subject to administrative supervision under various guidelines, circulars and codes of practice, but these are not ordinarily justiciable in themselves.

As a general principle, the ordinary recourse for an aggrieved party is to a judicial review action pursuant to the Remedies Directives as implemented.

There is also the possibility of filing administrative complaints with various Irish authorities or with the European Commission – ordinarily outside Irish law – although such a complaint could have the effect of prompting European Commission enforcement proceedings against Ireland.



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

According to article 117 paragraph 5 of the Italian Constitution, State, Regions and Autonomous Provinces, in the ambit of their respective competences, share the power to implement EU law into national legal system.

The transposition process is regulated by Law n.° 11 of 4 February 2005, “*General rules for the participation of Italy in the legislative process of the European Union and for the execution procedures of EU obligations*”.

The main transposition instrument is represented by a law adopted every year, defined *EC law*: the President of the Council of Ministers or the Minister for European Community Policies, on the base of the acts adopted by EU Institutions, following to the verification of the conformity of national law with EU law, within January 31 of each year, presents to the Parliament a government bill having as object the “*Dispositions for complying with obligations deriving from the belonging of Italy to the European Union*”.

In particular, the *EC law*:

- Modifies or repeals national law, violating EU obligations or national implementing rules object of an infringement procedure of the European Commission;
- Transposes, directly, EU law into national laws or delegates the Government to adopt legislative acts of transposition;
- Authorizes the Government to execute EU Directives by regulatory or administrative way;
- Fixes fundamental principles to be respected by Regions and Autonomous Provinces in implementing EU law regarding issues of their respective legislative competence;
- Transposes into national law EU law regarding issues of competence of Regions and Autonomous Provinces in case such Institutions do not comply with their transposing obligation.

Recently a draft law has been presented in order to review Law n.° 11 of 4 February 2005, implementing some recent innovations from Lisbon Treaty. The law proposal aims at assuring more synergy between the phase of co-ordination of the national position on EU draft law and the transposition of EU law into the national legislation.

Moreover, the *EC law* will be split into two different laws:

- The law of European delegation, to be presented to the Parliament by 28th of February every year, which concerns only legislative delegations and authorizations to implement by regulatory way;
- The European law, eventually to be presented to the Parliament, also separately from the law of European delegation, which concerns provisions for the direct implementation.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

In Italy, Directive 2004/18/EC and EU Directive 2004/17/EC have been transposed into national law by Legislative Decree 12 April 2006 n. 163, "*Code of Public contracts of works, services and supplies*" (hereinafter, "*The Code*"). The *Code* enacted a single statute containing the provisions applying to all public works, services and supply contracts, both above and below the threshold, both in ordinary and special sectors, in order to simplify and rationalize the rules by identifying a set of core principles and provisions.

EU Directive 2007/66 of 11 December 2007, regarding **the improving of the effectiveness of review procedures concerning the award of public contracts**, has been transposed by Legislative Decree 20 March 2010 n. 53, which modified some articles of the *Code*, whereas procedural rules have been transposed in Decree 2 July 2010 n. 204, the new Administrative Justice Code.

With reference to EU Directive 2009/81 of 13 July 2009, on the co-ordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, Government has been delegated by *EU law* 2010 to transpose such a Directive.

The *Code* delegated Government to adopt a Regulation containing the executive discipline of the *Code*. The Regulation is in the process of being published on the National Official Journal.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

The *Code*, as already explained above, regulates the award and the performance of all public contracts (classical sector and utilities sector) regardless of the value; so the *Code* includes the rules on the contracts below the EC Thresholds (TITLE II- classical sector; article 238 - utilities sector).

Moreover, article 2 of the Code sets out that the EC Treaty obligations should be observed when awarding all public contracts.

According to articles 122 and 125, below the thresholds the *Code* provides to use the same procurement procedures provided for contracts above the threshold value, with the exceptions listed below:

Classical sector

- Services and supplies: below € 20.000,00 direct purchasing is permitted (article 125, par. 11);
- Works: below € 40.000,00 direct purchasing is permitted (article 125, par. 8);
- Works: below € 200.000,00 for some kind of contracts listed by the law, request of quotations (minimum five) is permitted, respecting the principles of EC Treaty (transparency, equality of treatment)- article 125, par. 8;
- Works: simplified restricted procedure for contracts whose value is below € 1.000.000,00 (art. 123);
- Works: equal or over € 100.000,00 and below € 500.000,00 negotiated procedure without notice is permitted (article 122);
- Engineering and architectural services: below € 100.000,00 request of quotations (minimum five) is permitted, respecting the principles of EC Treaty (transparency, equality of treatment, proportionality, non discrimination)- article 91, par. 2.

Utilities sector

- Article 238 establishes that contracting entities that are contracting authorities (State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law) apply the same rules provided for contracts above the threshold value for the utilities sector;
- Services and supplies: below € 20.000,00 direct purchasing is permitted (article 125, par. 11- art. 238, par 6);
- Works: below € 40.000,00 direct purchasing is permitted (article 125, par. 8, art. 238, par 6);
- Works: below € 200.000,00 for some kind of contracts listed by the law, request of quotations (minimum five) is permitted, respecting the principles of EC Treaty (transparency, equality of treatment)- article 125, par. 8. , art. 238, par 6;
- Services and supplies: below the European thresholds for classical sector for some kind of contracts listed by the law, request of quotations (minimum five) is permitted, respecting the principles of EC Treaty (transparency, equality of treatment);
- Public undertakings and contracting entities which operate on the basis of special or exclusive rights granted by a competent authority apply the rules provided in their regulations;

- In addition, for services and supplies contracts below the EC threshold value request of quotations is allowed (minimum five), in respect of the principles of EC Treaty (transparency, equality of treatment).

Rules for publication and time limits for submission of applications and tenders are the following:

- *For public works contracts:* the prior information notice is optional and is published on the contracting authorities web site and on Ministry of Infrastructures web site (after the secondary Regulation will come into force it will be mandatory the publication on web site of the Authority for the Supervision of Public Contracts (www.avcp.it). The publication of the contract notice and the award result notice for works contracts is mandatory: for contracts whose value is above € 500.000 the notices are published on the National Official Journal and on the above mentioned web sites; for contracts whose value is below € 500.000 the notices are published on the notice-board of the contracting authority.
- *For service and supplies contracts:* the prior information notice is optional and is published on the web site of the contracting authorities and on the Ministry of Infrastructures web site (after the secondary Regulation will come into force it will be mandatory the publication on web site of the Authority for the Supervision of Public Contracts (www.avcp.it). The publication of the contract notice and the award result notice for goods and services contracts is mandatory. The contracting authorities publish the contract notice on the National Official Journal, on the Notice-board and on the above mentioned web sites. The award result notice is published on the web sites.

As concerns rules for qualitative selection and award criteria, the same rules for contracts above the threshold value are provided. The grounds for exclusions are the same and are mandatory; for purchase of services and supplies the contracting authorities can establish the financial and economic requirements and technical and professional requirements in relation to the size of contracts.

For public works the level of technical and economic requirements is established by the secondary legislation (DPR 34/2000). For works whose value is not less than € 150.000, qualification is carried out by companies regulated by common law (SOA¹), which are authorized and supervised by the *Authority for the Supervision of Public Contracts*.

Qualification certificate is carried out on the basis of:

- General criteria (administrative and legal assessment on construction enterprises);
- Specific criteria (technical, economic and financial criteria on construction enterprises).

With reference to award criteria, the same rules are provided for contracts above the threshold value. It is provided a mathematic method for determining the abnormally low tenders (art. 86, par. 1) based on the average value of the tenders.

¹ *Società Organismo Attestazione*: private firms with public functions

The contracting authorities, for public works contracts below € 1.000.000 and services and supplies contracts below € 100.000, may provide in the contract notice the automatic exclusion of the abnormally low tenders if the admitted tenders are more than 10.

Procurement of services in Annex II B of Directives 2004/18/EC and 2004/17/EC

According to article 20 paragraph 1 of the Code, public contracts having as object services listed in Annex IIB of the Code (which includes services listed in Annex IIB of Directive 2004/18/EC) are partially excluded from the scope of the Code: such a contracts are subject solely to article 68 (technical specifications), art. 65 (notice of the results of the award procedure) and article 225 (report for contracts awarded) of the Code.

Furthermore, article 21 of the Code states that the aforementioned article 20, paragraph 1, even applies to contracts having as object both services listed in Annex IIB and services listed in Annex IIA of the Code (which includes services listed in Annex IIA of Directive 2004/18 and in Annex XVIIIA of Directive 2004/17) in case the value of services listed in Annex IIB is greater than the value of services listed in Annex IIA.

Finally, by virtue of article 27 of the Code, *Code general principles* (the same stated by EC Treaty), apply to the award of public contracts totally or partially excluded from the scope of the Code; as a consequence even to the abovementioned contracts.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

In Italy, the *Department for the co-ordination of European Union Policies* operates within the Prime Minister's Office and supports relationship between the Italian Government and the European Institutions.

In particular, in the framework of Public Procurement, the Department is responsible for the co-ordination of all national, regional and local administrations in order to: elaborate and validate a national position on EU draft law and guidelines; transpose EU law into national law. The Department represents the national position of the Italian delegation at the Public Procurement Council Working Group and the Advisory Committee on Public Contracts, Economic and Statistical Working Group and Electronic Public Procurement Working Group of the European Commission. Furthermore, the Department promotes initiatives in order to prevent infringement procedures for breach of EU Law and co-ordinates the activities finalized to solve infringement procedures started by the European Commission against Italy.

In Public Procurement also the Ministry of Infrastructures proposes the draft law for transposing EU directives and for modifying national law not complying with EU law. The Ministry has also a consultative function, by providing for advice to contracting authorities, in order to implement the EU law correctly.

The *Authority for the Supervision of Public Contracts of works, services and supplies*, adopts regulatory acts solving interpretative doubts concerning the rules on public procurement. It also proposes legislative modifications to the Government and suggests revisions of implementing regulation to the Minister of Infrastructure.

Main organisations responsible for procurement within the utilities sector

According to the Annexes of Directive 2004/17/EC, entities distributing gas, governed by the consolidated text of the laws on the direct assumption of control of public services by local authorities and provinces, approved by Royal Decree No. 2578 of 15 October 1925 and by Presidential Decree No. 902 of 4 October 1986.

Entities distributing heat to the public as referred to in Article 10 of Law No. 308 of 29 May 1982.

Local authorities, or associations of local authorities, distributing heat to the public.

Bodies responsible for managing the various stages of the water distribution service under the consolidated text of the laws on the direct assumption of control of public services by local authorities and provinces, approved by Royal Decree No. 2578 of 15 October 1925, Presidential Decree No. 902 of 4 October 1986 and Legislative Decree No. 267 setting out the consolidated text of the laws on the structure of local authorities, with particular reference to Articles 112 to 116.

Entities and undertakings, providing public transport services by rail, automated system, tramway, trolleybus or bus or managing the relevant infrastructures at national, regional or local level. Contracting entities operating in the postal services sector.

Entities granted an authorization, permit, license or concession to explore for or extract oil and gas or to store natural gas underground pursuant to the following legislative provisions.

National ports and other ports managed by the *Capitaneria di Porto* pursuant to the "*Codice della navigazione*", Royal Decree No 327 of 30 March 1942..

Autonomous ports set up by special laws pursuant to Article 19 of the "*Codice della navigazione*", Royal Decree No 327 of 30 March 1942.

Contracting entities in the field of airport installations.

Entities operating airport facilities on the basis of a concession granted pursuant to Article 694 of the "*Codice della navigazione*", Royal Decree No 347 of 30 March 1942.

Supervision bodies

The *Authority for the Supervision of Public Contracts* has been established by law n. 109/1994 with the aim of supervising public contracts in order to grant compliance with principles of transparency, rightfulness and competition among operators in the public procurement market. It is an independent body with regard to functions, evaluation and administrative responsibility and is autonomously organized.

The Board of the Authority is composed by seven members appointed by the Presidents of the two Chambers of the Italian Parliament, selected from personalities of high professional profile. From amongst those members, the President of the Authority is elected by the members themselves, and decisions are taken by the majority of the votes.

D.Lgs. 163/2006 (the Code) implementing directives 2004/17CE and 2004/18CE, identified the Authority as the responsible entity for the implementation of community law control, provided by art. 81, par. 2 of the aforementioned directives.

It supervises the entire public procurement system, both at a State and at a Regional level, in order to grant compliance with the principles of rightfulness and transparency in awarding procedures and with effective and convenient execution of contracts, as well as compliance with competitions rules within each single tender.

In particular it supervises the correct application of laws and regulations, while verifying the regularity of awarding procedures and the economic efficiency in contracts execution, also through sample surveys; it also ensures that any injury does not occur for the exchequer.

The Authority reports both to the Parliament and Government on particularly serious cases concerning non observance or distorted application of public procurement legislation; it also proposes legislative modifications to the Government on the same matter and suggests revisions of implementing regulation to the Minister of Infrastructure. It supervises also the system of the quality certification of the firms (SOA) operating in public contracts market. According to the *Code*, the Authority may impose pecuniary or restrictive sanctions when detecting any irregular, unlawful or illegal behavior of any SOA. It has the power either to suspend, in a precautionary way, or to directly annul unlawful certifications.

The Authority, through the Observatory, ensures the collection and processing of national data on public procurement, in order to provide indications for the supervising departments and to address the regulating activity towards rules of transparency, simplification and competition. In particular, the Observatory:

- Processes data collected and assesses the structural characteristics of the market of public procurements and its evolution. Statistics about number and value of awarding procurements grouped by localization, procurement entities, awarding procedures; the different typologies of procurement are periodically published;
- Assesses whether the criteria of efficiency and value for money are respected during the procurement process. Variations of the initial contractual conditions are recorded in the Data Base of the Authority.

- Detects dysfunctions and anomalies of the market; in order to reach this task, some specific measures are determined. Throughout the analysis of the “*Construction Companies Data Base*” (implemented with data collected by the Authority), in which denounces from contracting entities and from SOA are gathered, it is possible to verify the statistical distribution of qualified companies according to 1) their juridical typology, 2) the statistical distribution of qualified companies and inscriptions on a regional base, 3) the ratio between the number of qualified companies and the regional GDP, 4) the ratio between the number of qualified companies and the total number of construction companies, 5) the mobility index of qualified companies, 6) the concentration index of companies; therefore, thanks to this instruments, contracting entities are able to acquire information on public procurements market operators and to obtain the required checks.

According to art. 6, par. 7, n), of the *Code*, the Authority has been appointed to conciliation functions, by means of an instrument called *Alternative Dispute Resolution* (ADR). The opinion of the Authority is not binding and is facultative for the parties; the high percentage of acceptance and conformation with the Authority proposal proves that the conciliating role of the instrument is well recognized.

Every year, the Authority reports to the Parliament on the activity that has been developed.

The main competences of the Authority can be summarized as follows:

- Supervision activity;
- Activity of legislative proposal;
- Sanctioning functions;
- Power of crime detection and the denouncing to the Criminal Court and to the Court of Auditors;
- Activity of interpretation of legislation;
- Auxiliary reporting functions to the Parliament and the Government

With reference to the phenomenon of corruption in public procurement the Authority covers an important role of prevention, particularly in those phases of public procurement procedures which are also defined as “*grey areas*”² (the pre-bidding and post-bidding phases and the exceptions to competitive procedures), which are less subject to transparency requirements and, therefore, potentially vulnerable to corruption.

Main central purchasing bodies

Consip S.p.A., a public stock company owned by the Ministry of the Economy and Finance, operates as central purchasing body on behalf of the State. Its main activity consists in the implementation of the Program for the rationalization of public expenditure in goods and services through the use of information technology and innovative purchasing tools, with the aim of rationalizing the expenditure in goods and services of public administrations.

² OECD Global Forum on Governance: fighting corruption and promoting integrity in public procurement

Consip has been committed to draft and conclude, also by using electronic technologies, framework contracts for supplying to the public administrations specific categories of goods and services, which are defined every year through a Ministerial Decree, with providers selected on the basis of a transparent procedure. Within the framework contract, the providers have to accept any orders of specific goods and services, coming from public entities enabled to use the contracts themselves. Public entities shall or may purchase within the framework contracts. It is mandatory for State administrations, whereas the other administrations, whenever they perform their own tenders, have to take price and quality of the framework contracts as a reference. Italian Regions can also set up purchasing bodies which act on behalf of regional or local authorities.

4 THE REVIEW SYSTEM

Scope of the review system

Legislative Decree 20 March 2010 n. 53, which transposed Directive 2007/66, applies to all contracts covered by the *Code* : works, services and supply contracts and concessions, both above and below the threshold, both in ordinary and special sectors.

Review bodies

In Italy review bodies have judicial nature . Both for pre-contractual and for contractual review, the competence belongs to the administrative judge (sole jurisdiction) . Jurisdiction is allocated between *Regional administrative courts* (first instance) and the *State Council* (appeal).

Review procedure

Pre-contractual review

The review body can impose the suspension or the cancellation of decisions related to the award procedure.

Contractual review

The Legislative Decree 20 March 2010 n. 53 provides for ineffectiveness, or, in case of overriding reasons of general interest, alternative penalties. As concerns the meaning of ineffectiveness, the judge may opt between *ex tunc* or *ex nunc* ineffectiveness. Penalties imposed by the judge can be financial penalties or the shortening of the duration of the contract. Penalties are paid as revenues of the State budget.



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

Public Procurement in Latvia is regulated by two laws covering “classical” and “utilities” sector, for “classical” is the Public Procurement Law and for “utilities” - the Law on Procurement for the Needs of Public Service Providers. These laws have been adopted by the *Saeima*, the Latvian Parliament. According to relevant provisions in mentioned laws as well as regulations of the Cabinet of Ministers, the Ministry of Finance of the Republic of Latvia is in charge of public procurement policy. The Procurement Monitoring Bureau is Latvian central procurement body, also being as complaints review institution according to “Remedies directives”.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

Directive 2004/18/EC is implemented by the Public Procurement Law (effective as of 1 May 2006; last amendments came into force on 15 June 2010). The Public Procurement Law also implements requirements of Directive 2007/66/EC.

The Public Private Partnership Law (effective as of 1 October 2009) implements Directive 2004/18/EC requirements on works concessions.

Directive 2004/17/EC is implemented by the Law on Procurement for the Needs of Public Service Providers (effective as of 10 November 2004). The Law on Procurement for the Needs of Public Service Providers in next two months will be replaced by new Public Service Providers Procurement Law which will also implement requirements of Directive 2007/66/EC.

Directive 2009/81/EC will be implemented by separate law on defence and security procurement.

There are some Regulations of the Cabinet of Ministers which implements technical questions such as EC Thresholds and content, preparation and submission for publication of notices.

All the laws and regulations are available at the Procurement Monitoring Bureau's website: <http://www.iub.gov.lv/node/29> (at the moment available only in Latvian).

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

The Public Procurement Law also regulates procurement procedures below EC Thresholds for contracting authorities as mentioned in Directive 2004/18/EC. The same Regulations of the Cabinet of Ministers should be also applied for procurements below EC Thresholds.

The Public procurement Law sets out two level thresholds for procurement procedures below EC Thresholds. The first level threshold is 3000 LVL for public supply and services contracts and 10 000 LVL for public works contracts. The second level threshold is 20 000 LVL for public supply and services contracts and 120 000 LVL for public works contracts. In addition EC threshold is 87 888 LVL for public supply and services contracts and 3 406 520 LVL for public works contracts.

The Public Procurement Law define that Directive 2004/18/EC like procedures (open, restricted and negotiated procedures and design contest with shorter time limits for receipt of applications and for receipt of tenders and publication of notices only in central public procurement portal, www.iub.gov.lv) should be applied, if the estimated contract value for public supply and services contracts is equal to or greater than 20 000 LVL and the estimated contract value for public works contracts is equal to or greater than 120 000 LVL.

Below the mentioned thresholds, if the estimated contract value for public supply and services contracts is equal to or greater than 3000 LVL and the estimated contract value for public works contracts is equal to or greater than 10 000 LVL the more simplified procedure is used.

Below accordingly 3000 LVL for public supply and services contracts and 10 000 LVL for public works contracts direct purchasing is permitted.

For procurements below EC thresholds, only tender notices and award result notices are used. If the estimated contract value for public supply and services contracts is equal to or greater than 20 000 LVL and the estimated contract value for public works contracts is equal to or greater than 120 000 LVL, the content of those notices are the same as set by EU Regulation Nr.1564/2005. Below above mentioned thresholds but, if the estimated contract value for public supply and services contracts is equal to or greater than 3000 LVL and the estimated contract value for public works contracts is equal to or greater than 10 000 LVL, the content of those notices is noticeably simplified.

If the estimated contract value for public supply and services is equal to or greater than 20 000 LVL and the estimated contract value for public works contracts is equal to or greater than 120 000 LVL, the time limit for submission of applications is set to 25 days in case of restricted procedure and negotiated procedure with publication of a contract notice. The time limit for submission of tenders is set to 30 days in case of open procedure and 25 days in case of restricted procedure.

Below the mentioned thresholds, if the estimated contract value for public supply and services contracts is equal to or greater than 3000 LVL and the estimated contract value for public works contracts is equal to or greater than 10 000 LVL, the time limit for submission of tenders (this is like open procedure) is set to 10 days. The policies, rules and procedures for tender evaluation and the application of award criteria are the same in above EC thresholds procurement and procurements below EC thresholds, if the estimated contract value for public supply and services contracts is equal to or greater than 20 000 LVL and the estimated contract value for public works contracts is equal to or greater than 120 000 LVL. They are consistent with EU directives on public procurement. An accent on use of the most economically advantageous tender as selection criteria is provided in the Public Procurement Law. The lowest price only as selection criteria is allowed as well. Below the aforementioned thresholds, if the estimated contract value for public supply and services contracts is equal to or greater than 3000 LVL and the estimated contract value for public works contracts is equal to or greater than 10 000 LVL, there are no restriction that only contract award criteria which is directly linked to subject-matter of the contract in question should be used (as it is set in EC directives on public procurement and relevant ECJ case-law).

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

The Public Procurement Law, both above and below EC Thresholds, and the Law on Procurement for the Needs of Public Service Providers above EC Thresholds, provides the minimum requirements for procurement of II B Services set by the directive 2004/18/EC and by the directive 2004/17/EC (on technical specifications and publication of contract award notices). It also sets rules on documentation of contract award, minimum standstill period (there is a possibility to submit a complaint to Procurement Monitoring Bureau about contract award) and requirement for publication of notice on Internet or in newspaper, before the contract award and for setting time limit for submission of tenders.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

Latvia has a decentralized public procurement system and each ministry, local government, their institution and undertaking is a separate contracting authority under the Public procurement Law. Use of centralized or decentralized method of public procurement basically is selected by each contracting authority on voluntary bases. At the same time couple of ministries and local governments has their own policies on the centralization of public procurement. Currently there is a notable trend towards centralization through the establishment and operation of centralized procurement agency.

The Public Procurement Law obligates contracting authorities to form Tender Committees for managing the tender process. Tender Committees can be permanent or *ad-hoc*, it depends on each contracting authority and the body which supervises it. The composition and responsibility of the Tender Committees is regulated in Public Procurement Law. The main functions and mandate of the tender committees are to design of the procurement procedure documents, record the progress of the procurement procedure, to be responsible for the course of the procurement procedure, to select the candidates and to evaluate the tenderers and tenders submitted by them in accordance with the Public Procurement Law, the procurement procedure documents, as well as with other regulatory enactments, to make decision on the winner of the procurement procedure. The Chair of the procurement commission is responsible for organisation and managing the operation of the commission and its meetings. In accordance with the Paragraph five of Article 23 of the Public Procurement Law “[...] *The decision taken by the procurement commission shall be binding to the contracting authority upon concluding the procurement contract*”.

Main organisations responsible for procurement within the utilities sector

Above mentioned equally concerns utilities sector. In its turn the Law on Procurement for the Needs of Public Service Providers does not include regulation on Tender Committees and contracting entities (utilities) are allowed to establish such committees or appoint the person who will be responsible for tender evaluation and decision making. There is the possibility to establish the Tender Committee for the evaluation of the tender’s purpose providing that the final decision will make for example the board of administration of the entity. The trend towards centralization in utilities sector is less notable.

Supervision bodies

Main supervision bodies in public procurement are:

- *Procurement Monitoring Bureau* - carries out ex ante control (before starting procurement procedures in cases of projects co-financed from Structural Funds) and carries out pre-contractual review (acts as first level complaints examination body in accordance with the EC Directive 2007/66/EC);
- *Corruption Prevention and Combating Bureau* - carries out control on corruption in public procurement;
- *State audit office* (independent body, established by the Constitution of the Republic of Latvia) - after the conclusion of contracts assess if the use of state and local government finance recourses by selected contracting authorities/entities are legal and effective.
- *Administrative Court (judicial institution)* - carries out the review of decisions made by Procurement Monitoring Bureau and carries out contractual review in accordance with EC Directive 2007/66/EC.

Main central purchasing bodies

The main central purchasing bodies in Latvia are:

- *The State Regional Development Agency* - responsible for operation and development of the e-procurement system and concludes framework agreements for common use goods (for example personal computers and their accessories, furniture, medicine etc) in the interests of central and local government institutions. For central government institutions use of e-catalogues which are based on framework agreements and is maintained by State Regional Development Agency will become obligatory since the autumn of 2010;
- *The Providing State Agency of the Ministry of Internal Affairs* and *State Agency for Defence Properties of the Ministry of Defence* - central purchasing bodies in the security and defence sectors.

Those are institutions with greater turnover in relation to public procurement. At the same time other ministries and local governments have their own purchasing structures that also act as permanent or *ad hoc* central purchasing bodies.

Supportive bodies

The Procurement Monitoring Bureau is the main supportive body for contracting authorities/entities and suppliers in public procurement, whose duties include providing oral and written consultations, organization of workshops, drafting guidelines and explanatory notes and drafting standardized contract documents.

4 THE REVIEW SYSTEM

Scope of the review system

Below EC Thresholds the review system depends on the above mentioned national thresholds. If the estimated contract value for public supply and services contracts is equal to or greater than 20 000 LVL and the estimated contract value for public works contracts is equal to or greater than 120 000 LVL, the Directive 2007/66/EC consistent review rules are applicable.

Below the mentioned thresholds, if the estimated contract value for public supply and services contracts is equal to or greater than 3000 LVL and the estimated contract value for public works contracts is equal to or greater than 10 000 LVL, there is a possibility to appeal to Administrative District Court actually only for damages.

Review bodies

Complaints on procurement procedures organized by contracting authorities and entities and public service providers are reviewed by the Procurement Monitoring Bureau as first level (non-judicial) review body. The Procurement Monitoring Bureau is a direct State administrative institution subordinate to the Ministry of Finance and operating in accordance with the Public Procurement Law, Public Private Partnership Law and Law on Procurement for the Needs of Public Service Providers. In order to examine complaints, the Procurement Monitoring Bureau shall establish a complaints examination commission consisting of three members. The decisions of the Procurement Monitoring Bureau (of the complaints examination commission) can be appealed in the Administrative court (judicial body). An appeal to the commission's decision does not interrupt its implementation. It means, if the complaints examination commission permits entering into a contract, the conclusion of the contract is not suspended in case if the decision is appealed. But a court can make a decision, which imposes a duty on the contracting authority to prohibit a conclusion of a contract. Court examines appeals on decisions of the Procurement Monitoring Bureau in three instances, if it's necessary.

After conclusion of the contract in cases defined by the EC Directive 2007/66/EC complaints should be submitted directly to the Administrative District Court.

All above mentioned applies to the contracts, if the estimated contract value for public supply and services contracts is equal to or greater than 20 000 LVL and the estimated contract value for public works contracts is equal to or greater than 120 000 LVL and there is no difference between contracts to which the EC Directive 2004/18/EC apply and contracts to which EC Directive 2004/18/EC do not apply.

Review procedure

Pre-contractual review

Review procedures at the Procurement Monitoring Bureau's Complaints Examination Commission are carried out as administrative proceedings in accordance with the Public Procurement Law, but when the decision of Complaints Examination Commission is appealed to the Administrative Court, the court proceedings takes place in accordance with Administrative Process Law.

The Complaints Examination Commission of the Procurement Monitoring Bureau, according to Paragraph 2 of Article 84 of the Public Procurement Law, has following rights:

1. To allow to enter into a contract or a framework agreement and to let the requirements listed in the documents of the procurement procedure remain valid or the decision taken by a contracting authority or a procurement commission to be in force, if the complaint is unfounded or founded, but the infringements stated by the Commission cannot influence the decision regarding the awarding of the rights of procurement;
2. To prohibit to enter into a contract, if a contracting authority has not observed the requirements listed in Article 32 or in Paragraph seven of Article 79 of this Law;

3. To prohibit to enter into a contract or a framework agreement and to suspend the requirements listed in the documents of the procurement procedure or the decision taken by a contracting authority or a procurement commission in the full or partially, if the complaint is founded and the infringements stated by the Commission can influence the decision regarding the awarding of the rights of procurement;
4. To let the decision taken by a contracting authority or a procurement commission about the suspension or termination of the procurement procedure remain valid, if the complaint is unfounded;
5. To cancel the decision taken by a contracting authority or a procurement commission about the suspension or termination of the procurement procedure, if the complaint is founded. The Commission may take a decision about measures for preventing of the stated infringements in cases listed in Clauses 2, 3 and 5 of Paragraph two of this Article.

Contractual review

Review procedures at the Administrative Court are carried out as court proceedings in accordance with the Administrative Process Law.

The Administrative Court has rights to set out by the EC Directive 2007/66/EC both for the retroactive cancellation of all contractual obligations (*ex tunc*) and cancellation of obligations which would still have to be performed (*ex nunc*) taking into account the nature of breach of the Law and the effectiveness of sanction. The Administrative court has no right to apply alternative penalty – fine.



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

Public procurement rules provided by EU directives are transposed into Lithuanian legislation by the laws. General process of EU legal acts transposition into national legislation is regulated by the *Government Resolution on the European Union Affairs Coordination*. This legal act obligates the European Law Department under Ministry of Justice to coordinate EU *acquis* transposition into national legal acts.

The state institution responsible for preparation of a certain draft law has to inform the European Law Department about its planned actions for transposition of EU legal act. Having received information from different state institutions the European Law Department prepares a general plan of the legal acts which are necessary to adopt in order to harmonize Lithuanian legislation with EU *acquis*, controls implementation of this plan and reports to the European Commission, the Lithuanian Government and the Lithuanian National Parliament about the implementation of this plan. The Government Resolution on the European Union Affairs Coordination requires that the state institution responsible for preparation of the certain legal act which transposes EU directive have to draw up its correlation table with the relevant EU directive after the adoption of national legal act.

If the new law is necessary for the transposition of EU legal act, it will be adopted according to the common procedures set out in the Republic of Lithuania Law on Procedures of Drafting of Republic of Lithuania Laws and Other Regulatory Enactments.

The Ministry of Economy of the Republic of Lithuania which is responsible for the formation of public procurement policy prepares a draft law and submits it for justification with the institutions concerned. Thus the draft law is being reviewed by all the ministries, associations representing business sector, Lithuanian Public Procurement Office, European Law Department under Ministry of Justice and others. Lithuanian citizens also have an opportunity to comment the draft law and give their remarks and suggestions as the draft law is available on the internet in the legal acts database of the Lithuanian National Parliament. After the assessment of received remarks and necessary justifications of the draft law the Ministry of Economy delivers it to the Government. Government considers the draft law in its sessions and later submits it to the National Parliament which considers it in turn. After the members of the National Parliament vote for the adoption of the draft law it is being submitted to the Lithuanian President for signing. The new law comes into force after it is signed by the President and published in the national gazette "*Valstybės žinios*".

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

Directives 2004/18 and 2004/17 and also the Remedies Directive are transposed by the unique national legal act, i.e. the *Lithuanian Law on Public Procurement*. Lithuania is going to adopt the new law which will regulate procurement in the defence and security sector.

The same legal acts regulate public procurement above and below EU threshold and they apply for classical sector contracting authorities as well as utilities sector contracting entities. In addition to the Law on Public Procurement there are by-law legal acts which provide more detailed regulations of the provisions of the Law on Public Procurement, offer standard contract documents, give recommendations to contracting authorities or promote certain political trends (for example centralized public procurement).

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

The *Lithuania Law on Public Procurement* which is applicable for the award of contracts above the EC thresholds also regulates awarding of contracts below the EC thresholds by both classical sector and utilities sector contracting authorities and contracting entities. This regulatory instrument requires that EC Treaty obligations should be observed when awarding contracts below the EC thresholds.

Contracting authorities are obligated to approve their own rules for public procurement below the EC thresholds. They can follow the standard rules prepared as an example by the Public Procurement Office. Still, Law on Public Procurement requires observing certain rules (ex. contract notices, verifying tenderers' qualification, requirements for technical specification, tender evaluation, terms for submitting tenders) while preparing contracting authority's individual rules for public procurement below EC thresholds. The approved rules have to be placed in the Central Portal of Public Procurement.

Law on Public Procurement doesn't provide procedures for the contract awards below EC threshold – contracting authority is free to decide what kind of procedures to use. Contracting authorities are obligated to publicise about the public procurement below the EC thresholds in the supplement "*Informaciniai pranešimai*" (Information notices) to the official gazette "*Valstybės žinios*" and in the Central Portal of Public Procurement.

Exceptional cases (for example, technical or artistic reasons, extreme urgency, additional deliveries) are clearly identified in the law. It should be mentioned, that obligation to publicise public procurement notices in the national gazette "*Valstybės žinios*" shall be rescinded from 2011 and all public procurement notices will be published in only electronic format in the Central Portal of Public Procurement.

The time limit to submit tenders should be not less than 7 days from the publication of a contract notice in the supplement "*Informaciniai pranešimai*" (Information notices) to the official gazette "*Valstybės žinios*".

Rules for determining a tenderer's qualifications to perform a contract are the same as for the contract awards above the EC thresholds. Still it is allowed for the contracting authorities to determine in their approved rules cases when the tenderer's qualifications are not verified.

Rules for tender evaluation and award criteria are the same as for the above EC contract awards. In addition for area planning, architecture, engineering, data processing, complex artistic or other services of a similar character contracting authorities in their approved rules may determine other than the lowest price or most economically advantageous tender evaluation criteria.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

The award of contracts for II B Services is regulated by the Law on Public Procurement and it is equivalent to the rules for the procurement below EU threshold. However, for the above EU threshold contract awards of II B services there are additional provisions which are transposed directly from EU directives, i.e. provisions concerning technical specifications and contract award notices.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

The Ministry of Economy of the Republic of Lithuania is responsible for public procurement policy making in Lithuania. It implements the following functions:

- Prepares and coordinates with other ministries and responsible institutions the public procurement legislation for classical sector contracting authorities and utilities sector contracting entities; ensures that legal base on public procurement promotes transparent and effective procurement;
- Submits proposals to the Government of the Republic of Lithuania concerning policy and strategy of public procurement and its implementation;
- Ensures that national law on public procurement is compatible with the EU policies (including sustainable development, innovation, small and medium size enterprises, business development and other);
- Ensures harmonization of national laws on public procurement with terms of the EU and WTO Agreement on **Government Procurement**;
- Drafts national legal acts transposing EU *acquis*;
- Collaborates and represents the Ministry of Economy at the European Commission workshops, committees, etc.

Supervision bodies

The Public Procurement Office (PPO) was established in December 1996. The PPO is governed by the Law on Public Procurement and other laws, legal acts and international obligations of the Republic of Lithuania and its own regulations. The PPO is an institution which co-ordinates the activities of procurement and supervises compliance of procurement activities with the Law on Public Procurement and the implementing legislation. It coordinates the activities of procurement and supervises classical sector contracting authorities as well as utilities sector contracting entities. The PPO operates under the Ministry of Economy since 1st of January 2010.

The main tasks of the PPO are regulated in the Law on Public Procurement:

- According to its competence drafts and/or adopts legal acts regulating procurement;
- Supervises compliance during public procurement procedures and carries out measures to prevent violations;
- According to its competence analyzes cases of administrative offences;
- Provides methodological assistance, draws up recommendations necessary for implementing the Law on Public Procurement, lays down the guidelines; organizes training; offers consultations to contracting authorities and suppliers;
- Approves the forms of procurement notices and specifies the requirements for submitting notices for the contract awards below EU thresholds;
- Approves standard forms of procurement reports and sets the requirements for submitting the reports;
- Collects, stores and analyzes information about public procurement;
- Analyzes and assesses the procurement system and draws up proposals for its improvement;
- Prepares and submit annual statistics, other requested information to the Commission of the European Communities;
- Forwards the notices of the contracting authority for publication in the Official Journal, and ensures publication of the notices and other relevant information submitted by the contracting authorities;
- Presents to the Commission of the European Communities information about the violations of EU law;
- Maintains contacts with the relevant foreign institutions and international organizations;
- Administers the central portal of public procurement.

In addition it should be mentioned that according to the Lithuanian Law on Public Procurement, PPO has the following rights while implementing the supervision of public procurement procedures:

- To choose independently the contracting authorities for inspection, also the method, scope and period of control;
- To be provided by the contracting authorities with information relating to procurement;
- To be provided by the contracting authorities, Public Procurement Commission or its members as well as experts taking part in procurement procedures explanations of procurement-related actions or decisions;
- To present contract documents and tenders submitted by suppliers for additional expert examination;
- Upon receipt of a notification about possible violations, to obligate the contracting authorities, based on the criteria of reasonableness and fairness, to suspend procurement procedures, while PPO evaluates contract award procedure documents and decisions adopted by the contracting authority. If PPO ascertains the violation it may obligate the contracting authority to terminate public procurement procedures, to revoke or change the unlawful decisions or actions;
- To take an administrative action in the manner prescribed by law against the persons who violate the Law on Public Procurement;
- Upon establishing violations of the Law on Public Procurement, possible manifestations of corruption or competition related breaches to refer the material to law enforcement institutions or the Competition Council for further investigation;
- Upon establishing violations of the Law on Public Procurement or subordinate legislation to guard public interest and apply to the court for ineffectiveness of the contract or alternative penalties to the contracting authority.
- Besides PPO, public procurement procedures may be supervised by the authorities administering the projects funded by EU structural funds or other donors funded programs. The National Audit Office of Lithuania may also inspect public procurement procedures.

There is no special independent body appointed according the Article 81 of Directive 2004/18/EC in Lithuania.

Main central purchasing bodies

The Central Project Management Agency (CPMA) was appointed to act as Central Purchasing Body in Lithuania by the resolution of the Government. Since the beginning of the year 2007, the CPMA implemented the pilot model of centralized public procurement in Lithuania. In 2008 CPMA engaged in acting as a Central Purchasing Body on a regular base. In 2009 centralized public procurement through CPMA became obligatory for central government bodies.

As a central purchasing body, CPMA is acting in the following areas:

- *Market research.* Purchasing authorities are surveyed on their procurement needs and market supply is examined. Analysis is done afterwards to determine goods, services or works that are reasonable to be purchased centrally, procurement models and evaluation criteria to be applied are selected;
- *Public procurement.* Public tenders are carried out to conclude Framework agreements with a number of economic operators for a supply of product groups which were selected based on the market research;
- *eCatalogue.* Economic operators who have signed Framework agreements put their product specifications into a specially developed eCatalogue. Usage of eCatalogue eliminates the complex Public purchase procedures for commonly purchased goods, services and works, cuts prices thanks to repetitive competition and increases Public procurement transparency by eliminating human assistance;
- *eOrdering.* Contracting authorities which have requested the access to the eCatalogue place their orders for product specifications online. Electronic ordering significantly reduces the time needed to purchase products and eliminates the risk of technical mistakes.
- *eAwarding.* eOrders are further processed and delivered to potential suppliers. Suppliers compete to win an order contract by reviewing and submitting their proposals online. The winner is awarded the contract automatically, contract is prepared and provided online.
- *Trainings.* Contracting authorities and suppliers are trained to use the eCatalogue to perform public procurement. Organizations are also taught about on advantages of centralized public procurement, electronic tendering, Green Public Procurement. *Promotion of other public procurement initiatives.* Economic operators and contracting authorities are encouraged and given the possibility to use electronic signatures to sign proposals and contracts. A number of products in eCatalogue include environmental criteria, which makes it easy for contracting authorities to purchase “green” products. Various open source software is included in eCatalogue for contracting authorities to choose from. Procurement procedures, qualification criteria and the number of participating suppliers is adjusted to maximize the involvement of SMEs in centralized public procurement.
- *Manual,* which includes management of documents, risk, irregularities, claims, public relations, risk management, employees training, problem solving, internal audit and other procedures. Procurement is regulated by the procedures prepared by the CPMA. The CPMA has prepared and has been operating under the General Operations.

CPMA also performs the function of ex-ante and ex-post control of public procurement procedures for various EU and other donors funded programs and projects.

4 THE REVIEW SYSTEM

Scope of the review system

The Lithuanian Law on Public Procurement establishes public procurement review system which is in accordance with the requirements of Directive 2007/66/EC. The same review system applies for public contract awards above and below EU thresholds.

Review bodies

In Lithuania the regional courts review public procurement cases as the courts of the first instance. The claims should be reviewed following the procedures set out in the code of Civil Procedure of the Republic of Lithuania using oral or written procedure. Decision of the regional court may be appealed to the Court of Appeal of Lithuania.

The claim or appeal must be reviewed within 45 days from the day of its acceptance. There is no specific non judicial review body on public procurement in Lithuania.

Review procedure

Pre-contractual review

Every supplier who has an interest in procurement and believes that the contracting authority has not complied with the requirements of the Lithuanian Law on Public Procurement and violated or will violate his lawful interests, has the right to file a claim about the actions or decisions of the contacting authority prior to signing the public procurement contract with the successful tenderer.

The filing of the claim is the mandatory stage if the contract is not yet signed. The supplier may appeal contracting authority's decision to the regional court. The latter may apply the following measures:

- Interim measures including the suspension of contract award procedure or implementation of any decision taken by the contracting authority (or entity);
- Setting aside or changing unlawful decisions taken by the contracting authority (or entity);
- Award of damages.

Contractual review

After the public procurement contract is signed the supplier may appeal contracting authority's (entity's) decisions to the regional courts of Lithuania. The latter may apply the following measures:

- Interim measures;
- Award of damages;
- Ineffectiveness of the contract;
- Alternative penalties.



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

Institutions involved: Government, Parliament, “*Conseil d’Etat*” (a kind of 2nd chamber of the Parliament), the Chamber of Handicrafts and the Chamber of Commerce have the possibility to give their opinion in case of a law text.

Transposition act: laws and decrees by the Government, signed by the Grand-Duke.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

The directives 2004/18 and 2004/17 are implemented by the law on public procurement (Memorial A 172 p.2493 – loi du 25 juin 2009 sur les marches publics, and by the regulation (decree) that puts the law on public procurement into effect (*Memorial A 180. p.2608, règlement grand-ducal du 3 août 2009 portant execution de la loi du 25 juin 2009 sur les marches publics*) These 2 texts have been published as a compilation.

The first remedies directives have been implemented by two laws (*loi du 13 mars 1993; loi du 27 Juliet 1997*). The 2007 directives are also to be transposed by one singular law, that abolishes the law texts from 1993 and 1997).

The law on public procurement (*loi du 25 juin 2009 sur les marches publics*) and the regulation (*règlement grand-ducal du 3 août 2009*) covers also the national legislation on procurement below the EC Thresholds; these texts are both divided into 3 larger chapters, one for the procurement below the EC Thresholds, one for the directive 2004/18 and one for the directive 2004/17.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

- Open procedure, restricted procedure and negotiated procedure;
- Time limits for submission: 42 days, reduction to 22 days for small contracts in case of urgency is possible;
- Qualitative selection and award criteria, if they are used, they have to be in coincidence and respect with the directives, transposed into national law by the articles 35, 36, 83 and 84 of the procurement law.

Procurement of services in Annex II B of Directives 2004/18/EC and 2004/17/EC

Transposed into national law by the articles 35, 36, 83 and 84 of the procurement law.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

Each legal entity is responsible for its own procurement, except if they have launched a central purchasing body.

Central purchasing bodies are responsible to buy computers and other IT material on state level, and to buy office equipment on state level.

The Ministry for Sustainable Development, and Infrastructures, department for public works, is acting as supportive body.

Main organisations responsible for procurement within the utilities sector

N.A.

Supervision bodies

Consultative supervision is made by the *Tender Commission*, constituted equally by contracting authorities and representatives of the chamber of handicrafts and chamber of commerce. It is also possible to submit a case to the Mediator (who is responsible for all kind of cases).

The jurisdictional appeals against public procurement must be submitted to the *Tribunal administrative*, the *Cour administrative* represents a second level jurisdiction.

Main central purchasing bodies

N.A.

4 THE REVIEW SYSTEM, REVIEW BODIES AND PROCEDURES

The jurisdictional appeals against public procurement must be submitted to the *Tribunal administrative*. The *Cour administrative* represents a second level jurisdiction. These are two administrative courts. Appeals are also possible at the civil courts, especially for damages.

The above mentioned Tender Commission constitutes a non judicial review body specific for public procurement.

The common procedures used before the courts have to be applied, except the specific procedures and details transposed in accordance with the remedies directive.



Macedonia*

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU PRINCIPLES INTO NATIONAL LAW

Macedonia signed the Stabilisation and Association Agreement (SAA) with the European Communities and their Member States. From the SAA derives the obligations for Macedonia to transpose the EU legislation in number of areas including public procurement.

The Public Procurement Law (PPL) was adopted in 2007 and the implementation started from the beginning of 2008.

In order to adopt the law, *The Public Procurement Bureau* (PPB) prepares a draft law. Then the Government is in charge of official proposing the draft law to the Parliament that at the final stage adopts the new law. Between the last two stages the PPB is obliged to acquire positive statement from the Secretariat for Legislation that the draft law is in compliance with the national legal system.

The PPB also prepares a Table of Concordance for the draft law that is sent to the Government, the Parliament and the Secretariat for European Affairs. The EU Commission in its opinion stated that the PPL is with high level of compliance with the EU Directives.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU principles

The Macedonian legal system is comprised from laws and bylaws. The following Directives are included in the PPL: 2004/18, 2004/17 and Remedies Directives. The Defence and Security Directive is not implemented yet. The EU Regulations 213/2008 and 1564/2005 and Directive 2005/51/EC are transposed and implemented through bylaws in the national legal system.

* Former Yugoslavian Republic of Macedonia

National legislation on public procurement and Thresholds

National legislation on procurements below the national Thresholds

Macedonia is still a candidate country for EU accession, so it does not have the obligation to transpose the value thresholds for the procedures of the Directives. It has prescribed its own thresholds that are consistent with EU, and are also stricter (130.000 euro for services and goods and 4.000.000 for works). The procedures below the thresholds are stated in the PPL.

The contracting authority shall carry out simplified competitive procedure:

- without publishing a notice, if the estimated value of the public contract is below EUR 5,000 or
- by publishing a notice, if the estimated value of the public contract is below EUR 20,000 for public supply and service contracts and EUR 50,000 for public works contract.

In the cases of simplified competitive procedure without publishing a notice, the contracting authority shall simultaneously send the request for tender to at least three economic operators. In the cases of simplified competitive procedure with publishing a notice, the contracting authority shall send the notice for the simplified competitive procedure so as to be posted on the website of the Bureau. For this notice a prescribed form exists.

The time limit for submitting tenders when applying the simplified competitive procedure with notice cannot be less than 14 days from the day the notice was posted on the website of the Bureau, i.e. 8 days from the sending of the request to tender to the economic operators for the procedure without publication of notice. The contracting authority shall only establish the suitability to pursue the professional activity of the economic operators when carrying out simplified competitive procedure without publication of a notice.

In the simplified competitive procedure with publication of a notice, economic operators shall prove their qualifications by submitting a statement. After that, the contracting authority shall require the winning economic operator to submit the documents for determining its qualifications, as defined in the simplified tender documentation.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

According to article 17 of the PPL, subject to public service contracts is the delivery of one or more services, as railway and water transport services, temporary employment services, hotel, catering, legal, investigative, education, health, social, recreational, cultural, sport and other services not mentioned in Annex II A of Directives 2004/18/EC and 2004/17/EC:

- For service contracts with estimated value above EUR 20,000, only Articles 2, 33, 34, 35, 36 (obligation of the contracting authority to prepare detailed technical specification with the tender document) and article 55 (obligation for submitting contract award notice to the PPB) of this Law shall apply.

- For service contracts with estimated value below EUR 20,000, only Article 2 and 103 (obligation for keeping records of the simplified competitive procedures) of this Law shall apply.

When contracting authorities procure non-priority services they are obliged to ensure that competition, equal treatment and non-discrimination of economic operators, transparency and integrity in awarding the contract and rational and efficient utilisation of funds will be provided in the procedure.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

The Public Procurement Bureau has the status of a legal entity within the Ministry of Finance. It is governed by a Director appointed by the Government.

The State Appeals Commission is a state authority, which is independent in its operations and has status of a legal entity. The President and members of the Commission are appointed by the Parliament.

The Bureau administrative structure has two Departments, as follows: Department of Normative Affairs, Training and International Relations and Department of Monitoring the Public Procurement System and ESPP Management. Each of the Department comprises three Units. Also there is a Human Resource Management Unit as an independent unit.

The structure of the State Appeals Commission is as follows: Department for general and common affairs, with three units and Department for deciding in appeals cases in public procurement procedures, with two units. Also there is a Human Resource Management Unit and Internal Audit Unit as an independent unit.

The competences of the PPB are:

- Gives proposals to the Minister of Finance for adopting legal and other acts in the field of public procurement, monitor and analyze the enforcement of the laws and other public procurement regulations;
- The functioning of the public procurement system, and shall initiate modifications for improving the public procurement system, providing opinions regarding the provisions and the enforcement of the Law;
- Advises and assists contracting authorities and economic operators;
- Prepares standard tender documentation and standard model forms for the contract award procedures laid down in the Law;
- keeps and updates records of the public contracts awarded, and makes them available on its website;

- Collects, processes and analyzes public procurement data and draft statistical reports;
- Immediately informs the contracting authorities, and if necessary, the competent authorities concerned upon detecting irregularities from the notices received;
- Determines minimum requirements for professional qualifications for the persons performing professional activities in the field of public procurement;
- Organises and conducts training for civil servants and other competent persons with respect to public procurement, manages and operates its website and the Electronic System for Public Procurement (ESPP);
- Cooperates with international institutions and other foreign entities with respect to the activities related to development of the public procurement system;
- Realises international cooperation regarding the public procurement system and plan and coordinate foreign technical assistance in this field;
- submits annual report to the Government regarding the functioning of the public procurement system;
- Gives guidelines and prepares manuals and comments on the public contract award rules and publishes a bulletin and other tasks pursuant to this Law.

The State Appeals Commission is competent to resolve appeals in the contract award procedures prescribed by the PPL and deciding on the legality of procedures, actions and failures to undertake actions, as well as the formal decisions made in the procedures and on other issues pursuant to the PPL.

Main organisations responsible for procurement within the utilities sector

There are not any separate organisations responsible for procurement within the utilities sector. Every utilities contracting authority implements the PPL in the part of utilities rules for public procurement.

Supervision bodies

State Audit Office and the State Appeals Commission (SAC). The SAC controls the procedures only when there is an appeal filed.

The State Audit Office (SAO) is independent and professional institution and it is composed of 11 units. General State Auditor is elected by the Parliament of the Former Yugoslavian Republic of Macedonia.

As far as The State Appeals Commission is concerned (please refer above).

Main audit areas of the SAO are:

- The Budget of the Former Yugoslavian Republic of Macedonia;
- The budgets of the local government units;
- The budgets of the Funds, budget funds users and their spending units, state-owned enterprises;
- The National Bank of the Former Yugoslavian Republic of Macedonia;
- Legal entities in which the state is a major shareholder;
- Political parties funded by the Budget of the Republic
- Agencies and other institutions established by law, other institutions financed from public funds and beneficiaries of EU funds and other international institutions;
- Examination of documents, papers and reports on performed internal controls and internal audits;
- Examination of accounting and financial procedures, electronic data and information systems and other records to assess whether the financial statements truthfully and fairly present the financial position and the results of the financial activities;
- In accordance with the adopted accounting policies and accounting standard, examination of financial transactions defined as government expenditures with respect to their legal and authorized spending, assessment as to whether the funds are spent economically, efficiently and effectively (performance audit).

Main central purchasing bodies

There are not any.

4 THE REVIEW SYSTEM

Scope of the review system

The review system applies to all procurement procedures under the Macedonian PPL, above and below thresholds, with one exception, i.e. the deadline for filing an appeal is 3 days from the receipt of the decision for the simplified competitive procedure without or without publishing a notice (8 days is for the other procedures).

The stand still period is shorter for the simplified competitive procedure without or without publishing a notice (5 days from the receipt of the decision and 12 days for the other procedures).

Review bodies

State Appeals Commission (first instance)

Administrative Court (second instance)

Review procedure

Pre-contractual review

The State Appeals Commission review when they decide about the appeals. The appeal can be filed before the contract is signed.

Contractual review

State Audit Office reviews the signed contracts. But, the review procedure of the SAO is conducted under the State Audit Law and their procedures, and not under the PPL.



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

Malta has a horizontally and vertically centralised public procurement organisation. There is a single centralised public procurement institution for most functions on the national level named the Department of Contracts in Valletta.

A few tasks are carried out by other institutions and contracting authorities on the local level. The central role carried out by the Department as advisor to other contracting authorities and entities on public procurement is considered the main strength of the Maltese system.

The *Department of Contracts (DC)* is a dependent and integral part of the Ministry of Finance and was established on the basis of the Financial and Audit Act (1962). EU Directives 18 and 17 /2004 were transposed by means of Cap 174 Legal Notices 177 and 178 (2005). Legal Notice 177 has been updated by means of LN296/2010, which came into force on the 1 June 2010. It has a staff of 39 full-time civil servants. The DC is responsible for:

- Developing standard procedures and routines;
- Developing a procurement policy;
- The preparation of guidelines and instructions;
- The national contribution to EU advisory committees;
- The Maltese PPN participation;
- The preparation of an annual report to the government on the functioning of the public procurement system;
- The collection of statistical and other data;
- The permission of less competitive procedures;
- The use of exceptions, extensions;
- The use of the accelerated procedures etc.;
- Advising the government on public procurement policy.

The DC is also the central purchasing unit for all contracts above Euro120,000 for approximately 133 entities. This service is provided free of charge. Moreover, it is responsible for the administration of the national public procurement bulletin, including its publication and checking of contract notices.

The DC is also in charge of the control of public procurement. The provision of legal and other advice for contracting entities and utilities is shared between the Department of Contracts and the Attorney General (Minister of Justice), whereas the Chamber of Commerce mainly provides legal and other advice for tenderers.

The DC together with the contracting authorities themselves is responsible for drafting tender and contract documents. The DC together with the Department of Economic Policy and the Ministry of Foreign Affairs is in charge of the national contribution to the GPA. The Ministry of Finance is responsible for drafting primary and secondary legislation. The contact point for the Commission is the Maltese Permanent Representation to the EU.

Responsibility for overall management of the DC is with the Director General who is aided by a Director (Operations) and a Director (Compliance) as well as three Assistant Directors on Pre-contracts, Post-contracts and EU Affairs. The Department is subdivided into sections on Pre-Contracts (7 staff), Post-Contracts (2 staff), the Secretariat to the General Contracts Committee (2 staff), the EU Unit (6 staff), the General Administration (10 staff) and Messenger duties (6 staff). The Pre-Contracts section caters for all administrative procedures, from the publication of the tender notice to the issuing of the letter of acceptance or the conclusion of the contract. The Post-Contracts unit caters for any issues arising during the implementation of the contract, including litigation. The Secretariat to the General Contracts Committee is responsible for vetting the evaluation reports prior to their submission to the Committee, as well as the debriefing of unsuccessful bidders. The EU Unit is responsible for all procurement financed through EU funds. The General Administration deals with all accounting and human resources questions of the DC.

Following the introduction of a new Procurement Management System (PMS), the new website of the Department (<http://www.contracts.gov.mt>) was officially launched in January 2009. A project funded through the EU Transition Funds (2005) Programme, this endeavour provides a more effective way with which tenders are administered and managed by the Department, and offers enhanced functionalities for economic operators. The website provides unrestricted access to procurement-related matters, such as information on the individual tenders (including a free preview version, the summary of tenders received, and the award), and the recommendations issued by the General Contracts Committee. Free registration further allows for the setting-up of new tender alerts (dispatched via email and/or SMS), provides access to purchase tender documents online, faster notification of new clarification notes, and for the receipt of alerts advising for changes in the tender status.

The website also serves as a single point of reference for public procurers, who are able to view and download procurement-related circulars, guidance notes, tender templates and forms, as well as being directed to EU explanatory notes and policies amongst other matters.

The degree of the Department's new e-services can perhaps be gauged by perusing the European Commission's Benchmarking Report on eGovernment Services for 2009. A new indicator, eProcurement Availability Benchmark, has been measured for the first time on a comparable sample of 746 contracting authorities. Malta (with the Department's website being its main representation) performed strongly in this measurement, with the report stating "the top performers for the Availability Benchmark are a group of 4 countries: Estonia, Ireland, Malta and Luxemburg. In these countries, a strong proactive policy for eProcurement has succeeded in aligning availability and visibility for most contracting authorities."

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

EU law has been transposed by:

- Legal Notice 177/2005 transposed EU 2004/18;
- Legal Notice 178/2005 transposed EU 2004/17;
- Legal Notice 296/2010 transposed the Remedies Directive;
- Defence and Security Legal Notice currently being drafted.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

The Legal Notice 296/2010 provides the national legislation on procurements below EU threshold.

The award procedures used for procurements below the EC thresholds are:

- Cheapest technically compliant or
- MEAT

Rules for publication and time limits for submission of applications and tenders:

- Up to Euro 6,000 Direct from the open market or by Call for Quotations
- Between Euro 6,000 and Euro 120,000 by Public Tender issued by the Contracting Authority and published through the local Government Gazette (usually 3-4 week publication period)
- All tenders above 120,000 are published in OJEC and GG.

The rules for qualitative selection and award criteria are the same provided by the EU Directives

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

As provided by the EU Directives

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

Ministry of Finance.

The Department of Contracts acts as a Central Contracting Authority (Agency) responsible for all public procurement issues. It also administers tenders above Euro120,000 for all Contracting Authorities listed in Schedule 2 of LN296/2010 (141 CA's). Contracting Authorities listed in Schedule 3 (6 in No.) however, administer their own tenders while Local Councils are also listed in Schedule 3

Main organisations responsible for procurement within the utilities sector

The Department of Contracts acts as the responsible Agency for all public procurement issues within the utilities sector.

Main central purchasing bodies

The Department of Contracts acts as the main central purchasing body in Malta.

Supervision bodies

The following bodies are responsible for the supervision on Public Procurement:

- The Department of Contracts;
- Internal Audit and Investigations Department;
- National Audit Office;
- Public Contracts Review Board Legal Notice 296/2010: appointed by the Prime Minister for a period of three years it is competent for Alternative Dispute Resolution/ Conciliation functions and sanctioning functions.

4 THE REVIEW SYSTEM

Scope of the review system, review bodies and procedures

Any different review system is envisaged for procurements below the EC thresholds

The competent body is the Public Contracts Review Board to hear and determine complaints submitted by any person having or having had an interest in obtaining a particular public supply, public service or public works contract and who has been or risks being harmed by an alleged infringement by any authority listed in Schedule 1 (of the Public Procurement Regulations - 2010) and whose value exceeds twelve thousand euro (€12,000), in accordance with the procedures laid down in these regulations.

Every contracting authority listed in Schedule 1 shall indicate in its tender documents that the award of the contract is subject to the review procedure as set forth in these regulations. The document shall include a copy of Parts XII or XIII, as the case may be, for the guidance of tenderers. It shall likewise be the function of the Board to hear and determine complaints submitted by any person having or having had an interest in obtaining a public service concession contract when recourse to the Board is so specified in the call for tender.

In its deliberation the Review Board shall have the authority to obtain, in any manner it deems appropriate, any other information not already provided by the contracting authority. The Review Board shall determine the complaint by upholding or rejecting it. The written decision of the Review Board shall be affixed on the notice board of the contracting authority and copies thereof shall be forwarded to the Director of Contracts and all the parties involved.

In its review, the Board shall consider a contract to be ineffective, and thus shall declare the contract as null from the date of the decision by the Review Board:

- 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 in accordance with Directive 2004/18/EC;
- In the case of an infringement of sub-regulation (1); or when a contracting authority, notwithstanding an appeal lodged before the Review Board, concludes the contract before a final decision is given, so long as this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of these regulations, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract.

The tenderer or candidate concerned who is not satisfied with the decision granted by the Review Board may refer the matter to the Court of Appeal (Inferior Jurisdiction) in terms of article 41(6) of the Code of Organization and Civil Procedure within a period of sixty days. Such recourse however may not delay the Head of the contracting authority from implementing the Review Board's decision.

The award process shall be completely suspended if an appeal is eventually submitted.



1 NATIONAL RULES AND PROCEDURES FOR THE TRASPOSITION OF EU LAW INTO NATIONAL LAW

The Dutch government is in the process of making a new public procurement law, which is at the moment soon going to be send to the Dutch parliament. This law proposal will be replacing the current framework law and two underlying decrees which implement directives 2004/18/EC and 2004/17/EC. After parliament (2nd Chamber and Senate) has accepted this new proposal, it will be in force probably early 2012.

The current public procurement law is in wording similar to the public procurement directives. No additional measures have been added to the current public procurement framework.

In the new public procurement law proposal new measures are added for public contracts with a value under the EU-thresholds and the EU-directives are written down in the new law proposal in a more logical order, following the actual procurement procedures.

Current rules:

- A framework law, with two decrees, one for directive 2004/17/EC and one for directive 2004/18/EC;
- A separate law for the implementation of the remedies directive (2007/66/EC).

In preparation:

- A new public procurement law containing directives 2004/17/EC, 2004/18/EC and 2007/66/EC;
- A separate law proposal for directive 2009/81/EC (defence and security).

2 THE LEGAL SYSTEM

National legislation on procurement not covered by the EU directives

Currently there is no additional national legislation covering public contracts below EC thresholds.

The new public procurement law proposal that is being prepared contains measures for public contracts below the threshold. This law declares applicable the principles of transparency, non-discrimination, equal treatment and proportionality also to public contracts below the EC thresholds, whenever these contracts are published. In cases the contracting authority chooses not to publish a tender but instead to ask a minimum of two economic operators to place an offer for the tender, the contracting authority has to apply the principles of non-discrimination and equal treatment.

- Awarding procedures for procurements below the EC thresholds:

Contracting authorities either publish a contract notice to announce their tender, or ask a minimum of three economic operators to place an offer. It is up to the policy rules of the contracting authorities itself which rules are applicable. For the new public procurement it is expected this picture might change, but it is necessary to wait and see what happens;

- Rules for publication and time limits for submission of applications and tenders:

Currently this is not regulated. In the new procurement law proposal tenders below the EC-threshold have to be published. Time limits are not applicable for this kind of contracts;

- Rules for qualitative selection and award criteria: not regulated.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

Not regulated, and will not be regulated in the new public procurement law.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

The Minister of Economic Affairs is politically responsible for any policy on a law level concerning public procurement. The Minister is politically (in the parliament) accountable that contracting authorities comply by the public procurement rules and regulation, in so far that she has the ability to take measures to improve the compliance of contracting authorities.

Following our system, a contracting authority – whether it is on central, regional or local level - has the sole responsibility for its actions in the field of public procurement (the procuring of tenders).

Main organisations responsible for procurement within the utilities sector

Each contracting entity in the field of the utilities is responsible for its own tenders and public procurement procedures, as long as they abide by the public procurement regulations.

Supervision bodies

Audit offices control a sample of public procurement procedures.

Main central purchasing bodies

The Netherlands does not have a main central purchasing body.

Supportive bodies

In 2005 the governmental agent PIANOo under the ministry of Economic Affairs has been established with the special purpose of helping contracting authorities professionalises their public procurement process. By professionalising the Ministry of Economic Affairs expects that contracting authorities comply with the procurement rules in a better way, and that economic operators are given better access to public contracts.

PIANO provides contracting authorities with all kinds of information about public procurement, answers questions, organises lectures and conferences about public procurement and organises meetings between contracting authorities and economic operators.

4 THE REVIEW SYSTEM

Scope of the review system

If an economic operator has a complaint concerning a public contract (above or below the threshold) and/ or a public procurement procedure, he can bring a case in summary proceedings before a civil court. A judgement in summary proceedings usually takes two to six weeks.

There is no specific procurement judge or procurement authority in The Netherlands.

Review bodies

A court of law (civil court) in first instance is the court of first instance. After a judgement in summary proceedings (or proceedings on the merits), the economic operator can appeal before a Court of Appeal. The Court of Appeal will handle the case as regard content. The economic operator can in the end present its case to the Supreme Court. This Court will only do a limited judicial review.

At this moment there are no non-judicial review bodies specific for public procurement. The Ministry of Economic Affairs is however considering setting up a non-judicial complaints board for public procurement.

Review procedure

Please, see above.

The remedies directives have been implemented in such a way that the civil court is competent to judge in public procurement cases with regard to the measures in the remedies directives. If a judge decides – on the basis of overriding reasons relating to a general interest – not to declare a public procurement contract ineffective, the judgement needs to be final for the Competition Authority to impose a fine.



1 NATIONAL RULES AND PROCEDURES FOR THE IMPLEMENTATION OF EU LAW INTO NATIONAL LAW

Norway is closely associated with the European Union through its membership in the European Economic Area (EEA) in the context of being a European Free Trade Association (EFTA) member.

The Norwegian legislation on public procurement implements the EU public procurement directives. The act which lays down the general principles is adopted by the Parliament. The act gives the Government power to enact more detailed rules through regulations.

2 THE LEGAL SYSTEM

National legislation on public procurement implementing EU law

The current legislation implementing the public procurement directives is found in:

- The Act on public procurement of 16 July 1999, No. 69, as amended (*Lov om offentlige anskaffelser*), lays down the general principles of public procurement, including implements part of Directives 2004/18/EEC and 2004/17/EEC.
- The Regulation on public procurement of 7 April 2006, No. 402, as amended (*Forskrift om offentlige anskaffelser*), implementing Directive 2004/18/EEC.
- The Utilities Regulation of 7 April 2006, No. 403 (*Forskrift om innkjøpsregler i forsyningssektorene (vann- og energiforsyning, transport og posttjenester)*), implementing Directive 2004/17/EEC.
- The amendments to the Remedies Directives are not yet implemented into Norwegian law, but will be implemented through the act and the two regulations mentioned above.
- The Defence and Security Directive is not yet implemented into Norwegian law, and no decision has yet been made as to the method of implementation.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds:

In addition to implementing the EU directives in its part III, the Regulation on public procurement contains in part II rules applying to contracts with estimated value below the EU thresholds but above NOK 500 000. These rules are also based on the rules in the Directive, but are a bit more flexible. Furthermore, in principle, all procurements should, to the extent possible, be subject to competition and the fundamental principles of non-discrimination, transparency etc (part I of the Regulation on public procurement).

The procuring authority may choose between an open, restricted and negotiated procedure. The rules for publication, time limit for submission of applications and tenders, qualitative selection and award criteria correspond to a large extent with the relevant rules of the EU directives.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

Part II of the Regulation on public procurement apply to "list B services" above NOK 500 000 as well.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

The Ministry of Administration, Reform and Church Affairs (FAD) has the overall responsibility for the public procurement legislation in Norway and has published guidelines related to both the EC/EEA and the national rules on public procurement.

The Agency for Public management and e Government (Difi) is responsible for providing assistance to the public, including arranging seminars and running a web site with extensive and updated information and advice related to public procurement (www.anskaffelser.no). The agency is overseen by FAD.

Main organisations responsible for procurement within the utilities sector

N.A.

Supervision bodies

The Office of the Auditor General (*Riksrevisjonen*) shall ensure that the community's resources and assets are used and administered in accordance with the Parliament's decisions, including monitoring the compliance with the public procurement regulations. They do this through auditing, monitoring and guidance. The office has an independent status *vis-a-vis* the Government.

An independent advisory complaint board – the *Public Procurement Complaint Board* (KOFA) – is also set up, (ref. article 81 of Directive 2004/18). The legal status, composition and competences of KOFA are described further below.

Main central purchasing bodies

There is no centralized purchasing body in Norway. Each public authority is responsible for its own procurement. This applies to both the classical and utilities sector.

4 THE REVIEW SYSTEM

Scope of the review system, review bodies and procedures

The same review system is applicable for procurements both below and above the EU thresholds.

Dissatisfied economic operators in a public procurement procedure may take a formal complaint to ordinary courts. The courts have the power to suspend a procurement process before awarding the contract and also grant compensation for damages (e.g. loss of expenses, profit, etc).

In addition an advisory complaint board – the *Public Procurement Complaint Board* (KOFA) – an independent advisory body that consists of ten highly qualified lawyers. Three members of the Board participate in the handling of each complaint. Although its decisions are not legally binding, due to the high quality of its recommendations, the Board's opinions are followed by the parties in nearly all cases.

The Public Procurement Regulation grants involved bidders the right to complain after a contract has been awarded. The complaint must be submitted to the KOFA within six months after the contract has been signed. When the complaint is submitted within the standstill period KOFA asks the contracting authority to postpone the signing of the contract until the case is closed. Furthermore, the Board gives priority to complaints where the contracts have not yet been signed.

Furthermore, a procedure was set up in 2006 to handle cases when contracting authorities disregard the rules as a whole by not advertising competition. For direct illegal procurement, an administrative fee can be levied by KOFA (up to 15% of the contract value). The decision to impose such a fee is a legally enforceable decision. In these cases the complaint must be submitted to KOFA within two years after the contract has been signed.

There will be changes in the review system due to the implementation of the new remedies directive, but it has not yet been decided how this directive will be implemented.



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

The rules on public procurement in Poland are specified in the Act of 29 January 2004 - Public Procurement Law which is in compliance with EU directives - 2004/17/EC, 2004/18/EC and 2007/66/EC.

The institution responsible for preparation of the projects of acts or regulations within public procurement is *Public Procurement Office*. In order to adjust Polish law to EU requirements (directives), President of PPO submits a project of the act to the Committee for European Affairs which takes decisions on behalf of the Council of Ministers. Before that, project of the act is the subject of intra-ministerial consultations and in case of many comments and reservations the agreement conference is organized. The project is also sent to Government Legislation Centre which performs legal and legislative evaluation of the act. After evaluation project is dispatched to Council of Ministers and in case of its acceptance sent to *Sejm* (lower chamber of Parliament).

According to Polish Constitution, an act adopted by the lower chamber is subsequently passed to the higher chamber (*Senat*) which has 30 calendar days to adopt, amend or reject it. In case of a rejection or an amendment proposed by the higher chamber, the lower chamber may reject them by an absolute majority. The act adopted by the Parliament is then sent to the President of the Republic for signature. The President endorses the act within 21 days and orders its publication.

In order to help streamline the administrative process and share information with the public a new online database has been set up *e-STEP* provides Polish authorities with the necessary monitoring tool to coordinate the transposition processes (www.e-step.pl)

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

The rules on public procurement are specified in the Act of 29 January 2004 - *Public Procurement Law*. The main aim of preparation this legislation was the adjustment of the Polish procurement provisions to the EU requirements. In April 2006 and April 2007 the Public Procurement Law was largely amended in order to implement the provisions of the EU directives 2004/17/WE and 2004/18/WE.

The latest amendment to the Public Procurement Law was aimed on the adjustment to the remedies directive 2007/66/WE and published in Journal of Laws of 2009 - No. 223, item 1778. The new, which will adjust the Polish provisions within public procurement to defense and security directive 2009/81/WE, is now being prepared.

The Law is accompanied with a number of regulations, which have supplementary character:

- Regulation of the Prime Minister of 22 March 2010 on the rules regarding the procedure for examining the appeals (Journal of Laws No.48, item 280);
- Regulation of the Prime Minister of 15 March 2010 on the amount of and the manner for collecting the registration fee for the appeal, kinds of costs in the appeal procedure and the manner for their settlement (Journal of Laws No. 41, item 238);
- Regulation of the Prime Minister of 16 October 2008 on the standard forms of notices placed in the Public Procurement Bulletin (Journal of Laws, No. 12, item 68)
- Regulation of the Prime Minister of 28 January 2010 on the list of priority and non-priority services (Journal of Laws, No. 12, item 67)
- Regulation of The Prime Minister of 30 December 2009 on the types of documents which may be requested by the awarding entity from the economic operator and forms in which these documents may be submitted (Journal of Laws, No. 226, item 1817)
- Regulation of The Prime Minister of 23 December 2009 on the average exchange rate of Polish zloty against Euro being the basis for converting the value of public contracts (Journal of Laws, No. 224, item 1796)
- Regulation of The Prime Minister of 23 December 2009 on the value threshold of contracts and design contests which imposes an obligation of dispatching the notices to the Office for Official Publications of the European Communities (Journal of Laws, No. 224 item 1795)
- Regulation of the Prime Minister of 16 October 2008 on the report on contract award procedure (Journal of Laws, No. 188, item 1154)
- Regulation of the Prime Minister of 10 September 2007 amending the regulation on the scope of information included in annual report on the conducted contract award procedures, its standard form and the manner of submission (Journal of Laws No. 175, item 1226)

- Regulation of the Prime Minister of 2 July 2007 on the manner of conducting the qualifying procedure for members of the National Appeal Chamber, the manner of appointing the qualifying committee, as well as detailed scope of the qualifying procedure (Journal of Laws No. 120, item 820)
- Regulation of the Prime Minister of 22 March 2004 on the amount of remuneration of the Chairman, Vice Chairman and other members of the Council of Public Procurement (Journal of Laws, No. 49, item 470).

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

The Public Procurement Law applies to the contracts and contests where their value exceeds the equivalent in PLN of EUROS 14.000. Generally, the rules concerning the awards of the contract are the same for procedures below and above UE thresholds.

Awarding entities shall prepare and conduct contract award procedures in a manner ensuring fair competition and equal treatment of economic operators.

The main difference between contracts below and above EU thresholds concerns place of publishing of contract notices - under Article 11 of PPL - they can be placed in Public Procurement Bulletin (contracts not exceeding EU thresholds) or published in the Official Journal of the EU (for contracts of the value equal to or exceeding EU thresholds). Another difference concerns activities undertaken by the awarding entity.

For instance, in case of contracts of the value equal to or exceeding the EU thresholds awarding entity is obliged to appoint tender committee for the conduct of award procedure. In case of contract below EU thresholds the awarding entity may appoint tender committee. It also concerns request from the economic operators documents proving that they satisfy the conditions for participation in the procedure or the scope of information included in specification of essential terms of the contract etc. There is also more flexibility as far as the choice of award procedure in the contracts below EU thresholds is concerned.

According to art. 10 of the *Public Procurement Law*, there are two primary procurement procedures: open tendering and restricted tendering. Other procedures could be applied only when conditions determined in the PPL are met.

In case of contracts below EU thresholds the awarding entity may award contracts by open and restricted tendering, by negotiated procedure with publication, request for quotation or electronic bidding.

Request-for-quotations means contract award procedure in which the awarding entity sends a request-for-quotations to economic operators of his choice and invites them to submit tenders. The awarding entity may award a contract under the request-for-quotations procedure, if the objects of the contract are generally available supplies or services of fixed quality standards.

Electronic bidding means contract award procedures in which using a form available on the website allowing to enter the necessary data on-line, economic operators shall submit successive more advantageous tenders (bid increments), subject to automatic classification. This contract award procedure is admissible only where the contract value is less than the EU thresholds. The awarding entity shall commence an electronic bidding procedure by placing a contract notice in Public Procurement Bulletin, on its website and on the site where the bidding is to be conducted (Article 75).

The awarding entity may also award the contracts not exceeding EU thresholds by other procedures (negotiated procedure without publication or single-source procurement). However, in that case specific circumstances must occur.

If the value of the contract does not exceed EU thresholds the awarding entity is not obliged (in case of contracts above EU thresholds it is mandatory) to dispatch to the President of the PPO information about launching the negotiated procedure without publication of notice or single-source procurement, stating factual and judicial justification of a procedure for awarding a contract.

The *Public Procurement Law* provides for a general obligation of publishing of contract notices (under Article 40 – open tendering, 48- restricted tendering). When commencing a negotiated procedure with publication, the provisions of Article 40 and of Article 48 paragraph 2 shall apply accordingly (Article 56). This also refers to competitive dialogue procedure under Article 60c.

The awarding entity shall fix the time limit for submission of tenders taking into consideration the time necessary for preparation and submission of tender, however in case of contracts for supplies or services the time limit shall not be less than 7 days and in case of contracts for works – not less than 14 days (open and restricted tendering).

Under Article 11, the notices for contracts of the value not exceeding the EU thresholds are placed in Public Procurement Bulletin. The standard forms of notices to be placed in the Public Procurement Bulletin are determined by the Prime Minister by means of a regulation. In addition, in primary procurement procedures, the awarding entity places the contract notice in a place accessible to the public in its seat and on its website. The awarding entity may place the contract notice also in a different manner in particular in a national daily or periodical.

The Act determines the minimum information to be included in contract notice (Article 41).

Under the *Public Procurement Law* the same rules with reference to qualification of economic operators concern the contracts of the value not exceeding, equal to and exceeding the EU thresholds Art. 24 provides for exclusion from contract award procedures for specific reasons *i.a.* for causing damage by failing to perform a contract or by performing a contract improperly, for being validly sentenced for bribery, treasury offence etc. (the same criteria of exclusion as in the directives).

Awarding entities are bound to prepare and conduct contract award procedures in a manner ensuring fair competition and equal treatment of economic operators.

The tender evaluation criteria are specified when commencing contract award procedure (in contract notice). They are also listed in specification of essential terms of the contract, which the economic operators competing for a contract are provided with once the contract notice is published. Any change in tender evaluation criteria that results in modification of the contract notice has to be placed in the Public Procurement Bulletin or published in the Official Journal of the European Union. Under Article 82 paragraph 3, the content of the tender should correspond to the content of the specification of essential terms of the contract.

Tender evaluation criteria are based either on price alone or price and other criteria relating to the object of the contract. Other criteria, linked to the object of the contract, refer in particular to: quality, functionality, technical parameters, use of best available technologies with regard to the impact on the environment, exploitation costs, after sale service and period of contract performance. Specification of essential terms of contract apart from listing tender evaluation criteria, specifies the importance of particular criteria as well as the method of evaluation of tenders (art. 36 section 1 point 13).

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

Pursuant to article 2a of the *Public Procurement Law (PPL)*, under the regulation of the Prime Minister of 28 January 2010, priority and non-priority services are distinguished.

To contract award procedures where the object involves services of non-priority nature, specified in provisions issued under Article 2a, the provisions of the PPL regarding the time limits for submission of requests to participate in a procedure or time limits for submission of tenders, obligation to demand deposit, obligation to demand documents certifying the fulfillment of conditions for participation in the procedure, prohibition to determine contract award criteria on the basis of the economic operator's characteristics as well as preconditions for the selection of negotiated procedure with publication, competitive dialogue and electronic bidding do not apply.

The awarding entity may also commence the negotiated procedure without publication or single-source procurement also in justified cases other than those defined in Article 62 paragraph 1 or Article 67 paragraph 1 of PPL respectively, in particular when using other procedure could result in at least one of the following circumstances:

- Violation of principles of purposeful, economical and effective spending;
- Violation of principles of expenditures in the amounts and within the time limits as result from previously incurred obligations;
- A loss in public property;
- Prevention of timely performance of tasks.

In the case of contract award procedures where the object of contract are legal services in form of legal representation before courts, tribunals or other ruling authorities or legal assistance with regard to legal representation, or – when it is required for protection of important rights or interests of the State Treasury – the provisions of the Act regarding preconditions for selection of negotiated procedure without publication and preconditions for selection of single-source procurement shall not apply.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

In Poland, the *Public Procurement Office* is a central government body competent for matters concerning public contracts. The President of PPO is appointed by the Prime Minister. The organization of the PPO is defined by a statute issued by the Prime Minister by an order.

The Polish *Public Procurement Office* (PPO) was created on 1 January 1995, following the adoption of the Act on Public Procurement on 10 June 1994. Currently the Office employs app. 120 people working in 7 different units:

- Legal Department;
- *Ad hoc* Control Department;
- Department of Control for Contracts co-financed from EU funds;
- European Union and International Cooperation Department Information, Education and System Analyses;
- Department Appeals Department;
- Organizational and Financial Bureau;
- Independent Position for Internal Audit.

The key duties of PPO are:

- To issue by electronic means the Public Procurement Bulletin, where the notices provided for the PPL are placed;
- To prepare drafts of legislative acts on public procurement;
- To ensure the functioning of the system of legal protection measures;
- To check the regularity of conducted procedures;
- To prepare training programs, organize and inspire training events in the field of public procurement;
- To maintain international cooperation on issues relating to public procurement.

Polish public procurement system is decentralized. That means that all entities spending public funds independently apply national provisions in the field of public procurement.

Public Procurement Office plays a policy making and co-coordinating role for the whole public procurement system. It is an independent unit within the Polish government.

Main organisations responsible for procurement within the utilities sector

There is no separate organization responsible for public procurement within the utilities sector. Utilities contracts are awarded in accordance with Public Procurement Law (it concerns contracts where the contract value is equal to or exceeds the EU thresholds).

Supervision bodies

Polish public procurement control system is decentralized. Several institutions are authorized to conduct the control procedure of contract award procedures (Supreme Chamber of Control, Regional Clearing Chambers). However, the *Public Procurement Office* (PPO) plays the most significant role as it is the only institution with specialized units responsible for the control of public contract award procedure. Within *Public Procurement Office* act two departments responsible for control of public procurement procedures: Ad hoc Control Department and Department of Control for Contracts co-financed from EU funds. The objective of controls is to check the conformity of contract award procedures with the Public Procurement Law.

Ad hoc control

The PPO President commences an *ad hoc* control ex officio or on request in case of justified presumption, that in course of the contract award procedure a breach of the provisions of the Act appeared, which might have influenced the result. The *ad hoc* control may be commenced not later than within 4 years from the day of the end of the contract award procedure. The end of the control is the submission of information on the result of control, which contains in particular description of the contract award procedure, which was the object of the control and information on confirmation of breach or lack of breach. The awarding entity shall have the right to make justified reservations to the PPO President within 7 days from the submission of information on the result of ad hoc control.

Ex-ante control

Ex-ante controls carried out by the PPO President may be divided into 2 groups:

- Obligatory *ex-ante* controls if the value of contract is equal to or exceeds the PLN equivalent of EUR 20 000 000 for works and EUR 10 000 000 for supplies or services and the contract is co-financed from the EU funds.

- Optional *ex-ante* controls, which the PPO President may commence *ex-officio* or on request if there is a justified presumption that the provisions of the PPL were violated in course of the contract award procedure what might have influenced results of the award procedure. Optional controls are usually commenced as a consequence of complaints lodged by the economic operators to the PPO President but also as a consequence of e.g. press releases.

During obligatory *ex-ante* control it is forbidden to conclude the contract. The end of an *ex-ante* control shall be the submission to the awarding entity of the information on the result of the control, which contains in particular: description of the contract award procedure, which was the object of the control, information on confirmation of breach or lack of breach, post control recommendations – if in course of the control the cancellation of the procedure or removal of the confirmed breaches was found legitimate.

The head of the awarding entity, shall inform in writing the PPO President on the manner of performing post control recommendations. The awarding entity shall have the right to make justified reservations to the PPO President within 7 days from the submission of the information on the control results. The provisions of Article 167 paragraph 2-6 shall apply accordingly.

The President of Public Procurement can impose - by an administrative decision - financial penalty on awarding entity.

Supreme Chamber of Control

The mission of the Supreme Chamber of Control is to promote economic efficiency and effectiveness in the public service to the benefit of the Republic of Poland. The Supreme Chamber of Control undertakes audits from the point of view of legality, economic efficiency, efficacy and integrity.

The President of Supreme Chamber of Control is responsible for its activity before the *Sejm* (lower chamber of Parliament). The President is appointed by the *Sejm* with the approval of the Senate for the term of six years. The subsequent re-election is allowed only once.

The Supreme Chamber of Control audits the activity of bodies of governmental administration, the National Bank of Poland, state legal persons and other units of the state. It may audit the activity of bodies of local government, communal legal persons and other communal organizational units as well as the activity of other economic subjects (businesses) and organizational units, to the extent to which they make use of state or communal property or resources and meet their obligations to the state. The subjects of audits are contained in annual and quarterly work plans, adopted by the Council of the Supreme Chamber of Control. Audits are performed on the basis of these plans. If necessary, the Supreme Chamber of Control can undertake ad hoc audits.

For audits contained in the periodical work programs audit programs are prepared. The goal of every audit is to establish the facts, that should be properly documented, and to assess them according to the rules as put down in the law. The final element of a field audit is drawing up an audit report. It should describe the facts established during the audit, including the reasons for their occurrence, the scope and effects of irregularities as well as the persons responsible for them. The audit report should be signed by the auditor and the head of the audited unit. The audited may appeal against the findings of the audit.

The Supreme Chamber of Control operates on the basis of annual and quarterly activity schedules adopted by its Council. Ad hoc audits of SCC are undertaken in particular in order to: perform a preliminary evaluation of specific issues for purposes of drafting an audit program (survey audit), examine the implementation of notes and recommendations by the addressees of post-audit pronouncements (follow-up audit), review complaints and recommendations (complaint audit www.nik.gov.pl).

Main central purchasing bodies

There is no main central purchasing body in Poland. Nevertheless, appropriately to article 15a point 4 and 5 of PPL the Prime Minister may appoint the central purchasing body from among government administration bodies or organizational units which are subordinate to or supervised by them. The Prime Minister may also obligate its subordinate organizational units, by order, to obtain certain types of contracts from the central purchasing body or from economic operators selected by the central purchasing body, and to award contracts on the basis of a framework agreement concluded by the central purchasing body, and to define the scope of information to be provided by such units to the central purchasing body as necessary to conduct the procedure, and the mode of cooperation with the central purchasing body.

Supportive body

There is no any separate, specialized body/agency in public administration supporting contracting authorities and suppliers in the field of public procurement. Issuing guidelines, providing interpretations of the PPL provisions and providing trainings are some of the “educational” activities of the *Public Procurement Office*.

Public Procurement Office has organized so far many training events for wide and variety audience (public administration units, organizations of entrepreneurs and employers, trade associations, control bodies, foundations). Trainings, seminars, conferences were first of all aimed at:

- Increasing among the participants of public procurement system knowledge of provisions concerning the procurement and in the end increasing effectiveness of the governance of public funds;

- Unification and popularization of good practices concerning the award of public contract;
- Improvement of control mechanisms;
- Promoting the right patterns of behaviour and preventing unfair behaviour.

In the last few years PPO also prepared and issued many publications concerning public procurement system in Poland and in the European Union, which are available also in electronic form on PPO's website.

Another body providing some kind of guidance, among others, in the field of public procurement is Polish Agency for Enterprise Development. The purpose of its activity is to support entrepreneurship through implementation of actions aimed at using innovative solutions by entrepreneurs, development of human resources, expansion on international markets, regional development (www.parp.gov.pl).

4 THE REVIEW SYSTEM

Scope of the review system

Public Procurement Law envisages 2 legal protection measures: appeal and complaint. The Public Procurement Law applies to public contracts and contests where their value exceeds the equivalent in PLN of EUR 14.000. An appeal is admissible against actions incompliant with the Public Procurement Law, performed by the awarding entity in the course of contract award procedure or against failure to act which the awarding entity is bound to perform under PPL. If the value of contract award procedure does not exceed the EU thresholds, the appeal is admissible only against following actions:

- Choice of the negotiated procedure without publication, single-source procurement and request for quotation;
- Description of the method used for the evaluation of the fulfillment of conditions for participation in the contract award procedure;
- Exclusion of the appellant from the contract award procedure;
- Rejection of tender of appellant.

Review bodies

National Appeals Chamber (NAC) is body in the review proceedings against actions incompliant with the Public Procurement Law performed by the contracting authorities. According to PPL NAC is to consist of no more than 100 members appointed and dismissed by the Prime Minister from among persons satisfying the requirements, who obtained the best results in competitive procedure. A person eligible to become member of NAC: 1) is a Polish citizen; 2) has higher law education; 3) has full legal capacity to enter into legal transactions; 4) enjoys all public rights; 5) has an unblemished reputation; 6) has not been validly convicted of offences committed intentionally; 7) has minimum 5 year work experience in public administration or at the positions connected with giving legal advice, preparing legal opinions, preparing drafts of legal acts as well as acting before courts and offices; 8) is at least at the age of 29.

The members of NAC are selected by qualifying procedure, which consists of a written exam in theoretical and practical knowledge of the contract award procedure rules and an oral exam (interview).

The bodies of the Chamber are: Chairman, Vice-chairman, General Assembly composed of the members of the Chamber.

The parties and participants of the appeal procedure may complain to the court against the Chamber's ruling. The complaint should be lodged with the district court competent for the seat or place of residence of the awarding entity. The complaint should be lodged through the Chairman of the Chamber within 7 days of the day, on which the Chamber's ruling was submitted, dispatching simultaneously its copy to the complaint's opponent.

The Chairman of the Chamber transfers the complaint together with the files of the appeal procedure to the competent court within not more than 7 days from the date of its receipt. Within 21 days of the day, on which the ruling was passed, a complaint may also be lodged by the PPO President. The PPO President may also join the pending procedure.

Review procedure

Pre-contractual review

Within Polish review system in the field of public procurement exist two review bodies:

- National Appeal Chamber – non judicial review body (appeals)
- Regional Courts – judicial review bodies (complaints).

In case of appeal being lodged, the awarding entity may not conclude a contract until the Chamber passes its judgment or decision (ruling) which ends the appeal procedure. The Chamber examines the appeal within 15 days from the date of its submission to the Chairman of the Chamber.

The appeal can be by the Chamber:

- Returned;
- Examined;
- Rejected;
- Dismissed;
- Admitted.

The Chamber examines the appeal within 15 days from the date of its submission to the Chairman of the Chamber. The Chairman of the Chamber may order a joint examination of the appeals, which were lodged in the course of the same contract award procedure or refer to the same actions of the awarding entity.

The Chamber rejects the appeal if it states that:

- The provisions of the PPL do not apply in the case in question;
- The appeal was lodged by an unauthorized entity;
- The appeal was lodged after the expiry of the time limit set in the PPL;
- The appellant invokes only those circumstances which were the subject of resolution by the Chamber in case of another appeal pertaining to the same procedure, lodged by the same appellant;
- The appeal pertains to action, which was performed by the awarding entity in accordance with the judgment passed by the Chamber or court or – if the charges contained in the appeal were recognized – performed in accordance with the demand contained in the appeal;
- In the procedure where the value of the contract is less than the UE thresholds, the appeal pertains to actions other than defined in PPL;
- The appellant failed to dispatch to the awarding entity a copy of the appeal.

The Chamber admits the appeal, if it states the breach of the provisions of the PPL which had or may have an essential influence on the result of the contract award procedure.

When recognizing the appeal, the Chamber may:

If the public contract has not been concluded - demands performance or repetition or demands cancellation of action performed by the awarding entity;

In case of appeal being lodged, the awarding entity cannot conclude a contract until the Chamber passes its judgment or decision which ends the appeal procedure. The awarding entity may put forward a motion to the Chamber in order to revoke the ban on conclusion of contract. The Chamber may revoke the ban on conclusion of a contract, if non conclusion of a contract might cause a negative effect for public interest exceeding the benefits related to the necessity of protecting of all interests, with reference to which a possibility of sustaining a loss due to actions conducted by the awarding entity in contract award procedure occurs.

The parties and participants of the appeal procedure may complain to the court against the Chamber's ruling. The complaint should be lodged with the district court competent for the seat or place of residence of the awarding entity. Unless the provisions of PPL provide otherwise, in the proceedings pending as a result of a lodged complaint, the provisions of the Code on Civil Procedure of 17 November 1964 on the appeal shall apply accordingly.

The court rejects a complaint lodged after the expiry of the time limit or a complaint inadmissible for any other reasons as well as a complaint, where the shortcomings were not supplemented by the party on time.

It forthwith examines the complaint, however not later than within 1 month of the day, on which the complaint was received by the court.

The court dismisses the complaint by means of a judgment, if the complaint is unjustified. If the complaint is recognized, the court changes the challenged ruling and rule, by means of a judgment, on the merits of the case, whereas passing a decision in all other matters. If the appeal is rejected or grounds for discontinuation of the procedure occur, the court repeals the judgment or changes the decision and rejects the appeal or discontinues the procedure.

The court's judgment or decision that ends the procedure in the case is not a subject of revocation complaint.

Contractual review

The nature of contractual review in Poland is the same as in case of pre-contractual review. There are two review bodies:

- National Appeal Chamber – non judicial review body (appeals)
- Regional Courts – judicial review bodies (complaints).

When recognizing the appeal (within 15 days), the Chamber may:

- If the public contract has been concluded and one of the prerequisites concerning the annulment of the contract occurs:
 - 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, under the contract being subject to invalidation, is impossible;
 - impose a financial penalty or rule the shortening of the duration of contract if important public interest requires that the contract is maintained;
- If the contract was concluded in circumstances permitted by the PPL - state the violation of the provisions of the PPL.

Another form of contractual “review” in the Polish public procurement system is *ad hoc* control conducted by the PPO President. At the latest within 4 years from the day of the end of the contract award procedure the PPO President can commence *ad hoc control*. In case of disclosed breach of the provisions of PPL, the PPO President may:

- Notify to the competent agent for public finance discipline of the breach of public finance discipline or make a request to the relevant enforcement committee to impose a penalty for the breach of public finance discipline;
- Impose a financial penalty;
- Apply to the court for the annulment of procurement contract in its entirety or in part (see also paragraph concerning Institutional system - Supervision).

Public procurement contracts are regulated by the provisions of *the Act of 23 April 1964 - Civil Code*, unless the provisions of PPL provide otherwise.



Portugal

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

Directive 2004/17/CE and Directive 2004/18/CE were transposed to national law by the Code of Public Contracts (henceforth also CPC), approved by the Decree-Law 18/2008, 29th January, approved by the Portuguese Government.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

EU law has been transposed by:

- Decree-Law 18/2008, of January 1st, that approved the “Code of Public Contracts” (also “CPC”, henceforth);
- Statement of Rectification No. 18-A/2008, of March 28th, correcting the “Code of Public Contracts”;
- Decree-Law No. 278/2009, of October 2nd, amending Code of Public Contracts;
- Decree-Law No. 37/2007, of February 19th, which defines the National System of Public Purchases (also NSPP) and creates the National Agency for Public Purchases (also NAPP), as the responsible entity for the management of that system;
- There also exist a few sectoral legislative acts, with specific rules for public procurement (for instance, regarding defence procurement).
- Regulation 330/2009, of June 6th, that establishes the rules applicable to the National System of Public Purchases;
- Regulation No. 701-A/2008 of July 29th, approves the main standard forms of public procurement related contract notices that are published in the “*Diário da República*” (*Official Journal*);
- Regulation No. 701-B/2008 of July 29th, Appointing a monitoring committee of the Code of Public Contract and establishes its composition;

- Regulation No. 701-D/2008 of July 29th, defines the model of statistical data to be reported by contracting authorities;
- Regulation No. 701-E/2008 of July 29th, defines the model of the data reports to be completed and provided by contracting authorities in the Public Procurement Portal (www.base.gov.pt);
- Regulation No. 701-F/2008, of July 29th, regulates the establishment, operation and management of the Public Procurement Portal (www.base.gov.pt);
- Regulation No. 701-G/2008, of July 29th, sets out the requirements and conditions of utilization of electronic platforms by the contracting authorities and regulates the terms of operation of those platforms;
- Regulation No. 701-H/2008 of July 29th, approves the mandatory content of the program and the execution project of public works; the procedures and standards to be adopted in the design and phased elaboration of public works projects, called “Instructions for the drafting of works”; as well as the classification of works by category;
- Regulation No. 701-I/2008 of July 29th, establishing the “Observatory of Public Works”, and its functioning rules.
- Regulation No. 701-J/2008 of July 29th, establishing the rules for monitoring and supervision of research and development projects and instates the related committee.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

Legislative acts

- The above mentioned Decree-Law 18/2008, of January 1st, that approved the CPC;
- There also exist legislative acts, with specific rules for public procurement, of a transitory nature, regarding projects of a special importance or conjunctural measures regarding the promotion of public procurement procedures (namely, relating to the encouragement of speedier public investment, vis a vis the current economical crisis).

Regulations

- All of the regulations of the CPC, cited above;

For the procurement below the EC thresholds any of the procedures allowed by the CPC can be adopted, in a general manner.

However, for public contracts above a certain value, the use of procedures preceded by a contract notice is mandatory.

These values, for central contracting authorities, including public institutes, foundations and associations, as well as associations controlled, participated or financed by them, are, as a rule (excluding VAT):

- For services and goods, $\geq \text{€ } 75.000$ (or $\geq \text{€ } 25.000$ for the acquisition of architecture or engineering projects);
- For works, $\geq \text{€ } 150.000$;
- Regarding other bodies governed by public law, these values ascend to $\geq \text{€ } 193.000$ and $\geq \text{€ } 1.000.000$, respectively.

For public contract procedures with a mandatory previous contract notice, this notice must be published in an official publication journal ("*Diário da República Electrónico*", henceforth also DRE], as well as given independent publicity in a specific government Public Procurement Portal (www.base.gov.pt).

For public contract procedures without mandatory contract notice, with value above $\text{€ } 5.000$, the celebration of the contract is noticed in the public procurement portal (www.base.gov.pt). It should be noted that the failure of the contracting authority to follow through with this obligation causes the ineffectiveness of the contract.

Apart from the publication obligations, the CPC also imposes the communication, by contracting authorities to the Public Procurement Portal (www.base.gov.pt), of various elements and information related to the celebration of the contract and its execution. Namely:

- The celebration of the contract, in a set deadline after its date of occurrence;
- For all public contracts (including those without mandatory notice with value up to $\text{€ } 5.000$), the contracting authority must communicate information about the execution and completion of the contract.
- Although this elements are not "published" in a strict sense (even if there is a possibility of access by any interested party to individual items), they are provided and used for statistical and economic analysis and study of the public procurement markets, as well as for the definition and supervision of public procurement policies.

In all public procurement procedures, the time limit for the submission of tenders is set by the contracting authority, necessarily bearing in mind the time needed for the elaboration of the tender, considering the nature, the characteristics, volumes and complexity of the object of the procedure, as well as any special needs for verification or testing that may be adequate.

It should also be noticed that, in all public contracts with a prior contract notice, the tenders must be submitted by electronic means, through an electronic system.

For public contract procedures with a mandatory previous contract notice, as a rule, the minimal time limits for submission of tenders are the following:

- In procedures without prior publication in the JOUE (i.e., normally below thresholds), 9 days (goods and services) or 20 days (works – can be reduced to 11 days, in case of notorious simplicity);
- In procedures implying publications in the JOUE, 47 days, except, namely:
- If a pre-contractual information notice was published, the minimal time limit is 36 days, reducible in certain cases to 22 days (e.g, if the pre-contractual notice preceded the contract notice by more than 52 days);
- If the contract notice is prepared and sent by electronic means, according to the conditions set in SIMAP, the time limit can be reduced by up to 7 days;
- In the utilities sectors, if a pre-contractual information notice was published, the time limit can be reduced by up to 7 days;

In restricted procedures, the minimal deadline for application is, as a rule:

- 9 days, in procedures without prior publication in the JOUE;
- 37 days, as a rule, in procedures implying prior publications in the JOUE, which can be reduced by up to 7 days if a pre-contractual information notice was published;
- To the submission of the tender itself are applicable, in a general manner, the rules for public contracts described above, with the most notable exception being the common time limit in case of procedures with prior publications in the JOUE, which is 35 days (and not 47).

Special provisions for urgency are applicable.

The rules for qualitative selection in contracts below the thresholds are similar to the general applicable rules.

Without prejudice to the obligation that all tenderers present a statement, by which they declare that they comply with the qualification criteria, only the selected tenderer has to prove the fulfilment of all the criteria of qualitative selection (and present the relevant documents).

The qualification, therefore, is proven only by the selected candidate, after the selection, being a condition for the awarding of the contract. As an exception, in procedures with prior qualification (namely, the restricted procedure, the negotiated procedure, the competitive dialogue), the qualification naturally occurs in the specific phase of the procedure, before the tender is produced.

The contract award criteria in contracts below the thresholds are similar to the general applicable rules.

The contract award criteria stated in the CPC are:

- The lowest price with exclusion of any other award criteria, provided that the contract documents fully describe all other elements needed to define the object of the contract;
- The most advantageous tender, as long as the award criteria relate only to elements of the tender that are submitted to the market, and not fully defined in the contract documents.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

There are no specific significant rules in the CPC regarding the contracts covered by Annex II-B of Dir. 2004/18, other than:

- The dispensation, for the State only and up to the value stated in art. 7^o, al. b), of Directive 2004/18/EC, of prior contract notice publication in the JOUE, although this entity must follow other rules of the CCP (namely, as cited above, use open procedures, preceded by a contract notice, for services of value equal or above € 75.000, for instance).
- Partial exclusion of the rules of the CCP, regarding the formation of the public contract, in contracts related to the acquisition of services stated in categories 24 and 25 of Annex II-B of Directive 2004/18/EC.
- The option to publish, or not, the contract award notice in the JOUE, according to art. 35^o, nr. 4, Directive 2004/18/EC

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

The responsibility for public procurement in Portugal rests with the Government, specifically the Ministry of Finance and Public Administration, with the support of the NAPP; the Ministry of Public Works, Transportation and Communications, with the support of the “*Instituto da Construção e do Imobiliário, I.P.*” (Institute of Construction Works and the Estate Sector) (also InCI).

As for the composition of these bodies, they comprise services at a central level with the contribution, in a auxiliary capacity, of other autonomous administrative bodies of the central administration.

These ministries are competent for the definition and study of public procurement policies and for following the developments in this area, at a national and international level, as well as complying with the statistical reporting and information obligations of the Portuguese Republic.

At regional level in the “Madeira” e “Açores” Autonomous Regions - Bodies of the Regional Autonomous Government responsible for finances and regional administration and for public works.

Other than these regional bodies, and without prejudice to the competences of the Government described above, there are no other bodies specifically responsible for public procurement, at a central or local level.

Main organisations responsible for procurement within the utilities sector

There are no bodies with competences specific to the utilities sector's public procurement in Portugal.

Supervision bodies

With the aim of assuring the supervision of the activity of all contracting authorities, as well as the control of public expenditure, there are entities with a two-fold nature:

- An independent judicial body, the "*Tribunal de Contas*" (Tribunal of Public Accounts, roughly translated);
- Central administration services with supervision and control competences over the procurement activity of the public authorities.
- As regards the Tribunal of Public Accounts, this is a constitutional body of a judicial nature and, therefore, fully independent, having powers of appreciation, jurisdiction over all the Portuguese administration and territory, and capable of applying sanctions for infractions. Namely:
 - Inspects and ascertain (jointly and by request of the Public Prosecutor) the legality and conformity of all acts regarding receipt or expenses of public entities, including public procurement acts and activities. In the pursuit of this attribution, the Tribunal renders judgment over infractions and applies sanctions even to physical persons in case of responsibility;
 - Carries out the examination over global categories of procurement acts and procedures, previous to the celebration of the contract and as condition of its validity; and
 - Performs activities of auditing and report, relating to specific public entities and contracts, as well as general reporting actions on public accounting and expense.
- As regards the Central administration services with supervision and control competences, these consist of ministerial services or "general-inspections", fully integrated in the Government. These entities vary in their scope of competence, ranging from:
 - Entities with functions limited to a ministry of the Government and their services and independent entities under its tutelage;
 - Other "general-inspections" with transversal competence, including all the central administration and its dependent organisms; and
 - "General inspections" with competence over autonomous administrations, namely, the local authorities.

These central administration services typically conduct inspections and audits to public services, their procedures and procurement activity, resulting in the production of reports and recommendations, as well as, if the situation so demands, its communication to the Tribunal of Public Accounts and to the Public Prosecutor.

Main central purchasing bodies

The National System of Public Purchases (also NSPP), comprises the National Agency for Public Purchases (also NAPP), as the central body charged with the task of defining, managing and implementing, in a progressive manner, the said system; and also the “Ministerial Purchasing Units”, who pursue such an activity at the level of each ministry, within the bounds defined by the NAPP and also expanding upon the areas not yet covered by the activity of that Agency. The NAPP has the nature of an “entrepreneurial public entity” (a form of public undertaking), while the Ministerial Purchasing Units are services of the central administration

In this system, it falls to the NAPP the definition, procurement and celebration of framework agreements having as object the acquisition of specified categories of goods, services and works, intended for their purchase by contracting authorities in the central (“direct”) administration and also by public institutes, who are obliged to resort to the suppliers who have been selected by the NAPP.

On a voluntary basis, entities of the autonomous administration and public undertakings/enterprises can adhere to the NSPP, by contract, globally or restricted to specific categories of purchases.

Supportive bodies

The entities of the Portuguese administration that pursue auxiliary functions in public procurement, are the following:

- The NAPP, described above; and
- The InCI, which has partial competences regarding public works.

The tasks relating to public procurement that are enacted, in a joint action, by these entities, consist of:

- The fulfilment of the reporting and statistical obligations of the Portuguese State to the EU, extant in the Procurement Directives;
- The conception, definition, implementation and management of the Public Procurement Portal (www.base.gov.pt)

4 THE REVIEW SYSTEM

Scope of the review system, review bodies and procedures

Considering that the review system applicable in Portugal is currently “under review” itself, it is not possible to provide reliable information about this section of the questionnaire.



Romania

NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

National Authority for Regulating and Monitoring Public Procurement - N.A.R.M.A.P - (institution subordinated to the Government) together with The General Secretariat of the Government, having the capacity of initiators of the normative act, submitted for approval the G.E.O. no. 34/2006 by the Government.

The Parliament approved G.E.O. no.34/2006 by Law 337/2006, amended and supplemented by Law 128/2007 and G.E.O. 94/2007

G.E.O. no. 34/2006 regarding the award of public procurement contracts, public works concession contracts and services concession contracts was harmonized with the EU legislation concerning PP area:

- The Directive 2004/17/EC - The sector of “utilities”
- The Directive 2004/18/EC - “Classic” sector
- The Directive 2007/66/EC - Amending Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

Government Emergency Ordinance no. 34/2006 regarding the award of public procurement contracts, public works concession contracts and services concession contracts was adopted in order to implement EU law (Directive 2004/17/EC; Directive 2004/18/EC; Directive 2007/66/EC).

The national legislation is structured on two levels: primary legislation (G.E.O. no. 34/2006 with subsequent amendments) and secondary legislation (Government Decision no. 925/2006 for approving of the application norms of the Government's Emergency Ordinance no. 34/2006 regarding the award of public procurement contracts, works concession contracts and services concession contracts;

Government Decision no. 1660/2006 for approving the application norms of the provisions referring to the award of procurement contracts by electronic means from the Government's Emergency Ordinance no. 34/2006; Government Decision no. 71/2007 for approving the application norms of the provisions referring to the award of the public works concession contracts and of services concession contracts from the Governments' Emergency Ordinance no. 34/2006.

The Directive 2009/81/EC, on defence and sensitive security procurement, is to be transposed by a separate legislative act, most likely through a government emergency ordinance.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

For public contracts with value below EC thresholds, the national legislation, G.E.O. no. 34/2006, provides that the compliance with the general principles provided by the Treaty - non-discrimination, mutual recognition, transparency, equal treatment and proportionality - remains mandatory.

Public contracts regulated by national law, G.E.O. no. 34/2006, and not subject to EU Directives.

"Medium" contracts with value between threshold 1 and threshold 2. The awarding procedures and conditions for their application are identical to those provided for "large", contracts, with a few exceptions designed to eliminate some of the constraints imposed by the Directives for the award of the latter. Thus, publication of contract and award notices in the ESPP shall be binding only at national level, the minimum periods provided for preparing and submitting the offers are lower and the "waiting" period decrease to 4 days.

"Small" contracts, with value between threshold 2 and threshold 3. The award procedure can be applied without additional conditions is the request for tenders. The request for tenders procedures case, the publication is provided through ESPP, but the standard forms of publication of participation invitations are simplified and they contain only information absolutely essential to ensure transparency.

The minimum periods provided for preparing and submitting tenders are shorter, the "waiting" period is 4 days. Below threshold 3 are the "very small" contracts for which there is no rule provided by the national legislation.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

According to GEO no. 34/2006, art. 16:

- 1) In the case when the contracting authority awards a public procurement contract having as object the supply of services as included in Annex II B, then the obligation to apply this law is mandatory only for the contracts with a greater value than as stipulated in art. 57 paragraph (2) and are limited only to the provisions of articles 35-38 and to the provisions of art. 56.
- 2) In the case when the public procurement contract stipulated by paragraph (1) has as object, besides providing services included in Annex II B, the supply of services included in Annex II A, the provisions of paragraph (1) are applicable only if the estimated value of services included in Annex IIB is higher than the estimated value of services included in Annex II A.
- 3) The contracting authority does not have the right to combine, within the same contract, services included both in Annex II B and Annex II A, with the purpose to benefit of the provisions of paragraph (1) when it awards the respective public procurement contract”.

The complaints on the award procedure of services contracts will be solved according to Annex IIB, Chapter IX, GEO no. 34/2006.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

- National Authority for Regulating and Monitoring Public Procurement – NARMP
Public institution subordinated to the Government

The operative management and coordination of all activities of the Authority are made by the President, appointed by the Prime Minister.

Competences:

- Fundamental role: conception, promotion and implementation of the public procurement policy (Elaborates the legislative framework; elaborates application norms for the legislative framework; cooperates with other institutions for the purpose of identifying the best solutions of implementing the legislative framework; elaborates points of view concerning the application manner of the public procurement specific legislation);

- Regulating the legal framework concerning the application of the procedures for awarding the public procurement contracts;
- Monitoring, evaluating, analyzing and supervising (ex-post control) the manner of awarding the public procurement contracts;
- Methodological counselling of the contracting authorities in the awarding process of public procurement contracts;

- The Unit for Coordinating and Verifying Public Procurement (Ministry of Public Finances)

Specialized body of central public administration subordinated to the Government.

U.C.V.P.P. has the role of verifying the procedural aspects concerning the award process of the contracts that submit to the legislative provisions regarding public procurement, during the period starting with publishing the prior information notice, and finishing with the award and signing of the contract (ex – ante control).

The National Council for Solving Complaints is an institution with an administrative – jurisdictional activity regarding the “remedies” system. As regards its decisions, the Council is independent and it is not subordinated to the National Authority for Regulating and Monitoring Public Procurement.

The Council has the competence for solving the complaints formulated within the awarding procedure, before the conclusion of the contract, through specialized panels of advisers claims settlement.

- The operator of the electronic system for public procurement (ESPP) is the National Center for IT Management Society (Ministry of Communication and Information Society). The operator of ESPP is the legal person governed by public law that ensures to the contracting authorities the technical support for the application of the awarding procedures by electronic means.

Main organisations responsible for procurement within the utilities sector

N.A.

Supervision bodies

- Authorities responsible for the control of public funds:
 - The Court of Accounts - Supreme audit institution: the main specific activities of the Court of Accounts shall be the control and the external public audit. The external public audit shall include financial audit and performance audit.

- The Audit Authority is an operationally independent body in relation to the Court of Accounts and to the other authorities in charge of the management and implementation of non-reimbursable community funds.

Main central purchasing bodies

There is the intention to create a central purchasing body which will award public contracts/framework agreements for central public administration (there is a legislative proposal in this matter). However there some authorities who purchase for the institutions subordinated to them (i.e. Ministry of Health buy drugs or equipments for the public hospitals).

4 THE REVIEW SYSTEM

Scope of the review system

All contracts covered by the Government Emergency Ordinance 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts (transposing Directive 2004/17/EC and Directive 2004/18/EC): works, services and supply contracts and concessions, both above and below the threshold, both in ordinary and special sectors.

All contracting authorities, including all bodies obliged to comply with EU or national rules concerning the competition procedure for the award of public works, supplies and services contracts.

Review bodies

Administrative-jurisdictional body: The National Council for Solving Complaints.

Administrative branch of justice: the contentious-administrative sections:

- The courts at the level of each county - Tribunal County
- The Regional Appeal Courts- appeal
- Special procedure regarding the award of contracts in the infrastructure field – the Bucharest Appeal Court

Review procedure

Pre-contractual review

- The National Council for Solving Legal Complaints (Administrative-jurisdictional body)
- The contentious-administrative section – competence of each court (Judicial review)

Contractual review

Administrative branch of justice (sole and substantive jurisdiction) - the contentious-administrative section:

- The courts at the level of each county - Tribunal County
- The Regional Appeal Courts- appeal
- Special procedure regarding the award of contracts in the infrastructure field – the Bucharest Appeal Court.

Competences devoted to review bodies:

Infringements

- Ineffectiveness;
- In case of overriding reasons of general interest the judge may opt between ineffectiveness or alternative penalties.



Slovakia

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

In the Slovak Republic there are two possible initiatives for legislative procedure:

- a) From *the Government of the Slovak Republic* - the Government of the Slovak Republic submits a legislative draft (Act, Decree, Regulation) to the Interministerial procedure for comment and to its advisory/consultative bodies for appraisal. Subsequently, the draft is approved by the Government and submitted to the National Council of the Slovak Republic (the Parliament) for discussion and approval and afterwards to the President of the Slovak Republic for signature. It comes into force after the signature of the President and the publication in the Collection of Laws.
- b) From *Members of Parliament* – Members of Parliament submit a legislative draft to the Parliament for discussion and approval, afterwards to the President for signature. It comes into force after the signature and the publication in the Collection of Laws.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

EU law has been transposed by:

- *Act No. 25/2006 Coll. of Laws on Public Procurement* and Amendments of Certain Acts within the wording of Act No. 282/2006 Coll. of Laws
- Act No. 102/2007 Coll. of Laws;
- Act No. 232/2008 Coll. of Laws;
- Act No. 442/2008 Coll. of Laws;
- Act No. 213/2009 Coll. of Laws;
- Act No. 289/2009 Coll. of Laws;
- Act No. 402/2009 Coll. of Laws;

- Act No. 503/2009 Coll. of Laws;
- Act No. 73/2010 Coll. of Laws;
- Act No. 129/2010 Coll. of Laws (hereinafter the “Act on Public Procurement”) was adopted to transpose EU public procurement law;
- Act No. 503/2009 Coll. of Laws was adopted to transpose the new “Remedies Directive”).

National legislation on procurement not covered by the EU directives

The award procedures for procurement below the EU thresholds are the same as for the above the EU thresholds. They are regulated by the Act on Public Procurement – open procedure, restricted procedure, and negotiated procedure with or without prior notification, competitive dialogue. Design contest is not covered.

For the procurement below EU thresholds the same Act on Public Procurement is binding for contracting authorities only.

Rules for publication and time limits for submission of applications and tenders, rules for qualitative selection and award criteria are the same as for the above the EU thresholds.

Notices for invitation to the below the thresholds public procurement are not published in the EU Official Journal, in national e-Journal of Public Procurement only.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

Procedures of procurement of services in annex II B are incorporated in Article 25 of the Act on Public Procurement. These procedures are little bit simpler than EU procurement procedures. Notices for invitation are published in national e-Journal of Public Procurement, contract award notices are published in EU Official Journal and national e-Journal of Public Procurement too.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

Bodies responsible for managing public procurement – contracting authorities and contracting entities. The Office for Public Procurement only controls whether the performance of public procurement procedures is in compliance with the Act on Public Procurement.

Supervision bodies

The Office for Public Procurement (<http://www.uvo.gov.sk>) as a central state administration authority for public procurement, only oversees public procurement procedures, whether they are in compliance with the Act on Public Procurement.

The Supreme Control Office, the Ministry of Finance of the Slovak Republic, internal controlling bodies of contracting authorities/entities can also control public procurement procedures.

These institutions and bodies only state the violation/infringement of the Act on Public Procurement (or by other laws), but the fine for violation/infringement of the Act on Public Procurement can impose the Office for Public Procurement only.

4 THE REVIEW SYSTEM

Scope of the review system

The Office for Public Procurement performs:

- Supervision of public procurement process before awarding a contract – in the form of:
 - protest proceeding (request for remedy must be before);
 - control;
- Control after awarding a contract.

The Office for Public Procurement's decision regarding protest proceeding and control can be scrutinized by a Court. Only the Court is in competence to nullify a contract.



Slovenia

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LA INTO NATIONAL LAW

Public procurement represents a significant part of Slovenian GDP (12,98 %) and is thus an important generator of economic growth. Central government expenditure public procurement amounts to 47,36%. There are approximately 210.000 award procedures carried out annually. Their total value is 4,47 billion EUR. The purpose of public procurement rules is to ensure economic use of public resources, transparent public procurement procedures and prevention of improper use of public resources and corruption. However, the scope of public procurement and possibilities of influencing and driving market development allow for public procurement policy to be a way to pursue and achieve goals of other policies, mostly environmental and social policies and R&D and innovation policies.

Since Slovenia's accession to the European Union, the *acquis* has constituted an important part of our internal legislation, so that dealing with the drafts of regulations in the Republic of Slovenia must also encompass an assessment of their compliance with the instruments of the European Union which, in line with the principle of their primary nature, prevail over the national legislation.

All national bodies involved in the procedure of adopting the regulations of the Republic of Slovenia which must be brought in line with the *acquis* have since accession been raising various questions, relating in particular to the legally suitable transposition of Directives into Slovenia's legal order and the legal harmonisation of Slovenia's regulations with other EU institutions. The ministry, competent for the relevant subject, Government Office for Legislation and The Legislative and Legal Service of the Slovenian Parliament are thus constantly searching for suitable answers to these questions, trying to establish a balance and conformity between European and Slovenian regulations and, in cooperation with other ministries and institutions, searching for answers to procedural questions, as well as striving to establish consistent practices with regard to communication with the competent EU bodies.

In line with articles 87 through 91 of the Constitution of the Republic of Slovenia (Official Gazette no. 33I/91, 42/97, 66/00, 24/03, 69/04, 69/04, 69/04, 68/06)¹ all primary legislation is adopted by the Slovenian Parliament. The adoption procedure foresees three readings. After the third reading the act is adopted and sent for approval to the National Council of the Republic of Slovenia, which is the representative body for social, economic, professional and local interests.

The National Council may exercise a suspensive veto on an adopted act, which means the Parliament needs to vote again on a law prior to its promulgation. After the law is passed and approved by the National Council the President of the Republic of Slovenia promulgates it and sends it to the Official gazette for publication.

All primary legislation to be adopted by the Parliament can be submitted into adoption by the Government of Republic of Slovenia or by an individual member of the Parliament, under The National Assembly of Slovenia Rules of Procedure (Official Gazette no. 35/02, 60/04, 64/07)². Accordingly most of the primary acts and all of the primary acts transposing EU legislation into Slovenian national law are prepared by the relevant ministry or government office and firstly adopted by the Slovenian Government. Secondary legislation is adopted only by the Slovenian Government or by the competent minister. On governmental level the adoption procedure is regulated by Rules of procedure of the Government of the Republic of Slovenia (Official Gazette no. 43/01, 23/02, 54/2003, 103/2003, 114/2004, 26/2006, 21/2007, 32/2010, 73/2010)³. With the intention to prepare adequate legislation, both primary and secondary, inter-ministerial coordination, monitoring of the acquis, and standpoints and opinions of relevant stakeholders and public are integrated into the preparation phase of the legislation. To facilitate the process of including stakeholders and public into the process of legislation preparation the Government has adopted guidelines in the form of Resolution on Legislative Regulation (Official Gazette no. 95/09)⁴ and established a special platform e-Demokracija (<http://e-uprava.gov.si/e-uprava/edemokracija.euprava>), where anyone can submit a comment or an opinion on legislation drafts.

The competency of each ministry and government offices is determined by the Public Administration Act (Official Gazette no. 52/02, 56/03, 61/04, 123/04, 93/05, 48/09)⁵. Public procurement legislation falls into the competency of Ministry of Finance.

1 Constitution of the Republic of Slovenia is available at <http://www.dz-rs.si/?id=150&docid=27&showdoc=1>.

2 The National Assembly of Slovenia Rules of Procedure is available at <http://www.dz-rs.si/index.php?id=99&archive=1&docid=12&showdoc=1>.

3 Rules of procedure of the Government of the Republic of Slovenia are available at http://www.vlada.si/fileadmin/dokumenti/si/predpisi/2010/2010_09_97_sv_-_poslovnik-precisceno.DO

4 Resolution on Legislative Regulation is available at http://zakonodaja.gov.si/rpsi/r06/predpis_ZAKO5516.html

5 Valid Public Administration Act is available at <http://www.dz-rs.si/index.php?id=101&unid=UPB179EC504889424751C12576D200255919&showdoc=1>.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

All Slovenian legislation is in coherence with the *acquis*, however only the following legislation transposes EU directives in this field:

- Public Procurement Act (Official Gazette no. 128/06, 16/08, 19/10) and Decree on lists of contracting authorities, works, services, lists of products, information to be included in notices, definition of technical specifications and requirements relating to devices for the electronic receipt of tenders (Official Gazette no. 18/07) transpose Directive 2004/18/EC;
- Public Procurement in the Water, Energy, Transport and Postal Services Act (Official Gazette no. 128/06, 16/08, 19/10) and Decree on lists of contracting authorities, community legislation, works and services, information to be included in notices, definition of technical specifications and requirements relating to devices for the electronic receipt of tenders (Official Gazette no. 18/07) transpose Directive 2004/17/EC;
- Auditing of Public Procurement Procedures Act (Official Gazette no. 78/99, 90/99, 110/02, 42/04, 61/05, 78/06, 53/07) transposes Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contra and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts is yet to be transposed into Slovenian law. Directive 2007/66/EC is partly transposed by last amendments of Public Procurement Act and Public Procurement in the Water, Energy, Transport and Postal Services Act, the remaining provisions will be transposed by a new act on remedies in public procurement procedure - Legal Protection in Public Procurement Procedures Act.

Regardless of the delay in transposing Directive 2007/66/EC, Slovenian legal system is none the less coherent with EU law as most of the directive's requirements are all ready in place according to the valid Auditing of Public Procurement Procedures Act.

Defence procurement and procurement in the field of security is currently regulated by Decree on Defence and Confidential Procurement (Official Gazette n. 80/07), however an act in this field is in preparation (Public Procurement for Defence and Security Act), which will also determine legal protection in these type of procedures and will duly transpose Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

Other legislation, not concerning EU law:

1. Regulations in the classical sector (on the basis of Public Procurement Act):
 - Decree on rules and the procedure for establishing the status of a contracting entity pursuant to the Public Procurement Act (Official Gazette no. 58/07);
 - Decree on provisions for direct remuneration to the subcontractor when a contractor enters into public contract with the subcontractor (Official Gazette no. 66/07);
 - Rules on types of data for the contracts awarded during the preceding year pursuant to the Public Procurement Act and the way of their collecting (Official Gazette no. 8/09);
 - Decree on the implementation of procedures of awarding joint public contracts for the purposes of administrative authorities (Official Gazette no. 111/03, 52/05).

2. Regulations and rules in the utilities sector (on the basis of Public Procurement in the Water, Energy, Transport and Postal Services Act):
 - Decree on rules and the procedure for establishing the status of a contracting entity pursuant to the Public Procurement in the Water, Energy, Transport and Postal Services Act (Official Gazette no. 58/07); Decree on provisions for direct remuneration to the subcontractor when a contractor enters into public contract with the subcontractor (Official Gazette no. 66/07);
 - Rules on types of data for contracts awarded during the preceding year pursuant to the Public Procurement in the Water, Energy, Transport and Postal Services Act and the way of their collecting (Official Gazette no. 8/09).

On Green Public Procurement it is also in preparation a Decree on Green Public Procurement which will define minimal requirements and recommendations for public procurement of electricity, food and catering services, office IT equipment, copying and graphic paper, appliances marked with energy labels (household appliances, lights, air-conditioning,...), construction and re-construction of buildings, construction and re-construction of outdoor and public lighting, furniture, cleaning products and services and road vehicles.

The decree will also include provisions for transposition of Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles and article 5 of Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

All Slovenian public procurement legislation pertain both public procurement above EU thresholds and below EU thresholds. According to Public Procurement Act goods and services below 20.000 EUR and works below 40.000 EUR are excluded from public procurement rules and according to Public Procurement in the Water, Energy, Transport and Postal Services Act goods and services below 40.000 EUR and works below 80.000 EUR are excluded from public procurement rules.

There are two types of procedures for public procurement below EU thresholds:

- procedure for small value procurement:
 - goods and services from 20.000 EUR to 40.000 EUR;
 - works from 40.000 EUR to 80.000 EUR;
 - goods and services in utilities sector from 40.000 EUR to 80.000 EUR;
 - works in utilities sector from 80.000 EUR to 160.000 EUR;

- tender collection procedure with prior publication:
 - goods and services from 40.000 EUR to EU threshold;
 - works from 80.000 EUR to EU threshold;
 - goods and services in utilities sector from 80.000 EUR to U threshold;
 - works in utilities sector from 160.000 EUR to EU threshold.

Regardless of the procedure, all public procurement from lowest national thresholds (procedure for small value procurement and tender collection procedure with prior publication) is published in national platform Portal javnih naročil <http://www.enarocanje.si/>. Time limits are not provided by law, however the contracting authority must consider the principle of proportionality and set a deadline, which enables the tenderer to submit a complete bid - a bid that is received on time, is formally complete, admissible, properly prepared and appropriate.

The only time limit set for procedure for small value procurement and tender collection procedure with prior publication is a non-preclusive time limit to adopt the decision on the award of contract, which amounts to 45 days after the examination and evaluation of tenders.

As in EU public procurement procedures (open procedure, restricted procedure, negotiated procedure, competitive dialogue) the contracting authority may examine the suitability of the tender in the manner provided in the directives. A contracting authority must, however, in all types of procedures examine basic suitability of the candidate or tenderer (A tenderer convicted for a criminal offence pertaining to finances and business practices (e.g. fraud, bribes, participation in a criminal organization), especially those affecting the ECs' financial interests, must be excluded from public procurement procedures.) and economic and financial suitability by a statement from the tenderer, that he has no outstanding liabilities to his subcontractors in previous public procurement procedures. Definition of the award criteria is in the discretion of the contracting authority.

Public procurement below lowest national thresholds (goods and services below 20.000 EUR, works below 40.000 EUR, goods and services in utilities sector below 40.000 EUR, works in utilities sector below 80.000 EUR) is excluded from, the scope of Public Procurement Act and Public Procurement in the Water, Energy, Transport and Postal Services Act. Contracting authorities, especially those at central level, usually set up their own rules for this type of public procurement. It is common that contracting authorities collect three bids before awarding a public contract.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

According to Slovenian law services in annex II B are procured in line with the relevant provisions of Directive 2004/17/EC and 2004/18/EC. The contracting authority must comply with the rules on laying down the subject matter of the contract and technical specifications and on rules on publication of contract award notice.

3 THE INSTITUTIONAL SYSTEM

Institutions/Structures responsible for public procurement

The ministry, responsible for public procurement system and legislation, is the Ministry of Finance, specifically the Department for Public Private Partnership and Public Procurement System, which employs 10 public servants. The main tasks of this department are:

- Preparation and inter-ministerial coordination of Slovenian legislation on public procurement, concessions and public private partnerships, including legislation to harmonise Slovenian law with EU law;
- Follow-up on EU, WTO, OECD, UN and other institutions' legislation, guidelines and recommendations in the field of public procurement, concessions and public private partnerships;

- Cooperation with foreign institutions and expert in the field of public procurement and public private partnerships;
- Preparation of materials and standpoints for working bodies of EC and other European and international institutions,
- Making information on public procurement and public private partnerships in foreign countries publicly available,
- Preparation of opinions and interpretations of public procurement and public private partnerships legislation,
- Organization of education and training courses in the field of public procurement and public private partnerships,
- Publication of literature on public procurement and public private partnerships,
- Preparation of tender documentation for typical subject matters,
- Monitoring execution of primary and secondary legislation in the field of public procurement.

In 2010 the Act Establishing the Public Procurement Agency (Official Gazette no. 59/10) was adopted, which foresees the establishment of Slovenian Public Procurement Agency. The agency will be established by the end of this year and will start working on January 1, 2011. The agency will be in charge of carrying out joint public procurement for government and judiciary institutions (courts, office of the public prosecutor,...) and for carrying out public procurement above EU threshold on behalf of authorities of the Republic Slovenia (ministries, government offices, Parliament, Court of Audit, Human Rights Ombudsman,...). The agency will also perform some of the developmental tasks in the field of public procurement such as implementation of green public procurement criteria, preparation of analysis on state of play in public procurement and recommendations based on those analysis, development of e-procurement system, especially the necessary infrastructure.

While the public procurement policy making body in Slovenia is the Ministry of Finance, public procurement procedures are executed by approximately 3.000 Slovenian contracting authorities. Which are categorised as follows:

- a) Authorities of the Republic of Slovenia and of Slovenian local communities;
- b) Public funds, public agencies, public institutes;
- c) Public commercial institutions (public enterprises);
- d) Other bodies governed by public law.

As public procurement in Slovenia is fragmented, most of the contracting authorities are fairly small and do not have specialised procurement officers.

Structures responsible for public procurement at central, local and regional level

There are approximately 100 authorities of the Republic of Slovenia and 210 authorities of local communities.

Based on statistical data for 2010 there are 34.211 employees in all authorities of Republic of Slovenia. The biggest authorities of Republic of Slovenia are Police with 9.063 employees and Ministry of Defence with 7.628 employees. The smallest authorities of Republic of Slovenia have up to 10 employees. Number of civilian public servants employed at authorities of Republic of Slovenia is 16.307. Information on employment in Slovenian local communities is not available. According to the latest statistical data 110 or 52 % of local communities have less than 5.000 residents, which is the legal requirement, 25 or 12 % of local communities have less than 2.000 residents and a bit more than 3 % of local communities have less than 1.000 residents. The smallest of local community is Local Community of Hodoš with 320 residents; the biggest local community on the other hand is Municipality of Ljubljana with 278.314 residents.

Statistical data on public procurement in 2007 shows that according to number of contracts 11.40% of public procurement is executed by authorities of the Republic of Slovenia, in value of contracts this share amounts to 17,19%. Local communities on the other hand carry out 13,77% of all public procurement procedures and their value represents 11,81% of value of all public contracts.

Main organisations responsible for procurement within the utilities sector

Beside the local communities there are approximately 165 contracting authorities working in the utilities sector: 26 contracting authorities in the sector of transport or distribution of gas or heat, 11 contracting authorities in the sector of production, transport or distribution of electricity, 102 contracting authorities in the sector of production, transport or distribution of drinking water, 1 contracting authority in the field of rail services, 15 contracting authorities in the field of urban railway, tramways, trolleybus or bus services , 1 contracting authority in the postal services sector, 1 contracting authority in the sector of exploration for and extraction of oil or gas, 2 contracting authorities in the sectors of exploration for and extraction of coal and other solid fuels, 2 contracting authorities in the field of maritime or inland port or other terminal facilities and 4 contracting authorities in the field of airport installations.

According to statistical data for 2007 public procurement in utilities sector amounts to 2,53% of all public procurement (in number of contracts) and 4,10% of total value of all public procurement contracts.

Supervision bodies

In accordance with the Slovenian Constitution the Court of Audit of the Republic of Slovenia is the highest body for supervising state accounts, the state budget and all public spending in Slovenia.

The Constitution further provides that the Court of Audit is independent in the performance of its duties and bound by the Constitution and law. The Court of Audit Act also defines that the acts with which Court of Audit exercises its powers of audit cannot be challenged before the courts or other state bodies. The Court of Audit cannot be categorised within any of the three branches of power, legislative, executive or judicial. Its independent status is guaranteed in several respects by the Constitution and the law:

- The Court of Audit exercises its powers entirely independently. It is responsible for adopting its own programme of work. No body, institution or other entity may order it to carry out tasks nor give it instructions as to how to perform tasks, what sort of audit it should carry out or what it should audit. Pursuant to the Court of Audit Act, the deputies and working bodies of the National Assembly, the government, ministries and local authority bodies may propose that an audit be carried out; from among these proposals the Court of Audit selects for its annual work programme at least five proposals from the National Assembly, two of which must come from opposition deputies and at least two from the working bodies of the National Assembly. The Court of Audit can also, at its own discretion, act on proposals from individuals – this source of proposals includes articles and contributions in the media and civil society organisations;
- For covering the costs of its activities the Court of Audit proposes a financial plan to the National Assembly, which approves the required working funds. The Court of Audit is an independent budget user and receives budget funding under a special part of the budget, but it must use the funds in accordance with the provisions of the law regulating the implementation of the budget.

The law also contains the following provisions in connection with the functioning of the Court of Audit:

- Provisions setting out the work methods and audit procedures;
- Legal instruments are envisaged for ensuring and establishing accountability and for the dismissal of members of the Court of Audit, supreme state auditors and auditors;
- The Court of Audit is accountable to the National Assembly and the public for the implementation of its tasks, and so it has the right and the duty to report on its audit findings;
- The financial statements on the operations of the Court of Audit are audited by an auditor appointed by the National Assembly.

The Court of Audit of the Republic of Slovenia has three members: a president and two deputy presidents. The president and his two deputies form the senate of the Court of Audit. The Court of Audit also has a maximum of six supreme state auditors, who head the audit departments and secretary of the Court of Audit, who heads the support services. The Court of Audit is represented and headed by its President, who simultaneously holds the office of state auditor-general. In September 2009 there were 132 employees at the Court of Audit, of whom 71% carry out the tasks related to auditing of public funds.

Another supervision body in the area of public procurement is the Budget Supervision Office of the Republic of Slovenia. This is a central body of the public internal financial control system responsible for development, harmonisation and supervision of the financial management and internal control system as well as internal audit of direct and indirect budget spending centres on the central and local level. Budget Supervision Office is affiliated (constituent body) to the Ministry of Finance.

In the field of spending of the EU funds the Budget Supervision Office performs pre-accreditation reviews, independent control of expenditures, certifies declarations of expenditures and issues winding-up declarations. It regularly reports to the European Commission on irregularities regarding the use of EU funds, acts as the contact point of the European Anti-Fraud Office (OLAF) and coordinates activities referring to the protection of EU financial interests. An important part of the activities of Budget Supervision Office of the Republic of Slovenia traditionally represents budgetary inspection.

Public Procurement Act and Public Procurement in the Water, Energy, Transport and Postal Services Act each define 17 misdemeanours for contracting authorities, 3 misdemeanours for tenderers and 1 misdemeanour for subcontractors in public procurement contracts. The body competent for the detection of misdemeanours is the National Review Commission for the Auditing of Public Contract Award Procedures (shorter: National Review Commission). National Audit Commission is specific, independent, professional and expert state institution also responsible for legal protection of tenderers and for the supervision of implementation of Auditing of Public Procurement Procedures Act and misdemeanours thereupon.

Main central purchasing bodies

In Slovenia there is no special central purchaser organization. Though, Ministry of Public Administration carries out procedures of joint public procurement for the whole central government. Joint government procurement is carried out in line with provisions of the Decree on the implementation of procedures of awarding joint public contracts for the purposes of administrative authorities.

On the basis of needs expressed by central government contracting authorities, Ministry of Public Administration annually prepares a proposition of joint government procurement procedures to be carried out in the budget period.

The Government adopts the plan thus obliging all central government contracting authorities to procure through these procedures. All exceptions must be approved by the Government. In the last few years Ministry of Public Administration carried out joint public procurement for energy, cars, computers and screens, paper, mobile phones, air tickets etc. On average Ministry of Public Administration executed 10 to 15 procedures of joint government procurement. It is estimated that the number of joint public procurement procedures will rise with the establishment of the Public Procurement Agency in 2011.

Aside from joint government procurement there were some cases of centralised public procurement in the area of health care (executed by Ministry of Health) and some cases of joint public procurement of a few local communities.

Supportive bodies

All above mentioned tasks are tasks of Ministry of Finance. With the establishment of Public Procurement Agency some of the task will fall into the competency of the agency, however the Ministry of Finance will still be responsible for majority of the supportive functions. The agency will focus on practicing joint procurement and executing public procurement procedures above EU thresholds for authorities of Republic of Slovenia.

Supervision body ex art. 81 Directive 2004/18

Structure

National Review Commission was established on the basis of Auditing of Public Procurement Procedures Act. It is a specific, independent, professional and expert state institution providing legal protection to tenderers at all procedural levels of the award of public contracts. It is consisted of a Chairperson and four members. Both chairperson and members are nominated into office by Slovenian Parliament for a mandate of 5 years. They hold a status of a state functionary. Chairperson and members of the National Review Commission must fulfil the following conditions:

- A citizen of the Republic of Slovenia with an active command of the Slovenian language,
- Legal capacity and general medical fitness;
- Completed 30 years of age;
- Not convicted for premeditated criminal offences to a sentence of imprisonment in the duration of more than 6 months;
- At least two years of practice in the field of public procurement.

The chairperson and two members must have a university degree in law and the state legal exam, while the remaining two members must have a university degree in economics or technology.

During the preparation of the an act on legal protection in public procurement procedures Ministry of finance has started contemplating changes of the composition of National Review Commission, however this question is still up for both expert and political discussion.

Competences

National Review Commission decisions on the audit claim are taken by an individual member or by a three member senate. Individual claims to be decided on are assigned by the chairperson according to alphabetical order of names of the National Review Commission members and chairperson and time of receipt of the claim, taking into consideration the value and complexity of the public procurement procedure at hand.

The National Review Commission may, by way of a decision:

- Reject the audit claim when the audit claim or the note on the continuation of the procedure before the National Review Commission has not been submitted in due time, when it was submitted by a person who cannot demonstrate active legitimisation, or when the issuer of the claim failed to complete the claim within the time limit or in accordance with the request to complete the audit claim;
- Reject the audit claim as unreasoned;
- Grant the audit claim by partially or entirely annulling the contract award procedure;
- Terminate the auditing procedure on the basis of a received written note on the withdrawal of the audit claim before the decision of the National Review Commission has been taken.

The National Review Commission decision cannot replace the decision of the contracting authority, but it can over-rule the decision of the contracting authority. The National Review Commission may not take up a role of a mediator in a dispute between the contracting authority and the tenderer as the Auditing of Public Procurement Procedures Act does not foresee alternative resolutions of disputes.

The National Review Commission must state grounds for its decision. It may give the contracting authority instructions for a correct execution of the annulled part of the procedure. Upon the adoption of the decision on the audit claim, the National Review Commission may request from the contracting authority to submit the report about the carrying out or repeating of the procedure in which the audit claim submitted.

After the completed audit procedure before the National Review Commission, judicial protection is guaranteed in the compensatory proceedings before a general court.

4 THE REVIEW SYSTEM

Scope of the review system

The audit claim may be submitted in all phases of the public contract award procedure and against any activity of the contracting entity unless otherwise provided for by the law regulating the award of a public contract or Auditing of Public Procurement Procedures Act. An audit claim may be issued also against the criteria of tender evaluation or against the restrictions regarding the participation in public contract award procedures.

Rules on auditing of public procurement procedures are the same for public procurement above and below EU thresholds, however public procurement out of the scope of Public Procurement Act and Public Procurement in the Water, Energy, Transport and Postal Services Act is not subject of Auditing of Public Procurement Procedures Act.

Review bodies

Legal protection of contracting entities and public interest in public procurement procedures in Slovenia is carried out through auditing of public procurement procedures. Auditing procedure first takes place at the contracting authority, then, if the tenderer is still not content, he may continue the auditing procedure at the National Review Commission for the Auditing of Public Contract Award Procedures (shorter National Review Commission). The legal status, composition and role of National Review Commission are described in points 5.2.1 and 5.2.2.

After the completed audit procedure (at the contracting authority and at the National Review Commission), judicial protection is guaranteed in the compensatory proceedings before a general court.

Review procedure

Pre-contractual review

According to Slovenian Auditing of Public Procurement Procedures Act audit procedures take place before the conclusion of the contract. To ensure legal protection before the contracting authority and the most advantageous tenderer enter into obligations this act provides that the contacting authority may not conclude a contract before the stand still period of at least 10 days has run out.

The review procedure is executed in line with Auditing of Public Procurement Procedures Act and is conducted first at the respective contracting authority. Failing a satisfactory decision of the contracting authority and following such a complaint, the tenderer may initiate audit proceedings at the National Review Commission. In case the Auditing of Public Procurement Procedures Act does not cover pertinent issues, the legislation on civil judicial proceedings is to be utilised.

A favourable decision in the review procedure at the National Review Commission is a prerequisite for the contracting authority's successful litigation for damages in civil court.

Contractual review

Legal protection of entities, which were denied legal protection in the stage of pre-contractual review or were unfoundedly excluded from public procurement procedure (e.g. cases of direct award of public contracts), is provided in civil judicial proceedings before regular civil courts. Such an entity may sue for punitive damages or ineffectiveness of a public procurement contract.



Spain

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

The transposition of EU Directives on public procurement has taken place by passing the Parliament the necessary Acts amending the Public Procurement Law in force.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

Directive 2004/18 and Directive 2004/17 were transposed into the Spanish national legislation by means of Act 30/2007 (Ley 30/2007, de 30 de octubre, de contratos del Sector Público) and Act 31/2007 (Ley 31/2007, sobre procedimientos de contratación en los sectores del agua, la energía, los transportes y los servicios postales), respectively.

Directive 2007/66/CE has been transposed by means of a draft Act that has already been approved by the Spanish Government and is now being discussed by the Spanish Parliament. The latter Act amends Act 30/2007 and Act 31/2007.

The transposition Act of Directive 2009/81/CE is currently being drafted and will be approved by the Government in the coming months.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

The award procedures used for procurements below the EC thresholds are the same as those used for procurements above them.

Pursuant to article 126 Act 30/2007 contract notices for contracts of the Public Administration below the EC thresholds don't need to be published in the EU Diary, however, the contracting authority may decide to do so. Publication in a national or regional diary and in the buyer profile as a general rule is mandatory for the contracts of the Public Administration.

Time limits for submission of applications and tenders are established by the contracting bodies (pursuant to article 127 Act 30/2007). However, the law for each procedure fixes time limits, and these are narrower when the contract falls below the EC thresholds (article 143 Act 30/2007, among others).

Rules for qualitative selection and award criteria do not establish a different regime form contracts below EC thresholds.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

The contracting authorities have their competence attributed by Law (e.g. Article 291 Act 30/2007) and are generally assisted by a contracting table ("*mesa de contratación*"). For example, the contracting bodies in the Central Administration are the Ministers and State Secretaries. There is a big number of contracting bodies at the different territorial levels.

As to the composition of the contracting table, this is made of the Secretary, a President and a number of "vocals".

As to the supportive bodies, there is one central body, the so called State Consultative Board of Administrative Procurement ("*Junta Consultiva de Contratación Administrativa*"), and a number of regional supportive bodies, which are the equivalent to the Central one but at a regional level.

Supervision bodies

The supervision and control of public procurement is subject to an internal control and to an external and independent control.

As to the internal control, this is accomplished by the civil servants that have such a competence (at a State Level these belong to the so called General Intervention of the Central Public Administration, the so called "IGAE"). Their mission is mainly to control that there is enough credit in the Budget to afford the payments that may derive from the contract which is subject to public procurement.

As to the external and independent control, this is carried out by a constitutional body named Accounts Court ("*Tribunal de Cuentas*"). There is one at a national level and some regions have created their own Accounts Court with jurisdiction limited to their territory. They are attributed by the Constitution and by the Law the control of the contractual activity of the Public Administration. Mainly they control that the said activity respects the legality, efficiency and economy principles.

4 THE REVIEW SYSTEM

Scope of the review system, Review bodies and Review procedure

For procurements below the EC thresholds the general review system applies, this being regulated in Act 30/1992 for all administrative procedures.

For procurements with a community dimension a special review system applies. The said regime has its origin in Directive 89/665/CEE.

The traditional general review system can be used against pre-contractual and contractual acts.

The special review system can only be used against pre-contractual acts.

The aforementioned review procedures have an administrative nature and are carried out by an administrative body.

The review body should return a decision, if in favour of the operator, in less than 20 days from the notification of the act subject to review.

After the administrative procedure, as second instance, a judicial procedure can be initiated. Judicial review bodies do decide on the latter proceedings.



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

The legal grounds for the Swedish legislative system are to be found in the Constitution, in *Regeringsformen* (RF) (Instrument of Government). Sweden's transfer of decision-making right to the EU is prescribed in Chapter 10 article 5 RF. Furthermore, rules on Sweden's accession to the EU and the application of EU-law in the Swedish legislative system can be found in *lag (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen* (no English translation available). EU legislation must be implemented into the Swedish law.

The Parliament (*Riksdag*) is Sweden's legislative assembly (RF 1:4). A majority of the Parliament's decisions are based on proposals for new laws or amendments to existing laws, Bills (*propositioner*), presented by the Government, for example regarding legislation on public procurement. The Bills are prepared by the ministry responsible for the area of activity to which the item of legislation belongs. The responsible ministry for public procurement is the Ministry of Finance.

The mandatory parts of Directives 2004/18 and 2004/17 and the provisions in the Directives regulating framework agreements have been implemented into Swedish legislation. In April 2010 the Government published a Bill¹ regarding the implementation of the optional parts of Directives 2004/18 and 2004/17, such as competitive dialogue, and Directive 2007/66. The new rules are suggested to enter into force on 15 July 2010.

A new act implementing the Directive 2009/81 is suggested to enter into force on 1 July 2011. The conclusions of the Committee appointed to examine this issue are being circulated for consideration² (see below).

The procedure for transposing EU public procurement legislation into Swedish law includes a number of institutions.

Initiative from the Government, usually by appointing a committee examining the issue in question on the basis of a Committee Directive (*kommittédirektiv*) set by the Government. The conclusions of the committee are presented in a report, normally in the *SOU*-series. A proposal can also be prepared in the Ministry and presented in the *DS*-series. Regarding public procurement legislation, the conclusions of the Committee involved in the transposition procedure of Directives 2004/18 and 2004/17 are presented in *SOU 2005:22* and *SOU 2006:28*.

¹ *Proposition 2009/10:180 Nya rättsmedel på upphandlingsområdet*

² Opinions and considerations shall be submitted to the Ministry of Finance on 1 June 2010.

The Ministry of Finance has prepared a proposal for the transposition of Directive 2007/66 which is presented in DS 2009:30. The Committee involved in the transposition procedure of Directive 2009/81 has presented its conclusions in SOU 2010:13.

The SOUs regarding Directives 2004/17, 2004/18, 2009/81 and the DS regarding Directive 2007/66 have been circulated to relevant authorities, municipalities and organizations for consideration.

The Government usually sends its Bill to *The Swedish Law Council* (RF 8:18) (*Lagrådet*), for a review of the Bill's compatibility with the Constitution and other legislation. After its review, *The Swedish Law Council* submits its opinion to the Government, which then decides on the final version of the Bill and submit it to the Parliament. The Government Bills concerning Directives 2004/18, 2004/17 and 2007/66³ have been sent to *The Swedish Law Council* for review.

The Parliament Committee responsible for public procurement legislation, the Committee on Finance reviews the Government Bill with proposal from the members of the Parliament (*motioner*).

Then the Parliament votes the Government Bill with proposals from members of the Parliament. The Bill regarding transposition of Directives 2004/18 and 2004/17 was voted in the Parliament on 21 November 2007. The Swedish Public Procurement Act⁴ (*lagen (2007:1091) om offentlig upphandling, LOU*) and *lagen (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster*⁵ (*LUF*) (no English translation available) entered into force on 1 January 2008.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

EU law has been transposed by:

- Swedish Public Procurement Act (2007:1091) (*LOU*) (implementing Directive 2004/18 and an Directive 2007/66);
- *Lag (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster (LUF)* (no English translation available) (implementing Directive 2004/17 and Directive 2007/66).

It is not decided yet whether Directive 2009/81 will be implemented through a separate law or not. The implemented directive is estimated to enter into force on 1 July 2011.

³ Proposition 2006/07:128 Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster and Proposition 2009/10:180 Nya rättsmedel på upphandlingsområdet.

⁴ Implementing Directive 2004/18

⁵ Implementing Directive 2004/17

Regulations⁶

- *Förordning (2007:1099) om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster* (no English translation available), regarding publication of contract notices and equipment for electronic reception of certain documents. (implementing Directives 2004/18 and 2004/17)
- *Tillkännagivande (2010:53) av tröskelvärden vid offentlig upphandling* (no English translation available) regarding thresholds. (implementing COM Communication (2009/C 292/01))
- *Tillkännagivande (2007:1108) av de försvarsprodukter som avses i lagen (2007:1091) om offentlig upphandling* (no English translation available), regarding the list of products with regard to contracts awarded by contracting authorities in the field of defence. (implementing Directive 2004/18)

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

- National legislative acts on procurement below the thresholds;
- Swedish Public Procurement Act (2007:1091) (*LOU*), Chapter 15;
- *Lagen (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster, (LUF)* Chapter 15 (no English translation available).

Below the thresholds contracting authorities may use a *simplified procedure* or a *selection procedure*. If the value of the contract is low⁷, or if there are exceptional reasons to do so, an *informal procedure* may be used.

When using the *simplified procedure* the contracting authority shall request tenders through a notice in a generally available electronic database or through a notice in another form that facilitates effective competition. The notice shall indicate how a tender may be submitted, the deadline for receipt of a tender and the date up to which the tender is to be binding.

When applying a *selection procedure*, the contracting authority shall publish an invitation to apply by a notice in an electronic database that is generally available.

⁶ National government regulations regarding public procurement covered by the Directives not transposing EU legislation (English translation not available):

- *Förordning (2009:1) om miljö- och trafiksäkerhetskrav för myndigheters bilar och bilresor* (environmental and road safety requirements for contracting authorities when purchasing, leasing and using cars for certain road transports);
- *Förordning (2006:260) om antidiskrimineringsvillkor i upphandlingskontrakt* (special conditions for performance of contracts regarding anti-discrimination);
- *Förordning (1998:796) om statlig inköpsamordning* (co-ordination of government procurement in framework agreements).

⁷ According to the Government Bill (proposition 2009/10:180 *Nya rättsmedel på upphandlingsområdet*) "low value" amounts to 15 % of the relevant threshold.

The invitation shall indicate how a request to participate may be submitted and the deadline for the receipt of the application. The number of suppliers invited shall be sufficiently large to achieve efficient competition.

A contracting authority shall accept either the economically most advantageous tender or the tender that has the lowest price. When applying the economically most advantageous tender, the contracting authority shall either state how the criteria are weighted or in descending order of importance.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

Procurement of services in annex II B of the Directives is regulated by Chapter 15 in *LOU* and *LUF* respectively. For a brief description of the award procedure of contracts relating to this chapter, see above.

The Act on System of Choice in the Public Sector (2008:962) (*LOV*) entered into force on 1 January 2009. This Act regulates procurement of certain services included in category 25 in Annex II B of Directive 2004/18. The contracting authorities⁸ in these sectors have the possibility to establish a system where the users of the services in question (patients etc) choose between suppliers with whom the contracting authority has concluded a contract.

This is called a *System of Choice*. The contracting authority that has decided to establish or change a system of choice shall publish this on the national website set up for the purpose (www.valfrihetswebben.se) and continuously request applications.

All applicants satisfying the requirements referred to in the contract notice and contract documents, and which have not been excluded pursuant to Chapter 7, Section 1 of the Act, shall be approved and may conclude a contract with the contracting authority. The contracting authority shall provide information about all suppliers within the system of choice to private parties. For the private party who does not choose a supplier, the contracting authority shall provide a no-choice alternative.

A supplier, who claims that a contracting authority has breached a provision of the Act, may apply for rectification to a general administrative court.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

There are no specifically designated central, regional or local bodies responsible for carrying out public procurement in Sweden. All contracting authorities are responsible for their own purchasing and thus also for public procurement (with the exception of the government purchasing body, *statlig inköpssamordning*, mentioned below).

⁸ Contracting authorities mean municipalities and county councils responsible for health and social services, and Swedish Public Employment Service (*Arbetsförmedlingen*) regarding certain services.

The objective of *statlig inköpssamordning* (the government purchasing body) is to increase efficiency in public spending and thus achieve more value for money by co-ordinating the central government's purchasing and procurement.

The system for co-ordination of government procurement is regulated in a government regulation (1998:796) and applies to government agencies directly under the government, which includes about 252 central agencies. Other government related organisations can, under certain conditions, be included in the system. The scope of activities for the co-ordination function is to develop, co-ordinate and follow up procurement activities within the central government. This includes the establishment, development and deployment of a framework agreement, but also includes methods and support for increased procurement competence and practise.

The co-ordination function is a strategic function consisting of a small group (three-four persons) residing in the *Swedish National Financial Management Authority (Ekonomistyrningsverket)* which is the authority responsible for the system for co-ordination of government procurement. The co-ordination function is assisted by eleven government authorities who do the operational procurement by procuring different framework agreements for supplies and services needed within the government.

The system includes some 50 product areas with 90 sub areas, e.g. for stationery, cars, IT supplies and services, furniture, flight services. The annual turn-over is around 7,5 billion SEK. This corresponds to about 8 % of the total expenditure for the central government from external suppliers. Information regarding the different framework agreements can be found in a special database together with other information about the system for co-ordination of government procurement at the website.

Main organisations responsible for procurement within the utilities sector

As described above

Supervision bodies

The *Swedish Competition Authority (Konkurrensverket)* is a state authority working in order to safeguard and increase competition and supervise public procurement in Sweden. Its vision is "*Economic welfare through efficient markets*" and the goal of Swedish competition policy is well functioning markets.

The Swedish Competition Authority is responsible for information on and supervision of Public Procurement. The Authority also supervises the observance of Competition Act and provides proposals for changes to rules and other measures to eliminate obstacles to effective competition, as well as builds up and disseminates knowledge on competition issues.

The role of the *Swedish Competition Authority* will change with the implementation of the Directive 2007/66. The Authority then can or must apply for the Administrative Courts to impose a fine (*upphandlingsskadeavgift*) on a contracting authority for some infringements according to the Directives and *LOU* and *LUF*.

Head of the Swedish Competition Authority is the General Director who makes the decisions in the individual cases after preparation and presentation by case officers. Four departments within the Authority are working with issues regarding competition, one department responsible for public procurement, one legal department, one department with responsibility for communication and research and one administrative department. The Public Procurement Department has approximately 15 employees.

Main central purchasing bodies

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Supportive bodies

The *Legal, Financial, and Administrative Services Agency (Kammarkollegiet)* is, as of the 1st of January 2009, responsible for a national function for procurement assistance and development. The Legal, Financial and Administrative Services Agency has many other duties which however are not relevant for this production. The Agency administrates a website – www.upphandlingsstod.se – where practical help and guidance is provided to both contracting authorities and suppliers. The Agency also develops tools, methods and coherent procurement documents for a more efficient public procurement. The Agency has also been tasked to promote and develop the use of electronic procurement.

The Swedish Environmental Management Council (SEMCo⁹) (*Miljöstylningsrådet*) intends to facilitate for organizations, both within the private and public sector, to initiate and further develop systematic and voluntary environmental work towards sustainable development. SEMCo is one of the main actors in the implementation of the Swedish Government's Action Plan for Green Public Procurement 2007-2009.

The work includes awareness-raising among politicians and decision-makers, education and information along with elaborated work on further updating and developing the SEMCo GPP criteria portfolio. Furthermore, SEMCo works on evaluating how social and ethical aspects can be integrated in the GPP criteria. It cooperates in many national and international projects.

The Swedish Agency for Economic and Regional Growth (*Tillväxtverket*) works to achieve more enterprises, growing enterprises and sustainable competitive business and industry throughout Sweden.

The Agency is together with Swedish Tax Agency (*Skatteverket*) and Swedish Companies Registration Offices (*Bolagsverket*) setting up a web site for recently started undertakings with information on for example the public procurement market (www.verksam.se).

The National Board of Trade (*Kommerskollegium*) is the Swedish governmental agency dealing with foreign trade and trade policy. The Board's main activity is to provide the Swedish government with analyses, recommendations and proposals on any trade policy matter. This work is conducted within three primary domains:

- The Internal Market;
- The Customs Union;
- External Trade policy.

However, the National Board of trade is also a member of the SOLVIT-network where foreign suppliers can turn when experiencing difficulties regarding the internal market and therefore also questions relating to public procurement.

4 THE REVIEW SYSTEM

Scope of the review system, review bodies and procedures

Directive 2007/66 will be implemented into *LOU* and *LUF*. According to the Government Bill, the new rules will enter into force on 15 July 2010.

Same review system as described below applies for procurements below the EU thresholds.

⁹ Company owned by the State (Ministry of Environment), Federation of Swedish Enterprises (*Svenskt Näringsliv*) and Swedish Association of Local Authorities and Regions (*Sveriges kommuner och landsting*).

Review bodies

Administrative courts

- First instance: *Administrative courts of first instance (förvaltningsrätt)*;
- Second instance: *Administrative courts of appeal (kammarrätt)* (leave for appeal is required);
- Last instance: *Supreme Administrative Court (Regeringsrätten)* (leave for appeal is required).

General courts (damages)

- First instance: *District Court (tingsrätt)*;
- Second instance: *Court of Appeal (hovrätt)* (leave for appeal is required);
- Last instance: *Supreme Court (Högsta domstolen)* (leave for appeal is required).

Review procedure

Pre-contractual review

Economic operators¹⁰ may apply for review to Administrative courts. If a contracting authority has breached any provisions of *LOU* or *LUF*, and if the economic operator has suffered or may suffer damage the court shall decide that the procurement shall be recommenced or that the contract may be concluded only after rectification has been made.

A contracting authority which has not complied with the provisions of *LOU* or *LUF* may also be obliged to compensate the damage caused thereby to an economic operator, after an action for damages instituted by the economic operator to General Courts.

An application for review can be considered until the contract is concluded. From 15 July 2010, when Directive 2007/66 is to be implemented into *LOU* and *LUF*, the time limit for seeking review corresponds to the standstill period; 10 or 15 days from the day of sending the contract award decision.

If an economic operator applies for review in the Administrative Court of first instance before the ending of the standstill period, a prolonged standstill period applies automatically. To prevent the contracting authority from concluding a contract during an appeal in Administrative courts of appeal and the Supreme Administrative Court, a formal interim decision from the court is required.

The review body may impose suspension, correction or cancellation of decisions related to the award procedure.

¹⁰ The word supplier is used in *LOU* and *LUF*.

Contractual review

In accordance with Directive 2007/66¹¹, rules on ineffectiveness of a contract will be implemented in *LOU* and *LUF*.¹² Application of ineffectiveness is made by an economic operator to the Administrative Court. If a contract is considered ineffective all performances shall be returned. An economic operator whose contract with the contracting authority has been considered ineffective may be entitled damages by the contracting authority.

Contracts may be considered ineffective when:

- Unlawful award of a contract without prior publication of a contract notice in the Official Journal, or in case of infringement of the public procurement legislation and the economic operator has suffered or may suffer damage thereof;
- Infringement of the standstill period, prolonged standstill period or an interim decision;
- Conclusion of a contract based on a framework agreement in which all terms not are stated.

According to the Government Bill, the rules regarding ineffectiveness of a contract will also apply to contracts below the thresholds.

The Administrative Court may decide that the effects of the contract is maintained if this is required due to overriding reasons relating to a general interest.

The Administrative Court may also impose a fine (*upphandlingsskadeavgift*) on the contracting authority, after an application made by Swedish Competition Authority (*Konkurrensverket*).

This type of application is mandatory when the Administrative Court has decided that the effects of a contract will be maintained even though the contract has been concluded contrary to the rules on the standstill period or the prolonged standstill period, or due to overriding reasons relating to a general interest. *The Swedish Competition Authority* may also apply for imposition of fine when a contracting authority unlawfully has concluded a contract without prior publication of a contract notice.

The fine shall be imposed regardless of whether the infringement was committed intentionally or with negligence. The fine is allocated to the state budget and may not exceed more than 10 percent of the contract value¹³.

The review body may impose a retroactive cancellation of all contractual obligations (*ex tunc*).

¹¹ Article 2 d 1 of the Directive.

¹² In the current review system no contractual review is possible.

¹³ However, the minimum size of the fine is 10 000 SEK and maximum 10 000 000 SEK.



Switzerland

1 NATIONAL RULES AND PROCEDURES ON PUBLIC PROCUREMENT

As Switzerland is not an EU Countries, the Government Procurement Agreement of the WTO (GPA) represents the cornerstone of the Swiss procurement legislation¹.

It has led to a Federal law on procurement passed by Parliament and to an Ordinance from the Federal Council. At the cantonal level, the implementation of international procurement law has been achieved with an Inter-cantonal Agreement binding all 26 cantons and their 3000 communes.

Further liberalisation efforts at international level have been achieved in particular with the European Union realising thereby a liberalisation level comparable to the European Economic Area. Free-trade agreements (FTAs) with Mexico, Chile, GCC and Colombia have in fact resulted in an extension of the geographical scope of the GPA's rules and level of coverage.

Switzerland attaches great importance to the international cooperation in the framework of the "Public Procurement Network (PPN)" as well as to the concluding of Protocols of agreements with supervision authorities in order to enhance cooperation².

The Federal government and the cantons cooperate to apply homogeneously and in a coherent manner procurement law. Presently, their joint efforts focus on the development and running of a common electronic platform for all government procurement notices including those of the large cities. New federal laws on e-commerce and e-signature will reinforce efficiency, transparency and accelerate processes.

General principles

The Swiss legislation on government procurement is based on the following basic principles:

- Transparency of the tendering procedure;
- Strengthening of competition between tenderers;
- Rational use of public funds;

1 In Switzerland, about 20 % of government procurement takes place at the federal, 38 % at the cantonal and 42 % at the cities level for a total of about SFR 36 bn.

2 The Swiss and Italian (ASPC) supervision bodies have extended a Protocol of Agreement on September 18, 2006 covering mainly exchange of information and informal procedures to solve problems before contract awards.

- Equal treatment between tenderers;
- Respect of the provisions referring to workers' protection (i.a safety in the construction sector), and working conditions (i.a. social insurances, vacations, etc.) for procurement in Switzerland;
- Wide access of tender notices through paper and electronic means;
- Efficient remedy system at the federal and cantonal levels ;
- Opening-up of the Swiss market to foreign bidders on a reciprocal basis.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU principles

EU procurement law as well as the procurement legislations of EU-Member States play a significant role for the design of regulations for which the GPA is not self-executing. Recently, the Federal Council has amended the federal Ordinance for public procurement in order to address the issue of Dialogue in procurement procedures at federal level. Since the EU had regulated the instrument of Dialogue, the Directives CE/2004/17 and CE/2004/18 where of help (<http://www.bbl.admin.ch/bkb/00235/00362/00375/00380/index.html?>).

National legislation on procurements below the GPA-Thresholds

At federal and cantonal levels, the procurement procedures are applicable for procurements below the GPA-thresholds and below those fixed in the bilateral Agreement for procurement signed between the EU and Switzerland.

Limited tendering is applicable for purchases with low value. At federal level, this is the case for purchases of goods amounting up to SF 50'000 and of services with a value not exceeding SF 150'000. The procuring entity can directly choice a potential supplier and request him to submit an offer. It can award the tender to that person.

For purchases with a value situated between the said amounts and the international agreed thresholds, a procuring entity may use a "procedure by invitation". According to this procedure, the entity has to invite at least a certain number of potential suppliers located either abroad or in Switzerland to submit a tender. There is also no specific commitment for the publication of a tender.

The procedure of invitation does not require an obligation to publish the procuring entity's invitation to submit tenders. There is also no obligation to publish the award decision. Also with regard to time limits, the law does not impose specific obligations. It is nevertheless in the interest of the procuring entity that the suppliers have enough time to prepare well motivated and well prepared offers.

With regard to the criteria for participation and award, there are at federal_ as well as at cantonal levels no differences in application among procurements over and below the thresholds. Since a procedure of invitation is a procedure ruled by the principles of competition among suppliers, the principle of non discrimination is also applicable when the procurement done through a procedure by invitation.

This application of the principle of non discrimination can only be assured if the criteria of participation and award are known in advance and if the choice among the suppliers is made in accordance with those criteria.

For procurements operated below the thresholds there exists in Switzerland's legal regime at federal level no possibility to challenge an entity's decision. At cantonal level, the possibility to challenge a decision relating to a tender below the threshold exists only for suppliers from Switzerland because the Members of the GPA are not yet prepared to offer a reciprocal treatment to Switzerland.

Procurement of services listed in Annex 4 of Appendix I of the GPA

This positive list provides a symmetric coverage to the GPA-commitments of the EU in the field of services. At federal level the commitments has been implemented through the federal law on procurement and the associated ordinance of the federal Council.

At cantonal and communal levels all services are covered. The reason is that the inter-cantonal procurement law covers all services. In practice suppliers from abroad can participate in additional procurements of services which are not enumerated on the list of the GPA-commitments of Switzerland. There is of course no binding commitment to accept these offers.

3 THE INSTITUTIONAL SYSTEM

Institutions/Structures responsible for public procurement

Federal government level

- Purchasing Commission of the Federal government (BKB)
- The purchasing Commission is a policy and coordination body of the Federal government in the areas of goods and services. Membership is made of the largest purchasing entities of the Federal government and specialised units from various Federal departments.

Its tasks refer mainly to:

- a) the elaboration of the purchasing policy of the Federal government with in particular recommendations on the evolution of government procurement and tendering systems as well as the preparation of legislative projects in the field of government procurement;
- b) the coordination between purchasing entities;
- c) The elaboration of general conditions, standard contracts and tariff scales for services.

It is also useful to note that the purchasing Commission has developed an interactive support tool on internet (www.gimap.ch). The tool helps the purchasers to go through a government procurement procedure and provides i.a., legal information and environmental information on products.

- Coordination of the federal construction and real estate services (KBOB)

The KBOB has, in the area of construction, the same competences as the BKB. These entities have been kept separate because they deal with significantly different fields. Membership is made of the units of the Federal government dealing with most of the construction projects.

Its tasks refer to defending the interests of its Members – owners or administrators of buildings; in charge of constructions – with the aim of improved quality and saved resources. The KBOB contributes mainly to:

- a) Define the purchasing policy at the Federal government, cantons and cities level;
- b) Coordinate and exchange experiences between its Members;
- c) Represent its Members' interest when dealing with the construction industry;
- d) Publish recommendations, tariffs, general conditions, contracts as models;
- e) Work in various areas such as the elaboration of a concept for permanent training, security, inclusion of inflation in constructions' pricing, prevention of corruption and integrity clauses.

The BKB and KBOB exchange of views regularly on topics such as corruption and electronic tendering.

- Government Procurement Commission: Federal State-Cantons (KBBK)

The KBBK was established with the entry into force of the GPA. The KBBK aims at a faithful implementation by Switzerland of its international obligations in the area of government procurement. Its membership is composed of representatives of the cantons and the Federal government involved in government procurement.

Its major tasks refer to:

- a) The elaboration of the Swiss position in international fora;
- b) The promotion of exchanges of views between the Federal government and the cantons;
- c) The elaboration of recommendations on the transposition of international obligations in Swiss law;
- d) The conclusion of agreements with foreign surveillance entities;
- e) The granting of advice and acting as mediator in dispute cases;
- f) The filing of complaints for violation of international obligations to the federal or cantonal competent authorities under specific circumstances.

Cantonal level

The Swiss Conference of the cantonal directors for public works, land management and environmental protection (BUPK) is the inter-cantonal authority in charge of government procurement. The BUPK has the competence to modify the Inter-cantonal Agreement, edict rules on tender procedures, modify thresholds, check the implementation of the inter-cantonal Agreement and adopt rules of procedures and organisation.

The BUPK has elaborated executive directives and non-binding recommendations. The BUPK is also an information and advice organ to the cantons. At the level of each canton, no uniform structure has been established to control administratively government procurement. In general terms, the department or the unit in charge of government procurement follows and coordinates the implementation of the legislation.

Structures responsible for public procurement at central, local and regional level

At federal level, the Federal office for constructions and logistics of the Federal finance Department (FFD) is the main office in charge of civil procurements for goods and for construction services. Armatisuisse of the Federal Defence Department is the main body for acquisitions of goods and services in the fields of defence. According to the provisions of the Ordinance for the organization for procurements at the Federal level the purchase of services is handled on decentred basis by each office belonging to the federal administration.

Main organisations responsible for procurement within the utilities sector

The utilities covered by the GPA and the bilateral agreement Switzerland-UE are purchasing on individual basis.

Supportive bodies

At federal level the procuring entities benefit from the support of a specific desk specialised in questions related to the implementation of regulations in the fields of procurement [*Kompetenzzentrum für das öffentliche Beschaffungswesen (KBB)*]. The KBB provides support in the field of acquisitions of goods and services by procuring entities at federal level. In addition, the various legal divisions integrated in the federal offices offer also support for the implementation of the procurement law and ordinance at federal level (*Armasuisse*, etc.).

Supervision bodies

The Swiss Federal Audit Office is the supreme supervisory organ of the Confederation. It supports Parliament and the Federal Council, is independent and is bound only by the Federal Constitution and the law. The scope of its mandate is clearly laid down in the Federal Auditing Act.

The Swiss Federal Audit Office is a government agency which is assigned to the Federal Department of Finance, but is not, however, subject to its instructions. It is an institution acting as external audit at the federal level.

It aims at verifying a correct implementation of the legislation. It proceeds through special, non-systematic examinations. They cover detailed analyses of specific tenders as well as horizontal aspects of several tenders. It also checks prices for large tenders awarded without competition.

4 THE REVIEW SYSTEM

Scope of the review system

Federal government level

At federal level, appeals related to decisions above the international thresholds can be brought to a Court. If open and selective procedures are concerned, the supplier can address the award decision to the Federal Administrative Court. The appeal has no suspension effect; upon request, suspension may be granted. Decisions of the Federal Administrative Court may be, under certain circumstances, be appealed at the Federal Court.

The Federal Courts can only grant compensation payments corresponding to the tender costs; furthermore, after a contract has been signed, the Federal Courts can only take note of the violation of federal law in case of an evidence of such a violation. As previously evidenced, the review regime does not apply for tenders below the international thresholds (procedure by invitation and limited tendering).

Cantonal level

At cantonal levels, appeals related to decisions above the international thresholds can be brought to a cantonal administrative Court. Suspension may be granted provided the appeal has a solid basis and no major private or public interests are jeopardized.

The contract can only be signed 10 days – time-period for appeal – after the award. Decisions of cantonal administrative Courts can be appealed at the Federal Court. For tenders below the international thresholds the cantons provide review procedures. As mentioned, an award decision can be brought to a cantonal administrative Court.

Review bodies

Federal government level

The first instances is the Federal Administrative Court

The final instance is the Federal Court

Cantonal level

The first instances is a cantonal administrative Court

The final instance is the Federal Court



1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU PRINCIPLES INTO NATIONAL LAW

Turkey is a candidate country for EU membership following the Helsinki European Council of December 1999. Accession negotiations started in October 2005 with the analytical examination of the EU legislation and, on 18 February 2008, the Council adopted a revised Accession Partnership with Turkey.

With “Public Procurement Law” (PPL) No. 4734 and “Public Procurement Contracts Law” No. 4735 (PPCL), which entered into force on January 1, 2003, a modern and sound legal framework in public procurement was established; promoting effective and fair competition.

The PPL was largely, but not fully, compatible with old EC Directives, since it also contained certain features deriving from the UNCITRAL Model Law and International Financial Institutions’ procurement rules and policies. However, although the PPL was largely modelled on the former EU procurement regime procedurally, and applies to contracts for goods, services and works it included a number of deviations from both the old and new Directives (Directives 2004/17/EC and 2004/18/EC), particularly in terms of scope, definitions, threshold values, time limits and methods for calculating the estimated costs.

Regarding procurement undertaken by institutions operating in the energy, water, transportation and postal services sectors (utilities) there is no separate utilities legislation in Turkey. It implies that privately owned utilities are not covered by public procurement rules while publicly owned utilities such as State Economic Enterprises (SEEs) have to follow the general public procurement provisions.

Turkey needs to enact new legislation regulating the award of public and concession contracts in the classical and utilities sectors in compliance with *Acquis* and governed by the fundamental principles of the EU Treaty (transparency, mutual recognition, equal treatment and non-discrimination)

In addition to the correct transposition of the Directives 2004/17/EC and 2004/18/EC into legislation Turkey will ensure that contracts outside the detailed rules of the EC directives, in particular those contracts falling below the EC thresholds and services listed in Annex 2B of Directive 2004/18/EC, are awarded in accordance with the Treaty principles and by rules and procedures that ensure effective and fair competition.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

Public Procurement Law was adopted by the Parliament on 4th January 2002 and published in the Official Gazette on 22nd January 2002. The new Public Procurement Law was revised and further harmonized with the EU *Acquis*.

The philosophy and the principles of the main EC Public Procurement Directives (goods, services, works and remedies) are assimilated in Public Procurement Law 4734. In other words, the new law has been primarily prepared with a view to further enhance the principles of transparency, competition, equality of treatment, impartiality, accountability, economic efficiency, predictability stated in generally accepted international procurement texts and codes such EU treaties and procurement directives.

On the other hand by some Amending Laws, certain articles of the new Public Procurement Law were revised and the scope of the new PPL is extended significantly as to cover procurement by all kinds of public entities and public economic enterprises as well as their specified partnerships, governed by public law, or under public control or using public funds.

Legislation in force

N. of Law	Title of Law/ Regulation	Approval date	O.J. Date and Number	EU Directives
4734	Public Procurement Law	04.01 2002	22.01.2002/ 24648	2004/18EC 2004/17EC 2007/66/EC
4735	Public Procurement Contracts Law	05.01.2002	22.01.2002/ 24648	

There will be the need to transpose the four draft revised Directives (consolidated public sector and utilities, defence and remedies). To this aim, EU Public Procurement directives are planned to be transposed by means of a unique legislative act. The draft law has been prepared, due consultations and feedbacks from EU is under the way.

Regulations in force:

- Regulation on the Implementation of Services Procurement
- Regulation on the Implementation of Works Procurement
- Regulation on the Implementation of Goods Procurement
- Regulation on the Implementation of Consultancy Services
- Regulation on the Implementation of Framework Agreements Procurement
- Regulation on Administrative Applications to Contracting Entities Against Tender Proceeding

The Services, the Goods and the Works Regulations specify the procedures to be followed by public bodies, called “contracting authorities”, when they seek offers for contracts for the provision of services, supplies or works. It should be noted that each of the above Regulations also implement the relevant enforcement rules.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

There is no separate law as regards to procurements below the EC Thresholds. However, in Turkey, there is no specific law or regulation covering below threshold procurement other than certain requirements for contracting authorities. The legislation in force does ensure that below threshold procurement be conducted on the basis of achieving value for money through competition.

EU practices have been taken into consideration as for the publication rules and time limits applicable under these procedures. The award procedures used for procurements below the EC thresholds are as follows:

- Open Procedure
- Negotiated procedure
- Direct Procurement

The advertisement will not include anything that is not specified in the tender documents. It is mandatory to include following information in the advertisements: the name, address, telephone and fax number of the contracting entity; the name, characteristics, type and related quantity of the tender; in case of procurement of goods, the place of delivery, and in case of services and works, the place where such task is to be realized; the commencement and completion dates for the subject of the tender; the procurement procedure to be applied, rules of participation and the required documents and certificates; the criteria to be used in the qualification assessment; indication of whether the tender is limited only to domestic tenderers, and whether there is a price advantage for domestic tenderers; where the tender documents can be seen, and the price to obtain tender documents, the place, date and hour of the tender proceedings, as well as the procedure to be applied; the address where the tenders are to be submitted until the hour specified for opening the tenders; the type of tender and contract; the amount of preliminary guarantee, when applicable, which is at least 2 % to 4% of the tender price, and which is determined by the contracting entity, the validity period of the tenders. The related article of PPL is as follows:

Article 13- (Amendment: 4964/Article 9) Giving all tenderers sufficient time to prepare their tenders.

Procurement with estimated costs equal to or exceeding the threshold values stated in Article 8, shall be advertised by publishing in the Official Gazette, at least once, provided that:

1. Notices of procurements to be conducted by open procedure shall be published not less than forty days prior to deadline for the submission of tenders,
2. Pre-qualification notices of procurements to be conducted by restricted procedure shall be published not less than fourteen days in advance of the deadline for the application to pre-qualification.
3. Notices inviting candidates in a negotiated procedure shall be published not less than twenty-five days prior to the deadline for the submission of tenders.

In procurements to be conducted by restricted procedure whose estimated costs equal to or exceeding the threshold values, it is compulsory to provide a letter of invitation to tender, not less than forty days in advance of the deadline for the submission of tenders to candidates that are qualified as a result of the pre-qualification proceedings.

For the procurements with estimated costs below the threshold values given in Article 8:

- The notices of procurements to be conducted for the procurement of goods or services with an estimated cost of up to 66 thousands Turkish Liras and for the procurement of works with an estimated cost of up to 132 thousands Turkish Liras shall be published at least once in not less than two newspapers being issued where the procurement is to be held and the work is to be performed, minimum seven days in advance of the deadline for the submission of tenders.
- The notices of procurements to be conducted for the procurement of goods or services with an estimated cost between 66 thousands Turkish Liras and 132 thousands Turkish Liras and for the procurement of works with an estimated cost between 132 thousands Turkish Liras and 1 million 102 thousands Turkish Liras shall be published at least once in the Official Gazette and in one of the newspapers being issued where the work is to be performed minimum fourteen days in advance of the deadline for the submission of tenders.
- The notices of procurements conducted for the procurement of goods or services with an estimated cost above 132 thousands Turkish Liras and below the threshold value, and for the procurement of works with an estimated cost above 1 million 102 thousands and below the threshold value shall be published at least once in the Official Gazette and in one of the newspapers being issued where the work is to be performed minimum twenty-one days in advance of the deadline for the submission of tenders.

In procurements to be conducted by restricted procedure with estimated costs below threshold values established in Article 8, it is compulsory that pre-qualification notices be published not less than seven days in advance of the deadline for the application to pre-qualification in accordance with the procedures in paragraph (b), excepting time limit, and that invitation letters (to tender) be sent to the candidates who are qualified as the result of pre-qualification proceedings, prior to tender date according to the time limits in paragraph (b).

PPA is competent to determine which of these procurement notices will be announced furthermore through "Media Announcement Institution" in one of the newspapers delivered nationwide (delivered in Turkey)

There were no newspaper is issued in the place of the procurement to be held, the notices shall be displayed on the notice boards of the related contracting entity, government and municipality buildings and announced by municipal facilities. These proceedings shall be minuted.

Apart from the above-mentioned compulsory announcement of notices, the contracting entities may also advertise the procurement notices by means of other newspapers or publications having national and international circulation, data processing networks or electronic media (internet), depending on the significance and characteristics of the procurement. However, where international announcement of notices is required, the above minimum time limits shall be increased by twelve days."

Regarding the rules for qualitative selection and award criteria, the tenders shall be submitted to the contracting entity until the time stated for submission of tenders in the tender documents. It shall be checked if the documents of the tenderers are complete or incomplete, and whether the tender letter and the preliminary guarantee are in conformity with the relevant procedures. Tenderers with incomplete documents or improper tender letters and tender securities shall be recorded in the minutes. The tenderers and their tender prices shall be announced.

Upon the request of tender commission, the contracting entity may ask the tenderers to clarify their tenders in writing on the unclear aspects of the tender, in order to use in the examination, evaluation and comparison of tenders. However, this clarification shall not be required and made with the intension of making change in the tender price, or converting any ineligible tender according the conditions in the tender documents to an eligible one.

In evaluating the tenders, first of all, the tenders of the tenderers whose documents are established to be incomplete or whose tenders or tender securities are established to be not in compliance with the requirements. Following this pre-evaluation and proceedings, the tender of tenderers with complete and appropriate documents and appropriate tender letters and preliminary guarantees shall be held subject to a detailed evaluation. At this stage, the tenders shall be examined for their conformity with the qualification criteria determining the capacity of the tenderers to perform the contract, which is the subject of the tender proceeding, as well as with the conditions, set forth in the tender documents. The tenders of tenderers that are found ineligible shall be disqualified.

The tender commission shall evaluate the abnormally low tenders taking into consideration the written explanations documented on the following aspects:

- a) Economic nature of the manufacturing process, the service provided and the method of works;
- b) Selected technical solutions and advantageous conditions to be utilized by the tenderer in supply of the goods and services or fulfilment of the works;
- c) The originality of the goods, services or works proposed.

As a result of this evaluation, the tenders of the tenderers whose written explanations are found insufficient or who fail to make a written explanation shall be rejected. Rejection of all tenders and cancellation of the tender proceedings

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

There is no separate category, specific rules and procedures for procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC.

3 THE INSTITUTIONAL SYSTEM

Structures responsible for public procurement at central, local and regional level

Ministries, their annexed and affiliated establishments with central, regional and provincial organizations, municipalities, state economic enterprises, social security establishments, entities of legal personalities assigned with public duties.

In principle, every contracting entity can procure its own needs. In addition to that, "Devlet Malzeme Ofisi" (DMO, State Supply Office) as a central procuring agency procures certain goods and services specified in its legislation on behalf of public bodies for their own needs. The sole responsibility of regulation in the field of public procurement belongs to Public Procurement Authority, which also guides the implementation and provides training. Also see 5.2 and 6.

DMO is a state economic establishment affiliated with the Ministry of Finance and is composed of a central (General Directorate) and 7 regional organization. It is competent for procurement of certain goods and services specified in its legislation in behalf of public bodies.

Main organisations responsible for procurement within the utilities sector

The Public Procurement Law 4734 does not cover entities operating in the utilities sector, which has not been totally liberated in Turkey. In addition, the Law 4734 provides exception for the state economic enterprises, some of which may operate in the utilities sector, in procuring goods and services related to their own production of goods and services. Therefore, there is no legislative framework that guides procurement of the entities operating in the utilities sector. However, in accordance with the National Strategy on Public Procurement gathered for accession negotiations with EU, preparation of a public procurement draft law covering the utilities sector as well is still on progress.

Supervision bodies

Public Procurement Authority, administratively and financially autonomous body, established by the Law 4734 and composed of Public Procurement Board, Presidency and service units.

The PPA evaluates and concludes complaints, prepares, develops and guides the implementation of the legislation, provides training, to gather information and to compile and publish statistics related to procurements contracts, keeps the records of those prohibited from participating in tenders, carries out research and development activities, publishes Electronic Bulletin of Public Procurement by which tender notices are announced.

Public procurements are also to be controlled by the Court of Accounts from the point of the public expenditure. In addition, in conformity with the principle of the supremacy of law, courts provide judicial review.

Main central purchasing bodies

DMO, "Devlet Malzeme Ofis", as described above.

4 THE REVIEW SYSTEM

Scope of the review system and review bodies

There is not any different review system below the EC thresholds. Conditional on the reply of the contracting entity to the appeal, Public Procurement Authority is the competent review body before judicial review.

Review procedure

Pre-contractual review

As far as applications satisfy the procedural requirements, pre-contractual review is confined to the claims of the applicant and whether there has been an infringement of equal treatment principle.

In response to an appeal, the review body may either order the termination of the procurement proceedings, or decide the corrective action, or reject the application.

Contractual review

As for contractual review, on the assent of the contracting entity, disputes deriving from the implementation of the works contract may be appealed to “*High Technical Board*” (*Yüksek Fen Kurulu*) of the Ministry of Public Works and Settlement. Otherwise administrative courts shall be appealed by the sides.

As far as the *High Technical Board* is concerned, review procedure launches only on the assent of the contracting entity and is confined by the cause of the dispute.

Decisions of *High Technical Board* are non-binding. In the case of direct appeal to the administrative courts, they generally demand technical opinion from the *High Technical Board*.



United Kingdom

1 NATIONAL RULES AND PROCEDURES FOR THE TRANSPOSITION OF EU LAW INTO NATIONAL LAW

The United Kingdom acceded into the European Union when it passed the European Communities Act 1972 in Parliament. This Act provides for incorporation of European Community law into the domestic law of the UK.

OGC is responsible for coordinating the transposition of EU Directives on Public Procurement into UK law. The Office of Government Commerce (OGC) is established to help Government deliver best value from its spending. The OGC is responsible for the Government's procurement policy and for the legislative framework.

The Procurement Directives are implemented by secondary legislation. The lawyers from the Treasury Solicitor's Department who are based at the OGC are responsible for drafting legislation on direction from OGC.

OGC leads transposition for England and for the devolved administrations in Wales and Northern Ireland. Scotland, which has its own Parliament, implements through its own regulations made by the Scottish Parliament. OGC and the Devolved Scottish Administration work closely to ensure alignment in broad terms.

When transposing a Directive, a consultation document setting out the issue under consideration and the associated proposed initiative is published. Responses are invited from interested stakeholders with a deadline set for submission of responses. Stakeholders are consulted on two separate occasions. The results are published on the OGC's website (and the Devolved Scottish Administrations, in the case of its regulations). Responses are then assimilated and the proposed policy position revised as appropriate. A regulatory impact assessment may be carried out if appropriate.

Following the second consultation, the draft statutory instrument (SI) is finalised and laid before Parliament in advance of the implementation deadline, whereupon it becomes law.

The entire process is to be conducted in accordance with the Code of Practice on Consultation issued by the Better Regulation Executive in the Department of Business, Innovation and Skills.

2 THE LEGAL SYSTEM

National legislation adopted to transpose EU law

Public procurement in the UK is governed by the EU Treaty and the EU Procurement Directives and UK Procurement Regulations that implement the Directives. This legal framework helps to ensure that public procurement is conducted in a fair and open manner.

The Directives have been implemented into national law in the UK by the following Regulations. Public procurement in the United Kingdom is regulated by the Public Contracts Regulations 2006 (Statutory instrument 5/2006 implementing EC Directives 2004/18 and 89/665) and the Utilities Contracts Regulations 2006 (Statutory Instrument 6/2006 implementing EC Directives 2004/17 and 92/13).

The aforementioned regulations are applicable to England, Wales and Northern Ireland. In Scotland, the Devolved Scottish Administration has issued two similar regulations (Scottish Statutory Instruments 1/2006 and 2/2006).

The remedies directive has been implemented by OGC and by the Devolved Scottish Administration by the EU deadline of 20 December 2009. Regulations and guidance have been produced. Remedies are being implemented by amendments to the Statutory Instruments, both for the Public Contracts and Utilities Contracts Regulations.

Regulations are currently being prepared to implement the Defence and Security Directive.

National legislation on procurement not covered by the EU directives

National legislation on procurements below the EU Thresholds

In the UK there is no specific law or regulation covering below threshold procurement other than certain requirements for local authorities under the Local Government Act and general EC principles. However, the UK approach does ensure that below threshold procurement is covered by Government procurement policy, which provides that Government purchasing should be conducted on the basis of achieving value for money through competition. Public procurement policy encourages the principles of openness, non-discrimination, and transparency to be applied to all procurement exercises. The Scottish regulations implementing the EU directives also make it explicit that EU Treaty principles apply even where the detailed procedural rules in the regulations do not.

Procurement of services in annex II B of Directives 2004/18/EC and 2004/17/EC

The services that fall within Part B are listed in schedule 3 of the regulations.

The Regulations do not require prior advertising of Part B services or any form of competitive tendering to be carried out for Part B services, they are still caught by general Treaty obligations such as transparency, equal treatment and non discrimination.

3 THE INSTITUTIONAL SYSTEM

Institutions/Structures responsible for public procurement

The Office of Government Commerce (OGC) is an independent office of HM Treasury, established to help Government deliver best value from its spending. The OGC is responsible for the Government's procurement policy and for the legislative framework.

OGC works with central Government departments and other public sector organisations to ensure the achievement of six key goals:

- Delivery of value for money from third party spend;
- Delivery of projects to time, quality and cost, realising benefits;
- Getting the best from the Government's £30bn estate;
- Improving the sustainability of the Government estate and operations, including reducing carbon emissions by 12.5% by 2010-11, through stronger performance management and guidance;
- Helping achieve delivery of further Government policy goals, including innovation, equality, and support for small and medium enterprises (SMEs);
- Driving forward the improvement of central Government capability in procurement, project and programme management, and estates management through the development of people skills, processes and tools.

The OGC represents the UK in the UE Advisory Committee and the PPN. OGC provides the UK delegate at international meetings, such as UNCITRAL and the OECD, and attends meetings as a member of the GPA in Geneva. The devolved administrations, especially Scotland (which has its own Parliament) may accompany OGC representatives as observers.

Buying Solutions (BS) is the national procurement partner for UK public services. BS is an Executive Agency of the Office of Government Commerce and acts as a central purchasing body.

The primary role of Buying Solutions is to maximise the value for money obtained by Government departments and other public bodies through the procurement and supply of goods and services. Buying Solutions is a Trading Fund which is run on commercial lines, with responsibility for generating income to cover its costs and make a return to the Treasury.

Structures responsible for public procurement at central, local and regional level

The United Kingdom has a semi-centralised public procurement structure with the OGC as the key institution. Other bodies that play some part in the interpretation of procurement policy at the regional level which have a statutory basis are:

- The Improvement and Development Agency for Local Government;
- The Regional Centres of Excellence for Procurement to which regional groups of local authorities contribute;
- The devolved governments of Scotland, Northern Ireland and Wales have their own institutions and arrangements for public procurement.

Main organisations responsible for procurement within the utilities sector

UK utilities mainly operate as privatised bodies and there is significant competition in the utilities sector. Regulatory structures have been created to oversee the operation of these sectors.

Supervision bodies

The primary means for a supplier to seek redress for breaches is in the courts.

OGC handles procurement infraction cases which are raised by the European Commission. OGC's Procurement Policy Division works closely with the OGC Legal Team to address these. OGC takes the lead on improving and regulating public procurement and has set up a Supplier Feedback Service to monitor and resolve issues.

The role of the Supplier Feedback Service is to:

- Provide a clear, structured and direct route for suppliers to raise concerns about public procurement practice when attempts at resolving issues with a contracting authority have failed.
- Provide reasoned feedback to enquirers on their concerns.
- Help OGC identify areas of poor procurement practice so it can work with the contracting authority to put them right, and help ensure similar cases do not arise in future.
- Take action to reduce the likelihood of similar issues arising in other authorities

Another body that scrutinises public procurement is the National Audit Office. This body audits central government accounts and reports to Parliament on the value for money achieved by government projects and programmes. The Audit Commission is responsible for auditing the accounts of local authorities

Main central purchasing bodies

Buying Solutions (BS) is the largest of over 40 Professional Buying Organisations (PBO) in the wider public sector. BS delivers procurement solutions for nationally sourced commodity goods and services to customers in both central civil government and the wider public sector. It however has no formal 'mandate' and therefore has to 'earn' its customers.

Supportive bodies

The OGC website is the main source for guidance and tools on both EU and domestic procurement policy. The Policy and Standards Framework on this website is an on-line portal that guides procurement professionals through the key principles and processes of public procurement, helping them understand "what to do" and "how to do it". Devolved Governments also maintain similar websites in relation to their countries..

4 THE REVIEW SYSTEM

Scope of the review system

The United Kingdom's review of procurement decisions is the responsibility of the national courts system, which is overseen by the Ministry of Justice but is otherwise separate from the executive functions of the state apparatus.

A bidder who considers that he or she has suffered or is likely to suffer loss as a consequence of a breach of the Public Contracts Regulations or utilities Contracts Regulations has the right to seek redress via the national court system.

Review bodies

Legal actions are brought in the High Court in England, Wales and Northern Ireland, in the Court of Session or Sheriff Court in Scotland. The claimant will serve a claim on the contracting authority and the case will be processed in accordance with the rules for the civil courts set out in the Civil Procedure Act 1997.

In the event an action brought by a claimant is unsuccessful and the claimant believes the decision to be legally flawed, he or she may bring an appeal in the Civil Division of the Court of Appeal. Procurement cases in the last instance are heard by the Supreme Court of the United Kingdom, subject to permission to appeal being granted.

Review procedure

Pre-contractual review

The Public Contracts and Utilities Regulations 2006 include the new provisions on remedies designed to improve the effectiveness of review procedures concerning the award of public contract. These UK Regulations have been amended to take account of the new Public Procurement Remedies Directives 2007/66/EC.

The new provision on remedies requires public authorities to wait a certain number of days, known as a 'standstill period', before concluding a public contract. This gives unsuccessful bidders the opportunity to start an effective review procedure at a time when unfair decisions can still be corrected. If this standstill period has not been respected, the national courts under certain conditions will set aside a signed contract, by rendering the contract "ineffective".

The amending Regulations make some procedural changes to the requirements of the "standstill period", which is the time between the notification of a contract award decision and the point at which the contract is entered into. These include:

- The reasons for the award decision must now be released automatically to tenderers and candidates at the start of standstill, rather than upon request;
- The duration of the standstill period must now take into account different means of communication, allowing more time for slower means;
- A precise statement of the standstill period should be included within the standstill notice;
- And the standstill period must now end on a working day.

In pre-contractual circumstances the review body:

- Set-aside decisions taken unlawfully
- Award damages
- Order documents to be amended

Contractual review

A new penalty of ineffectiveness has been introduced by the new Regulations, which enable the Courts to prospectively strike down contracts that have been awarded in serious breach of the procurement rules, for example where there has been a breach of OJEU advertising obligations. Two other new penalties have also been introduced: civil financial penalties and contract shortening. National courts are able to render these contracts ineffective if they have been illegally awarded without any transparency and prior competitive tendering. In these cases the contract will need to be tendered again, this time according to the appropriate rules.

In cases where a contract has been entered into the Court now have enhanced powers to:

- Order the (prospective) ineffectiveness of a contract where serious rule breaches have occurred. This will be coupled with a fine on the contracting authority.
- Provide for alternative penalties (either contract shortening, fines, or both) instead of ineffectiveness, in certain situations where ineffectiveness is appropriate.

