

Public Procurement 2020

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Public Procurement 2020

Contributing editor**Totis Kotsonis****Pinsent Masons**

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Public Procurement*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Greece, Israel, Mexico, Nigeria and Romania.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Totis Kotsonis of Pinsent Masons, for his continued assistance with this volume.



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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

The European Union has established a complex body of laws regulating the acquisition of all necessary goods, works, and services by contracting authorities in its member states, including primary legislation, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU), and, in specific cases, secondary legislation, namely a number of directives.

EU procurement law has been transposed into Maltese law. This consists mainly of five key Directives:

- the Public Sector Directive (Directive 2014/24);
- the Utilities Directive (Directive 2014/25);
- the Concessions Directive (Directive 2014/23);
- the Remedies Directive (Directive 1989/665 as amended); and
- the Utilities Remedies Directive (Directive 1992/13 as amended).

The principal piece of legislation that formed Malta's legal framework for public procurement is the Public Finance Management Act (Chapter 601 of the Laws of Malta). The framework was revised on 28 October 2016 to transpose the above-mentioned 2014 EU Directives on public procurement. The key applicable regulations are the following:

- Public Procurement Regulations of 2016 (Subsidiary Legislation 601.03) (the Public Sector Regulations);
- Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations of 2016 (Subsidiary Legislation 174.05) (the Utilities Regulations);
- Concession Contracts Regulations of 2016 (Subsidiary Legislation 601.09) (the Concessions Regulations);
- Public Procurement of Contracting Authorities or Entities in the fields of Defence and Security Regulations (Subsidiary Legislation 601.07);
- Emergency Procurement Regulations of 2016 (Subsidiary Legislation 601.08) (the Emergency Regulations);
- Electronic Invoicing in Public Procurement Regulations (Subsidiary Legislation 601.10); and
- Procurement of Property Regulations.

Collectively, these pieces of legislation are known as the Malta Regulations.

The Director of Contracts, Malta's central government authority and regulator for public procurement, also issued the General Rules Governing Tendering. These are usually included in the procurement documents published by contracting authorities and bidders must abide by them. The Rules are amended periodically; the latest version is 4, which was published in January 2019.

The Director of Contracts has also issued rules entitled the General Rules Governing Dynamic Purchasing Systems, which specifically apply to that procurement procedure. These rules are also periodically amended; the latest version is 1.2, which was published in March 2020.

Sector-specific legislation

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

There are specific regulations on the utilities sector, concession contracts and defence and security.

Prior to the coming into force of the Concession Contracts Regulations of 2016, two specific regulations were enacted that provided for a remedies procedure for competitive tender processes issued for services or works concessions, namely the Procurement (Health Service Concessions) Review Board Regulations of 2015 (Subsidiary Legislation 497.13) – to our knowledge, these were applied to a specific competitive tender process for a health-related service concession – and the Concessions Review Board Regulations of 2015 (Subsidiary Legislation 497.15), which apply to any works or services concessions issued by the government of Malta or any contracting authority on an opt-in basis.

International legislation

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

The Malta Regulations are applicable when a public contract falls within their scope, whether by way of subject matter or value threshold, even if the contract is not of cross-border interest.

However, there are instances where a public contract – in particular, one for the purchase of works, services and supplies – that does not fall within the scope of any of the Malta Regulations may still be classed as a public contract to attract interest from economic operators based outside Malta, and therefore, the provisions of the TEU and TFEU, as interpreted by the European Court of Justice, will apply. This means that a procurement process is required that observes the general principles of EU public procurement law.

Proposed amendments

4 | Are there proposals to amend the legislation?

The national legislative framework was overhauled on 28 October 2016, with the introduction of the Malta Regulations to transpose the 2014 EU Directives. The Malta Regulations have been amended a few times since then.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities are subject to procurement regulation?

The Public Sector Regulations list the contracting authorities subject to those regulations in Schedule 1, but this list is not meant to be exhaustive. Several limited liability companies that are wholly or partially owned by the government are on this list, such as Enemalta plc, Gozo Channel (Operations) Ltd and WasteServ Malta Ltd.

In a recent judgment delivered on 11 March 2019, *Virtu Holdings Limited v Gozo Channel (Operations) Limited et*, the Court of Appeal held that if any person is indicated as a 'contracting authority' on the list in Schedule 1, then it is the legislator's intention to have that person be deemed a contracting authority irrespective of whether it falls within the substantive definition of a contracting authority in terms of the Malta Regulations (which mirrors that in the Public Sector Directive, the Utilities Directive, the Concessions Directive, the Remedies Directive and the Utilities Remedies Directive (the 2014 EU Directives)).

In *Helicopter Services Malta v Malta Air Travel Ltd*, which was decided on 30 July 2019, the Public Contracts Review Board (PCRB) ruled that a wholly government-owned limited liability company was not a contracting authority on the basis that it was not included on the list in Schedule 1, and in any case, it had an industrial or commercial character.

Contract value

6 | Are contracts under a certain value outside the scope of procurement regulation? What are these threshold values?

The Malta Regulations apply irrespective of the estimated value of the public contract to be awarded, but naturally different procurement processes and requirements may apply, depending on the estimated value.

A public contract with an estimated value of up to €139,000, in the case of the Public Sector Regulations, and up to €428,000, in the case of the Utilities Regulations, is specifically regulated by a relatively light-touch regime loosely referred to as 'departmental tender procedures', which varies from open or restricted calls for tenders, calls for quotes and direct orders that are managed by the contracting authority itself. A contracting authority cannot use the following forms of procurement department tenders: competitive dialogue, competitive procedure with negotiation, dynamic purchase systems, electronic auctions and negotiated procedure without prior publication.

Once the value of a public contract exceeds €139,000, in the case of the Public Sector Regulations, the procurement process is either managed by the Ministerial Procurement Unit, depending on the Ministry that is in charge of the relevant contracting authority, for anything up to €250,000, or by the Director of Contracts when it exceeds that amount. The Director of Contracts generally manages the procurement process in the case of the Utilities Regulations where the value of a public contract exceeds €428,000. The public contract can only be awarded through one of the procurement procedures stipulated by law. The preferred option is the open procedure; however, there are exceptions – specific contracting authorities identified by law may manage the procurement process on their own irrespective of the value of the public contract to be awarded.

According to the Public Sector Regulations, if the estimated value of the public contract exceeds €5.35 million for works, €139,000 for supplies and services and €750,000 for services for social and other specific services (the public sector value thresholds), then other

requirements will apply in terms of publications and remedies, among other things.

According to the Utilities Regulations, if the estimated value of the public contract exceeds €5.35 million for works, €428,000 for supplies and services and €1 million for services for social and other specific services (the utilities value thresholds), then other requirements will apply in terms of publications and remedies, among other things.

The expeditious award procedure under the Emergency Regulations can only be resorted to if the value of the public contract for works, services or supplies is less than €135,000.

The Concessions Regulations apply irrespective of the value of the concessions contract, but if the estimated value is above €5.35 million, several procedural guarantees apply, mainly, prior information concession notices and contract award notices.

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new contract award procedure?

Contractual modifications to public contracts are allowed, subject to restrictions. The principle is that any substantial modifications that alter the overall nature of the public contract must not be consented to by the contracting authority and a new procurement process should be pursued. The Malta Regulations contain detailed rules (as transposed from the 2014 EU Directives) as to when contractual modifications are allowed without the need to pursue a new procurement process. These rules vary depending on the value of the public contract.

Public Sector Regulations

If the value of the public contract exceeds the public sector value thresholds, then a contracting authority can consent to a contract modification only with the prior approval of the Director of Contracts and in any of the following cases:

- where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options (these clauses shall state the scope and nature of possible modifications or options, as well as the conditions under which they may be used, and shall not provide for modifications or options that would alter the overall nature of the public contract);
- for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor (1) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, and (2) would cause significant inconvenience or substantial duplication of costs for the contracting authority, provided that any increase in price does not exceed 50 per cent of the value of the original contract and that notice of the modification is published in the Official Journal of the European Union (OJEU);
- where all the following conditions are fulfilled:
 - the need for modification has been brought about by circumstances that a diligent contracting authority could not foresee;
 - the modification does not alter the overall nature of the contract;
 - any increase in price is not higher than 50 per cent of the value of the original public contract; and
 - notice of the modification is published in the OJEU;
- where a new contractor replaces the contractor to which the contracting authority had initially awarded the contract because of either:

- an unequivocal review clause or option in conformity with the first paragraph;
- universal or partial succession into the position of the initial contractor, following a corporate restructuring (such as a take-over, a merger, an acquisition or insolvency) of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the Public Sector Regulations; or
- if the contracting authority itself assumes the main contractor's obligations towards its subcontractors; and
- where the modification, irrespective of its value, is not substantial; that is, if it renders the public contract materially different in character from the contract initially concluded.

Any contractual modification that is less than 10 per cent (for a service or supply contract) or 15 per cent (for a works contract), as applicable, of the initial contract value is not substantial, and therefore, the public contract may be modified without the Director of Contracts' approval. The law indicates four situations (the first four points above) that automatically presume that there is a substantial modification, and therefore, a new procurement procedure is required.

The law now establishes a specific procedure regulating the Director of Contracts' evaluation of requests for modification by contracting authorities.

Any contractual modification that is agreed to without the approval of the Director of Contracts or against the Director of Contracts' refusal is illegal and any compensation paid to the economic operator may be clawed back. These illegal contractual modifications (including where the Director of Contracts should not have given his or her approval) may be challenged by other interested parties.

Utilities Regulations

The same grounds and prior approval procedure apply, except that all public contracts within its scope are affected, irrespective of the contract value.

Emergency Regulations

Any public contract awarded through these provisions cannot be modified, and if the contract cannot be executed without modification then the public contract is cancelled, and a new award procedure initiated.

- 8 | Has case law clarified the extent to which it is permissible to amend a concluded contract without a new contract award procedure?

There has been no Maltese jurisprudence on the modification of public contracts, so far. Based on our experience, economic operators do not usually have appetite to spend time, energy and cost to challenge such changes, but there are two pending cases before the Malta courts on this matter. There have been several notable judgments delivered by the European Court of Justice on modification of contracts and the 2014 EU Directives have amended the provisions on modification of contracts to align the law with those judgments.

Privatisation

- 9 | In what circumstances do privatisations require the carrying out of a contract award procedure?

The Malta Regulations do not regulate privatisations specifically. The assessment of the proposed privatisation must be focused on the substance of the structure and mechanics of the deal, rather than its form. A competitive award procedure is statutorily required if the

privatisation entails the purchase of works, supplies or services from an economic operator or the grant of a concession to an economic operator (in particular, where there is transfer of a function).

If the privatisation is purely a disposal of government-owned assets against consideration, then it is likely that the Malta Regulations would not apply. Even if a competitive award process is not strictly required by the Malta Regulations, the market economy operator principle under EU state aid law and the general principles of non-discrimination and equal treatment that emerge from the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) may be satisfied by a competitive award process, as long as it is open, non-discriminatory and transparent.

With a few exceptions, the government of Malta has consistently launched and managed competitive award processes for privatisations. This is generally the task of the Privatisation Unit, which was set up in June 2000.

Public-private partnership

- 10 | In which circumstances does the setting up of a public-private partnership (PPP) require the carrying out of a contract award procedure?

The Malta Regulations do not regulate PPPs specifically. The assessment of the proposed PPP must be focused on the substance of the structure and mechanics of the deal, rather than its form. A competitive award procedure is statutorily required if the PPP entails the purchase of works, supplies or services from an economic operator or the grant of a concession to an economic operator.

Even if a competitive award process is not strictly required by the Malta Regulations, the market economy operator principle under EU state aid law and the general principles of non-discrimination and equal treatment that emerge from the TEU and TFEU may be satisfied by a competitive award process, as long as it is open, non-discriminatory and transparent.

The government of Malta has, in the past decade, organised competitive award processes for PPPs. In 2013, Projects Malta Ltd, a specific private limited liability company fully owned by the government of Malta, was set up to coordinate and facilitate PPPs.

ADVERTISEMENT AND SELECTION

Publications

- 11 | In which publications are calls for the expression of interest in regulated contract awards advertised?

The publication requirements depend on the value and nature of the public contract. The key notices possible under the Malta Regulations are the following:

- prior information notice: this is completely voluntary and generally indicates a planned procurement by contracting authorities;
- contract notice: this is mandatory for all procurement process for public contracts with an estimated value exceeding public sector value thresholds and the utilities value thresholds, except for the negotiated procedure without a prior call;
- contract award notice: this is also mandatory and contains the results of the public procurement, and must be published within 30 days of the decision to award or conclude the procurement process; and
- voluntary ex ante transparency notice: this may be resorted to within the context of the negotiated procedure without a prior call.

These notices are subject to a prescribed form issued by the Publications Office of the European Union and must contain a minimum standard of information as per the Malta Regulations.

Public Sector Regulations

If the estimated value of the public contract exceeds the public sector value thresholds, then: (1) the notices and procurement documents are uploaded to eTenders, the government of Malta's e-procurement platform; and (2) the notices are to be submitted to the Publications Office of the European Union for publication on the Tenders Electronic Daily (TED) website. Where the estimated value of the public contract does not exceed these thresholds, the contracting authority may still elect to upload notice of the procurement procedure and all procurement documents on eTenders.

Utilities Regulations

If the estimated value of the public contract exceeds the utilities value thresholds, then: (1) the notices and procurement documents are uploaded to eTenders; and (2) the notices are to be submitted for publication on TED. Where the estimated value of the public contract does not exceed these thresholds, the contracting authority may still elect to upload notice of the procurement procedure and all procurement documents on eTenders.

Participation criteria

12 | Are there any limits on the ability of contracting authorities to determine the basis on which to assess whether an interested party is qualified to participate in a contract award procedure?

In principle, a contracting authority has a wide margin of discretion to set the selection criteria and administrative requirements for the eligibility of an economic operator to participate in a procurement process.

However, these criteria and requirements must be in line with specific limitations set in the Malta Regulations and respect the general principles of public procurement law. In particular, the administrative requirements should ideally be objective, rather than subjective, and must guarantee equal treatment and fair competition.

There are three broad categories of permitted selection criteria: the suitability of a bidder to pursue the professional activity; the economic operators' economic and financial standing; and its technical and professional ability.

The Public Contracts Review Board (PCRB) and the Court of Appeal have had the opportunity over the past few years to test whether the selection and eligibility criteria are compliant with the law. A notable case is *X Clean Limited v St Vincent de Paul et* decided by the Court of Appeal on 12 July 2019, which turned down a prospective bidder's challenge against the requirement of having successfully performed contracts of service valued at €12 million spread over three years. The Court of Appeal held that this selection criterion was valid and proportionate with respect to the prospective public contract.

The contracting authority is also obliged to exclude an economic operator that is subject to a mandatory ground of exclusion – in particular, a conviction of the economic operator for participation in a criminal organisation, corruption, fraud or money laundering.

The contracting authority is also obliged to exclude an economic operator that the Director of Contracts has ordered to be blacklisted (ie, debarred from taking part in public procurement operations). An economic operator that is subject to a mandatory ground of exclusion or a blacklisting decision may undergo 'self-cleaning' to be able to participate in procurement processes.

13 | Is it possible to limit the number of bidders that can participate in a contract award procedure?

The number of potential economic operators invited to participate in a procurement process can be limited only when the following procedures are used:

- a restricted procedure;
- a competitive procedure with negotiation;
- an innovation partnership; and
- a competitive dialogue.

This limitation is subordinate to the general principle of promoting genuine competition.

A contracting authority that wishes to award a public contract governed by the Public Sector Regulations that has an estimated value that exceeds the public sector value thresholds, may limit the number of candidates when opting for restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships as per selection criteria, but at least five (restricted procedure) or three (competitive procedure with negotiation, competitive dialogue procedure and innovation partnership) candidates must have qualified. This is not an absolute rule, in fact, the contracting authority may proceed with the procurement process even if the number of qualified candidates is below the statutory minimum.

Moreover, the contracting authority may, in certain prescribed and exceptional circumstances, opt for the negotiated procedure without prior call with one or a limited number of economic operators.

If a public contract is governed by the Utilities Regulations, then the contracting authority may limit the number of candidates, but there is no minimum number of qualified candidates that is required. Again, the principle of promoting genuine competition is the guiding principle.

Regaining status following exclusion

14 | How can a bidder that could be excluded from a contract award procedure because of past irregularities regain the status of a suitable and reliable bidder?

An economic operator may undergo 'self-cleaning' to remove the effects of a ground for exclusion. The economic operator can achieve this by showing, in its bid or offer, that it took 'sufficient measures to demonstrate its reliability'.

This is presumed where the economic operator proves that:

1. it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
2. it has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
3. it has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators indicated in point (3) shall be evaluated by the contracting authority considering the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are insufficient, the contracting authority shall send the economic operator a statement of the reasons for that decision.

The economic operator shall not be entitled to make use of the possibility to remove the exclusion as provided in this regulation if the period of exclusion from participating in procurement award procedures has been established by a final judgment.

The 'self-cleaning' procedure applies to the mandatory grounds of exclusion but may also be used as a defence before the Commercial Sanctions Tribunal, if an economic operator appeals a blacklisting decision of the Director of Contracts. The Commercial Sanctions Tribunal is an independent review board set up in 2016 to hear applications from contracting authorities to blacklist economic operators.

THE PROCUREMENT PROCEDURES

Fundamental principles

- 15 | Does the relevant legislation require compliance with certain fundamental principles when designing and carrying out a contract award procedure?

The Malta Regulations impose an express statutory obligation on contracting authorities to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. The design of procurements should not be made with the intention of narrowing competition either. The principle of self-limitation is seen as a corollary to the principles of equal treatment and transparency and is given importance during evaluation, such that the evaluation committee adheres to the terms of the procurement document.

In public procurement relating to healthcare, the Public Contracts Review Board (PCRB) has also emphasised that due care must be given to the patients' safety and well-being in the drafting of the procurement document and in the evaluation of bids.

Contracting authorities remain bound by the general principles of EU public procurement law where the public contract is of a certain cross-border interest.

Independence and impartiality

- 16 | Does the relevant legislation or case law require that a contracting authority is independent and impartial?

The general principle of equal treatment of economic operators necessarily requires that a contracting authority must act independently and impartially during the pre-procurement stage, throughout that procurement process up to the award and performance of the public contract.

Conflicts of interest

- 17 | Does the legislation address expressly the issue of conflicts of interest?

A contracting authority must exclude an economic operator in case of a conflict of interest.

A conflict of interest is widely defined to capture any person acting on behalf of the contracting authority, who is involved in the conduct of the procurement procedure or who may influence the outcome of that procedure, and has a financial, economic or other personal interest that might be perceived to compromise his or her impartiality and independence in the context of the procurement procedure.

The contracting authority is vested with a wide margin of discretion if it is of the view that the exclusion can be avoided by imposing 'other, less intrusive measures'.

Bidder involvement in preparation

- 18 | Are there any restrictions on the ability of a bidder to be involved in the preparation of a contract award procedure?

A contracting authority must exclude an economic operator that has been involved in the preparation of the procurement procedure. The contracting authority is vested with a wide margin of discretion if it is of the view that the exclusion can be avoided by imposing 'other, less intrusive measures'.

Procedure

- 19 | Which procurement procedure is primarily used for the award of regulated contracts?

This varies from sector to sector and according to a contract's value, but the open procedure appears to be preferred.

Separate bids in one procedure

- 20 | Can related bidders submit separate bids in the same procurement procedure?

This very much depends on the terms of procurement documents. The Malta Regulations do not provide specific requirements on such an option other than the equal treatment of bidders. The General Rules Governing Tenders do allow an economic operator to submit multiple tender offers, but there are restrictions to avoid conflicts of interest. An economic operator may not submit an offer in its individual capacity and also as a member of a joint venture or consortium.

Negotiations with bidders

- 21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

There are a few procurement procedures that allow a degree of negotiation with bidders, such as the competitive dialogue and the competitive procedure with negotiation.

The use of these procedures generally requires the approval of the Director of Contracts, which may be granted if any of the following circumstances exist:

- the needs of the contracting authority cannot be met without the adaptation of readily available solutions;
- the works, services or supplies require designing or innovative solutions;
- the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up of the circumstances or the risks attached to them;
- the technical specifications cannot be established with sufficient precision by the contracting authority; and
- only irregular or unacceptable tenders were submitted in response to an open or a restricted procedure.

While the specific procedure is flexible, the Malta Regulations require that the contracting authority establish, at the outset, a minimum framework for the procedure that is known to all participating bidders to guarantee equal treatment throughout the procurement procedure. There may be subsequent stages where bidders are disqualified and negotiations or dialogue with remaining bidders intensify, until there is the submission of the final offer for adjudication.

- 22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The competitive procedure with negotiation appears to be regularly used within the utilities sector, and also for concessions and complex procurement.

Framework agreements

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

A framework agreement may be concluded with one or several economic operators that have successfully participated in the call for competition or the invitation to confirm interest. The duration of the framework cannot, in principle, exceed four years.

24 | Is it possible to conclude a framework agreement with several suppliers?

A framework agreement can be structured in such a way that any subordinate agreements concluded within the context of the framework agreement are subject to competition (or no competition at all) between the economic operators that are a party to the agreement. The law also allows for a hybrid framework agreement that may or may not be subject to a competitive process, depending on the public contract. The law provides a minimum structure for such subordinate competitions within the context of framework agreements.

Changing members of a bidding consortium

25 | Is it possible to change the members of a bidding consortium during the course of a contract award procedure?

The General Rules Governing Tenders require that all partners in a joint venture or consortium remain part of it until the conclusion of the procurement process, and, in principle, that the same members to perform the public contract.

The General Rules require this as the members of a joint venture or consortium 'as a whole' must satisfy the selection criteria indicated in the procurement documents.

The rule is flexible when it comes to subcontractors (which are not members of the joint venture or consortium). These can be changed during the procurement process, but only if the contracting authority allows the bid to be rectified.

Participation of small and medium-sized enterprises

26 | Are there specific rules that seek to encourage the participation of small and medium-sized enterprises in contract award procedures?

The Malta Regulations provide for several mechanisms that enable small and medium-sized enterprises to participate in procurement processes more effectively, whether intentionally or by effect. These mechanisms range from flexible selection criteria and performance-oriented and functionally equivalent technical specifications, to the prohibition of abnormally low tenders.

Contracting authorities cannot require the submission of a bid bond in procurement procedures for public contracts with a value that does not exceed €2 million.

The Malta Regulations allow contracting authorities to award public contracts in the form of separate lots and may determine the size and subject matter of such lots. Contracting authorities frequently use this option.

Contracting authorities are now required to indicate in the procurement documents the main reasons for their decision not to subdivide a contract into lots when the estimated value of the public contract exceeds the public sector value thresholds, in the case of the Public Sector Regulations, and the utilities value thresholds, in the case of the Utilities Regulations.

It is up to the contracting authority to determine whether one bidder may bid for one, several or all lots.

Variant tenders

27 | What are the requirements for the admissibility of variant tenders? Are bidders free to decide whether to submit a variant tender or is this subject to the contracting authority expressly permitting it in the tender documentation?

In accordance with the Public Sector Regulations, variant bids are allowed where the estimated contract value exceeds the public sector value thresholds, and in the Utilities Regulations the estimated contract value exceeds the utilities value thresholds.

The contracting authority's procurement documents must clearly state the minimum requirement to be met by the variants and any specific requirements for their presentation. The technical specifications and the award criteria must be such that can be applied to both the bid and the variant, as applicable.

Variant bids are not typically allowed in procurement procedures in Malta.

28 | Is a contracting authority obliged to consider any variant tenders that might have been submitted?

A contracting authority must consider variant bids if they were allowed in the procurement documents. If they were not allowed, the contracting authority must disqualify the bidder submitting them.

Tender specifications

29 | What are the consequences if a tender does not comply with the tender specifications?

This generally depends on the tender specification in question.

If a tender does not satisfy the selection and eligibility criteria, as put forward in the European Single Procurement Document, the evaluation committee may allow the bidder, at no cost and within five days, to rectify its bid accordingly.

If a tender does not satisfy the technical specifications or there is a matter of non-compliance with the technical or financial aspect of the tender, the evaluation committee may ask the bidder for a clarification, but no rectification of the bid is permitted.

Tenders that do not comply with the tender specifications, despite any clarification or rectification, should be rejected.

Award criteria

30 | Does the relevant legislation specify the criteria that must be used for the evaluation of submitted tenders?

A contracting authority possesses a considerable margin of discretion in law when setting the award criteria, as long as it is connected with the subject matter of the public contract and in line with the general principle of public procurement law.

A contracting authority must base the award criteria using the 'most economically advantageous tender' basis. In practice, this means that award criteria may consider the cheapest offer or the cost along with clearly indicated quality criteria (the best price-quality ratio).

A contracting authority may also set award criteria that are defined by labour, environmental and social aspects.

The law indicatively provides for three key categories of criteria:

- quality: technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- organisation: qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; and

- after-sales service and technical assistance: delivery conditions such as delivery date, delivery process and delivery period or period of completion.

Abnormally low tenders

31 | Does the relevant legislation specify what constitutes an 'abnormally low' tender?

The contracting authority must demand an economic operator to explain the price or costs proposed in the tender if the offer 'appears' to be abnormally low. This obligation applies in the Public Sector Regulations and in the Utilities Regulations, irrespective of the estimated financial value of the public contract.

Although the law imposes an obligation on the contracting authority, this obligation only kicks in when it 'appears' to the contracting authority that the offer is abnormally low. The term 'abnormally low tender' is not defined by law and it seems that the word 'appear' defeats the imposition of an obligation in the first place. If the contracting authority does not take the view that the cheapest offer submitted is abnormally low, it is difficult for an aggrieved competing bidder (which was not selected) to challenge it.

An aggrieved competing bidder generally learns of the price offered by other bidders immediately upon the issue of the opening tender report. This is accessible on the eTenders website or on the physical notice board of the Department of Contracts. However, we have observed that bidders tend not to draw this to the attention of the contracting authority during the evaluation stage, but rather it is raised as a ground for objection in any challenge to an award decision.

We have observed that the PCRB is generally open to consider such claims in connection to service contracts that require human resources when there is a risk of a successful bidder underpaying employees. This is a particularly relevant issue to all service contracts that require an intense deployment of human resources, such as security services, cleaning services and other sub-contracted services.

The PCRB has also, on occasion, insisted on the importance of monitoring for abnormally low tenders in the context of supply and works contracts. In *Vivian Corporation Limited v Central Procurement and Supplies Unit*, delivered on 19 December 2019, the PCRB found that two bids submitted were 'glaringly low' when compared to the average of the bids submitted and the contracting authority's own estimated financial value. The PCRB held that the evaluation committee should have investigated accordingly and allowed the bidders in question to clarify the rationale of the financial offer. The PCRB ordered that a fresh evaluation of the tenders is made.

32 | Does the relevant legislation specify how to deal with abnormally low tenders?

The contracting authority must demand an explanation if it 'appears' that a bidder's offer is 'abnormally low'. The economic operator must send its explanations and supporting evidence to the contracting authority, otherwise the latter will be entitled to assume that the tender is abnormally low. The contracting authority may reject the tender where the explanations and evidence submitted does not satisfactorily account for the low level of price or costs proposed.

REVIEW PROCEEDINGS

Competent review bodies

33 | Which bodies are competent to review alleged breaches of procurement legislation? Is it possible to appeal against a review body's decisions?

The Public Contracts Review Board (PCRBR) is the only judicial body vested with competence to hear appeals by interested parties or aggrieved bidders in connection with procurement processes and public contracts.

Any interested party may file an application before the close of the call for competition to challenge any discriminatory technical, economic or financial specifications, any ambiguities in the procurement documents or clarifications, or generally any illegal decisions taken by the contracting authorities. The estimated financial value of the prospective public contract value is immaterial to this procedure. This application may only be exercised within the first two-thirds of the time period allocated in the call for competition for the submission of bids.

Secondly, following the close of the call for competition, any bidder or any interested party may file an appeal against any decision of the contracting authority (eg, rejections or awards) within 10 days. The law only allows appeals in respect of prospective public contracts whose estimated financial value exceeds €5,000 (excluding VAT).

Thirdly, any bidder or interested party may also file an application to declare a concluded public contract ineffective, if it was concluded without following a procurement process or in default of the standstill period. The law only allows applications in respect of prospective public contracts whose estimated financial value exceeds €139,000, in the case of the Public Sector Regulations, and €428,000, in the case of the Utilities Regulations.

Any decision delivered by the PCRBR may be appealed before the Court of Appeal on points of law and of fact.

34 | Do the powers of competent review bodies to grant a remedy for a breach of procurement legislation differ?

The PCRBR is solely competent to rule on appeals in connection with a procurement process. It is vested with the same powers of a court of civil law and, therefore, it is able to compel witnesses to appear before it, issue interim orders and fine any defaulting party that fails to adhere to any of its decisions.

Time frame and admissibility requirements

35 | How long do administrative or judicial review procedures generally take?

An appeal hearing is scheduled within approximately one month from the filing of the appeal and all submissions and evidence will generally be heard in one hearing, depending on the complexity of the case. Following the conclusion of the hearing, the PCRBR must deliver the decision within a span of six weeks, but it is generally delivered within a couple of weeks.

Following the delivery of the PCRBR's decision, either the claimant or any other interested party (except for the contracting authority) may lodge an appeal before the Court of Appeal. The hearing will be scheduled within a span of two months from the date of filing of the appeal. There will be one case management sitting and one further sitting where oral legal submissions (and usually no further evidence) are made. The Court of Appeal must deliver its judgment within a span of four months from service of the appeal application on all parties to the proceedings.

36 | What are the admissibility requirements for an application to review a contracting authority decision?

The law expressly indicated that bidders have standing to file appeals against decisions of contracting authorities and applications to declare a public contract ineffective.

However, appeals and applications may also be filed by interested persons.

In the case of an application filed before the close of a call for competition, any interested person has standing to file the appeal, since no offers or tenders were submitted by that stage. In the case of an appeal filed against a decision of the contracting authority, the interested person must show that it has or had an interest in, or it has been harmed or risks being harmed by, a decision of the contracting authority.

The same test should apply in respect of applications to declare a concluded public contract ineffective.

A contracting authority may not lodge appeals against a decision of the PCRB, except where it declares a public contract to be ineffective.

37 | What are the time limits within which applications for the review of contracting authority decisions must be made?

The time limits applicable depend on whether the deadline for the submission of interest or offer has lapsed. An interested party may lodge an application before the PCRB within two-thirds of the time allocated in the call for competition for the submission, if the objection relates to the procurement documents and the procedure up to that point.

Following the close of the call for competition, an interested party may lodge an appeal against a decision of the contracting authority before the PCRB within 10 days of the date of that decision.

The application for a declaration of ineffectiveness of a public contract must be lodged before the PCRB:

- before the expiry of at least 30 days with effect from the day following the date on which:
 - the contracting authority published a contract award notice, provided that this notice includes justification of the decision to award the contract without prior publication of a contract notice in the Official Journal of the European Union (OJEU); or
 - the contracting authority informed the tenderers and candidates concerned of the signing of the contract; and
- in any other case before the expiry of a period of at least six months with effect from the day following the date of the signing of the contract.

An appeal may be lodged before the Court of Appeal from a decision of the PCRB within 20 days of its delivery.

Suspensive effect

38 | Does an application for the review of a contracting authority decision have an automatic suspensive effect on the contract award procedure?

Any application or appeal lodged by an interested party whether before the PCRB or before the Court of Appeal will suspend the procurement process, including the conclusion of the public contract in line with the standstill obligation. There are no exceptions to this rule.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

This is not applicable.

Notification of unsuccessful bidders

40 | Is the contracting authority required to notify unsuccessful bidders of its intention to conclude the contract with the successful bidder and, if so, when does that obligation arise?

Unsuccessful bidders must be notified of the award prior to the conclusion of the contract. If the bidders are not notified of the award decision, the standstill period does not start running and the public contract cannot be concluded.

Access to procurement file

41 | Is it possible for an applicant seeking the review of a contracting authority's decision to have access to that authority's procurement file?

Generally, after a decision, bidders are entitled to request the reasons for the rejection of their bid or the cancellation of a procurement procedure, the identity of the successful bidder (and where it is a joint venture, consortium or association, the identity of each member) and the 'characteristics and relative advantages' of the successful bidder's offer. The latter has been interpreted by the PCRB to require the disclosure of the scoring for each award criterion where a procurement procedure is adjudicated on the basis of the best price-quality ratio model, except for the evaluation committee's rationale for the allocation of these points as it may contain confidential information.

Owing to issues relating to confidentiality, trade secrets, sensitive commercial information and bid-rigging risks, contracting authorities generally turn down requests for unfettered access to the procurement file. However, the Malta Regulations specifically recognise the following information as not being confidential:

- the name of the bidders and the individual names of the members of a group of economic operators who submitted a tender;
- the name of the subcontractors;
- the documentation submitted by economic operators attesting that they comply with selection and eligibility criteria; and
- technical information that is already public.

Applications for such information under the Freedom of Information Act (Chapter 496 of the Laws of Malta) are seldom successful.

Challenges to contracting authority decisions

42 | How customary is it for contracting authority decisions to be challenged?

There is a culture of challenging decisions by contracting authorities before the PCRB, but this naturally varies from sector to sector. The PCRB delivered 134 decisions in 2018 and approximately 160 decisions in 2019. Some of these decisions are challenged before the Court of Appeal.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can this lead to the award of damages?

A claim for damages in this instance is based on pre-contractual liability and it may only be exercised once the remedies reviewing a contracting authority's decision are exhausted.

In *Norcontrol IT Limited et v Department of Contracts*, delivered by the Court of Appeal on 29 April 2016, damages were awarded for the preparation of a submitted offer and for judicial costs incurred for lodging the appeal; no loss of profits were awarded. A more recent case, *Costruzioni Dondi SpA v Department of Contracts et*, which was delivered by the First Hall, Civil Court on 9 November 2018, rejected

a claim for damages suffered in connection with a bid submitted for procedural reasons, mainly because a specific limitation period of six months (which the Court deemed applicable) had lapsed.

44 | Is it possible for a concluded contract to be set aside following successful review proceedings?

An interested party or a bidder may apply to the PCRB to declare that a public contract is ineffective. This right applies where the estimated value of the public contract exceeds: the public sector value thresholds (Public Sector Regulations); utilities value thresholds (Utilities Regulations); and €5.35 million (Concessions Regulations).

This right may be resorted to when a contracting authority:

- awards a public contract without the publication of the contract notice in the OJEU, unless permitted under the Malta Regulations; and
- concludes a public contract in default of a standstill obligation.

This application may be accompanied by a claim for compensation for damage suffered by the aggrieved party.

Legal protection

45 | Is legal protection afforded to parties interested in a contract that might have been awarded without an advertised contract award procedure?

An interested party or bidder may apply to the PCRB to declare that a public contract is ineffective and may also claim for damages.

Since October 2016, the Director of Contracts has been empowered to issue a decision to terminate a public contract if the award of that contract is in breach of the Public Sector Regulations. This decision must be in writing, properly detailed with findings and reasons, and communicated to the awardee. The awardee is then entitled to challenge the decision before the PCRB.

The Director of Contracts successfully exercised this power in *Burmarrad Commercials Limited v Public Broadcasting Services Limited et*, which was delivered by the Court of Appeal on 13 July 2018. The Court of Appeal affirmed the PCRB's decision to uphold the Director of Contracts' decision to terminate the public contract in question. The Court of Appeal remarked that the economic operator must also comply with the Public Sector Regulations and it is not a justifiable excuse that only the contracting authority has this responsibility.

It is the case, therefore, that an interested party may alert the Director of Contracts to an illegal public contract in the hope that the latter may exercise its power to terminate that contract.

Typical costs

46 | What are the typical costs involved in making an application for the review of a contracting authority decision?

Any application lodged before the PCRB and before the closing date for the submission of tenders is subject to the payment of a deposit, the amount of which is calculated on the basis of 0.5 per cent of the contract's estimated value, but will be no less than €400 and no more than €50,000. To date, this deposit only applies to applications filed under the Public Sector Regulations and the Utilities Regulations, but not the Concessions Regulations. This deposit may be refunded at the discretion of the PCRB. Professional legal fees are not recoverable in the case of a successful challenge.

Any appeal lodged before the PCRB and after the submission of tenders has closed is subject to the payment of a deposit, the amount of which is calculated on the basis of 0.5 per cent of the contract's estimated value, but will be no less than €400 and no more than €50,000.

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This deposit may be refunded at the discretion of the PCRB. Professional legal fees are not recoverable in a successful challenge.

There is no deposit to be paid on the application to declare a public contract ineffective before the PCRB. Professional legal fees are not recoverable in the case of a successful challenge.

Any appeal lodged before the Court of Appeal is subject to approximately €500 in court registry fees and judicial costs. Again, this excludes professional legal fees, which are only partly recoverable in a successful challenge.

UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or, on the contrary, been restricted?

On 30 April 2020, the Procurement of Property Regulations were promulgated. These Regulations generally requires the issue of a competitive tender procedure when contracting authorities intend to acquire immovable property by whatever title, including outright sales and leases. Direct awards are still possible, but prior approval is required.

The government of Malta remains committed to promoting concessions and public-private partnerships.

Coronavirus

48 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

A few days after Malta declared the covid-19 pandemic a public health emergency, the Director of Contracts immediately issued a circular to all contracting authorities on how public procurement is to be conducted in view of this new reality. The main thrust of these directions is that the issue of public procurement procedures, their evaluation and their award are to continue as smoothly as possible without public officials

meeting in person. This includes discussion on requests for clarifications, evaluation committee meetings and the signing of public contracts.

The Department of Contracts has also directed contracting authorities to accept certain documents, such as bank guarantees, in electric format for the time being, with the original to follow in due course or when asked for by the contracting authorities.

No specific emergency legislation, relief programmes or other initiatives were taken with respect to public procurement, specifically. However, we are aware that in health public procurement, the flexibility allowed by the Malta Regulations in case of unforeseen and urgent circumstances was taken advantage of, particularly for the supply of personal protective equipment.

Despite the covid-19 pandemic, economic operators were allowed to file challenges against contracting authority decisions before the Public Contracts Review Board and these challenges were heard through virtual means.

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