

Public Procurement

An overview of regulation in 40 jurisdictions worldwide

2012

Contributing editor: Hans-Joachim Prieß

 Freshfields Bruckhaus Deringer



Published by
Getting the Deal Through
in association with:

AB & David Law
Allende & Brea
Aluko & Oyeboade
Andreas Neocleous & Co LLC
Arthur Cox
Arzinger
Barretto Ferreira, Kujawski e Brancher
Sociedade de Advogados (BKBG)
Bech-Bruun
Capital Legal Services LLC
Crowell & Moring LLP
Debarliev, Dameski & Kelesoska Attorneys at Law
Difi – Agency for Public Management and eGovernment
Dittmar & Indrenius
Freshfields Bruckhaus Deringer LLP
Gide Loyrette Nouel
Grasty Quintana Majlis & Cia
Hamilton Advokatbyrå
Heenan Blaikie LLP
Hoet Peláez Castillo & Duque
Kachwaha and Partners
Kalo & Associates
Kalo & Associates Kosove SHPK
LetLaw
Mohammed Muigai Advocates
Oppenheim
Peterka & Partners
Prager Dreifuss Ltd – Attorneys at Law
Sabev & Partners Law Firm
Sérvulo & Associados
Stellenbosch University
Varul



Public Procurement 2012

Contributing editor:

Hans-Joachim Prieß
Freshfields Bruckhaus Deringer LLP

Business development managers

Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers

Ellie Nottley
Alice Hazard

Marketing assistants

William Bentley
Zosia Demkowicz

Admin assistant

Megan Friedman

Marketing manager (subscriptions)

Rachel Nurse
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistant

Lydia Geroges

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Subeditors

Anna Andreoli
Davet Hyland
Caroline Rawson
Charlotte Stretch

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Public Procurement 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2012

No photocopying: copyright licences do not apply.

ISSN 1747-5910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of May 2012, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law
Business
Research



Global Overview Hans-Joachim Prieß, Diana Harvey and Pascal Friton <i>Freshfields Bruckhaus Deringer LLP</i>	3
Albania Dorian Kashuri <i>Kalo & Associates</i>	8
Argentina María Morena del Río <i>Allende & Brea</i>	14
Austria Axel Reidlinger and Stephan Denk <i>Freshfields Bruckhaus Deringer</i>	19
Brazil Fabio Ferreira Kujawski and Thays Castaldi Gentil <i>Barretto Ferreira, Kujawski e Brancker Sociedade de Advogados (BKBG)</i>	25
Bulgaria Boryana Boteva and Emilia Petkova <i>Sabev & Partners Law Firm</i>	32
Canada Paul M Lalonde <i>Heenan Blaikie LLP</i>	40
Chile José Francisco Sánchez and Jorge Meneses <i>Grasty Quintana Majlis & Cia</i>	46
China Melissa Thomas and Christian Zeppezauer <i>Freshfields Bruckhaus Deringer LLP</i>	52
Cyprus Chrysanthos Christoforou and Loukia Kanarini <i>Andreas Neocleous & Co LLC</i>	59
Czech Republic Hynek Peroutka <i>Peterka & Partners</i>	64
Denmark Jesper Kaltoft <i>Bech-Bruun</i>	72
Estonia Jaak Parre and Triinu Kinkar <i>Varul</i>	79
European Union Hans-Joachim Prieß and David Broomhall <i>Freshfields Bruckhaus Deringer LLP</i>	86
Finland Hanna Laurila and Suvi Knaapila <i>Dittmar & Indrenius</i>	95
France Pascal Cuche, Marc Lordonnois and Juliette Deslandres <i>Freshfields Bruckhaus Deringer LLP</i>	101
Germany Hans-Joachim Prieß, Pascal Friton and Eva-Maria Meister <i>Freshfields Bruckhaus Deringer LLP</i>	110
Ghana David Oforu-Dorte, Isabel Boaten and Ferdinand Adadzi <i>AB & David Law</i>	119
Hungary Mariann Erdei and Petra Tasi <i>Oppenheim</i>	125
India Sumeet Kachwaha <i>Kachwaha and Partners</i>	130
Ireland Patrick McGovern <i>Arthur Cox</i>	135
Italy Marcello Clarich and Giuseppe Urbano <i>Freshfields Bruckhaus Deringer</i>	143
Kenya Mohammed Nyaoga and Muthomi Thiankolu <i>Mohammed Muigai Advocates</i>	148
Kosovo Atdhe Dika and Vegim Kraja <i>Kalo & Associates Kosove SHPK</i>	154
Latvia Kristine Gaigule-Saveja and Sintija Radionova <i>LetLaw</i>	159
Lithuania Robert Juodka, Tomas Venckus and Lina Stroputė <i>Varul</i>	165
Macedonia Jasmina Ilieva-Jovanovic and Dragan Dameski <i>Debarliev, Dameski & Kelesoska Attorneys at Law</i>	171
Netherlands Winfred Knibbeler, Nadiah Al-Ani, Alvaro Pliego Selie <i>Freshfields Bruckhaus Deringer LLP</i>	178
Nigeria Gbenga Oyebode and Olunmi Fayokun <i>Aluko & Oyebode</i>	184
Norway Trygve Olavson Laake <i>Difi – Agency for Public Management and eGovernment</i>	192
Poland Grzegorz Banasiuk and Piotr Brzeziński <i>Gide Loyrette Nouel</i>	200
Portugal João Amaral e Almeida and Paula Bordalo Faustino <i>Sérvulo & Associados</i>	206
Russia Pavel Karpunin and Rimma Leshcheva <i>Capital Legal Services LLC</i>	211
South Africa Phoebe Bolton <i>Stellenbosch University</i>	216
Spain Javier Gómez-Acebo and Manuel Martínez <i>Freshfields Bruckhaus Deringer LLP</i>	223
Sweden Fredrik Linder, Emma Berglund and Mikael Dubois <i>Hamilton Advokatbyrå</i>	230
Switzerland Bernhard C Lauterburg and Philipp Zurkinden <i>Prager Dreifuss Ltd – Attorneys at Law</i>	237
Ukraine Sergiy Shklyar and Oleksander Dyakulych <i>Arzinger</i>	244
United Kingdom Sally Roe and Diana Harvey <i>Freshfields Bruckhaus Deringer LLP</i>	250
United States Alan W H Gourley and Adelia Cliffe <i>Crowell & Moring LLP</i>	258
Venezuela José Gregorio Torrealba <i>Hoet Peláez Castillo & Duque</i>	265

Global Competition Review is delighted to publish the fully revised and updated eighth edition of *Public Procurement*, a volume in the **Getting the Deal Through** series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Public Procurement 2012 addresses the most important issues facing private enterprises competing for government contracts. Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 40 jurisdictions featured. New jurisdictions this year include Finland, Hungary, Poland and Switzerland.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. **Getting the Deal Through** publications are updated annually. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Global Competition Review gratefully acknowledges the efforts of all the contributors to *Public Procurement 2012*, who were chosen for their recognised expertise. **Global Competition Review** would also like to extend special thanks to contributing editor Hans-Joachim Prieß of Freshfields Bruckhaus Deringer LLP for his continued assistance with this volume.

Global Competition Review

London

May 2012



Ukraine

Sergiy Shklyar and Oleksander Dyakulych

Arzinger

Legislative framework

1 What is the relevant legislation and who enforces it?

Public procurement in Ukraine is regulated by the Law on Public Procurement (effective from 30 July 2010), which covers the entire scope of issues related to public procurements including procedures, framework agreements, dynamic procurement systems, sector procurements, remedies, etc. Enforcement of public procurement regulations is conducted by the Ministry of Economic Development and Trade of Ukraine, the Antimonopoly Committee of Ukraine, the State Treasury Service and the courts.

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

Because the Law was passed with the purpose of adapting the Ukrainian legislation to the WTO requirements, it has been expanded to be compliant with the GPA. It contains no discriminatory or protective provisions, but contains anti-corruption norms and clauses specially tailored to the economic situation in Ukraine. Whereas the GPA provides for open, selective and limited tendering procedures, the Ukrainian Law provides for open, two-stage tendering, price bidding (quoting), preliminary qualifications and procurements from a single bidder (article 12 of the Law). While financial guarantees constitute mandatory elements of tender documentation under the GPA, provision of guarantees in Ukraine is mandatory only if stipulated by the contracting authority.

3 Are there proposals to change the legislation?

The public procurement legislation is being constantly amended; moreover there were a significant number of proposals to change some provisions of the Law in 2011. A few of the more interesting ones are discussed below.

In September 2011 the AMC introduced in Parliament a Bill on Preventing the Restriction of Economic Competition, which proposes to impose criminal liability for prevention, elimination or restriction of competition through concerted actions (conspiracy) to distort the results of bids, auctions, contests, tenders.

In June 2011, the Bill on Amending the Law of Ukraine on Public Procurement (concerning the introduction of e-procurements) was introduced before Parliament. The Bill proposes to implement the electronic public procurement system in Ukraine as it is functioning effectively in other jurisdictions.

In December 2012 another Bill proposing to amend the Law was introduced, which is intended to extend the list of cases excluded from state procurement procedure and the sphere for Law's application.

In March, 2012 the Bill amending domestic rules on procurement in specific areas such as natural gas and oil, heat, electricity, drinking water and rail transport infrastructure was introduced before Parliament. The Bill proposes to increase the calculation of

the threshold value of contracts concluded by the enterprises with special or exclusive rights which operate in the areas mentioned above and which conclude contracts for their own means up to 2.5 million hryvna (approximately €237,760) for products or services purchases and up to 5.5 million hryvna (approximately €523,000) for work purchases.

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

Yes, the Law on Public Procurement contains exceptions for its applicability. We would like to highlight some of those exceptions, listed in the Law. The procurement of goods, works and services for satisfying the priority demands of the state is governed by separate legal acts which supplement the general public procurement regime under the Law. For example, procurement of mass-media services for reporting on the activities of state bodies and bodies of self-governance, procurement of agricultural commodities, procurement of weapons and military equipment and other special-purpose goods are regulated by specific legislation. The specific legislation was enacted to regulate areas such as rail transportation, mining, book manufacturing and agricultural equipment.

Some areas where procurement procedures are governed by separate laws are, procurement carried out by legal entities exercising their activities in the area which is a natural monopoly, procurement concerned with the purchase of crude oil and its derivatives, centralised heat power supply, natural and oil gas, postal services, services of international financial institutions associated with the involvement of loans and procurement with regards to the Euro 2012 football championship finals in Ukraine.

Applicability of procurement law

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

Under the Ukrainian legislation, a certain number of authorities entitled to administer state funds according to the law may award contracts for government procurement and thus may be regarded as contracting authorities in a sense. The Law concerns state bodies, including those of the Autonomous Republic of Crimea, bodies of local self-government, other bodies, institutions and organisations defined by the Constitution and relevant laws.

Still, there is no definitive list of such contractual authorities. However, there is a specific list of goods and services exempt from the procurement procedures. Such goods and services include those containing state secrets, design and manufacturing of banknotes, state awards and other types of paper containing security features, services required for bank operations of state banks and banks containing state capital, goods and services carried out by a purchaser outside Ukraine (eg, a diplomatic mission), services required for the operation, maintenance and repayment of the state debt, goods and

services required for running elections and referendums, electrical energy, etc.

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

The Law is clear in providing types of entities authorised to administer the state funds. The interpretation of state funds is also expressly given. This includes state and state-funded enterprises, institutions and commercial companies where the state share in their stock capital exceeds 50 per cent, their subsidiaries thereto, enterprises and commercial companies where at least 50 per cent of the stock capital is owned by state and budget-supported enterprises, and commercial companies where the total state share of the stock capital exceeds 50 per cent. However the Law was recently amended and now it is applicable only to those commercial companies that are authorised to administer the state funds and that constitute one of the following:

- a company that enjoys tax privilege;
- a corporation that is exempt from the obligation to pay debt to the budget; or
- a corporation that receives direct or indirect budget support.

Thus, the status of some state enterprises and utilities may be in dispute when the quota of shares specified is not definitely observed and when there is no open information that the entity meets all the requirements described above.

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

The Law applies to procurements where the price of goods and services amounts to or exceeds 100,000 hryvna (approximately €9,440) or the price of work amounts to or exceeds 1 million hryvna (approximately €94,400). The construction sector is an exception and the Law applies to procurements where the price of goods and services related to this sector amounts to or exceeds 300,000 hryvna (approximately €28,328).

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

According to article 40 of the Law, terms of the concluded procurement contract and the actual performance of the procurement should not derogate from the final terms of the tender specification until the obligations of the parties have been fulfilled (except for cases of an agreed decrease of the procurement volume or price). The extension of an existing contract is possible in case objective obstacles have arisen, such as acts of God, and therefore the performance of the contract is not possible in terms determined by it.

The extension of an existing contract is also possible for a period sufficient for procurement for the part of the following year in an amount which should not exceed 20 per cent of the sum specified in the contract signed the previous year.

In all other cases the extension of an existing contract requires a new procurement procedure. It should be noted that in some cases, as specified in the Law, such procedure may be simplified by continuing the procurement from a single participant.

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

Article 40 of the Law forbids any amendments of the concluded procurement contract which differ from the final terms of the tender specification until the obligations of the parties have been fulfilled.

With an exception for an agreed decrease of the procurement volume, for cases of price amendment (of an existing contract by not more than 10 per cent and not earlier than three months after contracting) or the improvement of the procurement object's quality without an increase in its price, the Law requires a new procurement procedure.

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

The existing contract cannot be transferred (subcontracted) to another supplier or provider without a new procurement procedure as referred to in article 40 of the Law which prescribes the permanence principle as to the contract, including the permanence of the supplier/provider.

- 11** In which circumstances do privatisations require a procurement procedure?

Privatisation procedures are set out in the Law on Privatisation of State Property, which specifies auctions, tendering procedures and the stock exchange as the means by which the privatisation may be completed in compliance with the order approved by the fund of state property of Ukraine, the Antimonopoly Committee of Ukraine, the State Committee on Securities and the stock exchange.

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

There are no special rules in relation to PPPs. Article 6 of the Law on Public-Private Partnership prescribes that public procurements within a public-private partnership are regulated by the principal law on public procurement.

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

Please see question 12.

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

If the concept of an in-house contract is interpreted in light of subordination and control relations of entities that may result in an improper conclusion of the contract between the entities in question, then the provision of the Law on 'related parties' shall be applied. It sets out that participation shall be denied to 'related parties', which are:

- those executing control over the bidder or being controlled by a bidder or being under a common control with a bidder;
- natural persons or relatives of a natural person executing control over a bidder; or
- officials or relatives of a bidder authorised to perform on behalf of a bidder legal acts aimed at the establishment, change or termination of legal relationships.

Exercising control is understood as one entity possessing, immediately or through a significant number of natural persons or entities, the largest share (holding of shares) in the stock capital of a bidder; holds the majority of votes in the management body of a bidder; or if no less than 20 per cent of shares in the stock capital of a bidder are concentrated within the entity. Also as mentioned in question 5, there is a specific list of goods and services exempt from the procurement procedures.

The procurement procedures

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

The principles of public procurement set out in the Law include fair competition, maximum efficiency, openness and transparency of all procurement stages, non-discrimination of bidders, objective and impartial evaluation of bids, prevention of corruption and abuse.

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

Yes. Article 11 of the Law specifies that the tendering procedures shall be conducted by a specially designated tender committee, which acts according to the principles of impartiality and collegiality.

- 17** How are conflicts of interest dealt with?

Article 11 mentions an absence of conflict of interest among the principles on which a tender committee should function. Membership in a committee must not create a contradiction between the interests of a customer and bidders or between interests of bidders if such a contradiction may influence the objectivity and impartiality of decision-making as to the winner of the tender. The committee must not consist of officials or representatives of the bidders, members of their families and also of deputies of the parliament of Ukraine, and the parliament of the Autonomous Republic of Crimea and of local governments.

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

For the purpose of the organisation and conduct of tendering procedures, special bodies (ie, tender committees) are established whereby conflicts of interest shall be avoided and impartiality ensured. Thus, representatives or parties related to the participants must not be involved in the activities of tender committees.

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

Article 20 of the Law defines open tendering as the prevailing procurement procedure.

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

No, according to article 17 of the Law, if the tender offer was submitted by a bidder related with another bidder or bidders they shall be excluded from a tender procedure

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

Rules on two-stage tendering, as referred to in articles 33 and 34 of the Law, provide for a negotiated procedure. In the course of the first stage the participants are invited to provide their preliminary tender bids, including technical and economic parameters, without quoting the price. Then the contracting authority enters into negotiations with the bidders to clarify the terms and make amendments to the tender documentation. During the second stage the accepted participants provide their final tender bids with price quotations. The rest is regulated by the rules of open tendering.

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

The two-stage procurement procedure in Ukraine is regarded as adequate for the competitive dialogue under EU legislation. This procedure is undertaken when a contracting authority cannot identify or compile a list of goods (works, services) to be procured or when all bids submitted do not meet the tender requirements; in this case preliminary negotiations are necessary to reach an optimal decision on the procurement and to define the means best suited to satisfy the needs.

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

The conclusion of a framework contract is not specifically regulated by the current legislation.

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

Please see question 23.

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

There are no specific requirements as to this issue.

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

Provisions on tender documentation state that necessary and relevant technical and quality characteristics, a detailed description of the subject, technical requirements, references to standard characteristics, experience in relevant area etc, of the subject to be procured be included. No reservations regarding 'burdensome or risky requirements' are mentioned.

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

The qualifications of tenderers shall be assessed by a contracting authority on the basis of qualification criteria and bid evaluation tactics as indicated in the tender documentation. For estimation of tender bids, relevant expert organisations or separate experts may be engaged whose recommendations may be used when determining the winner of a procurement procedure. Article 28 gives a list of criteria, which must be used while assessing the qualifications. For procurement of goods, works and services, which are supplied not on the basis of a specially developed technical project, and for which a constant market exists, the criteria in assessing is price. For certain complex procurements (for example consultancy, scientific research, experiments) it is price together with other criteria, such as quality, terms of payment, terms of performance, after-sales service, operating costs, transferring of the technology and training of administrative, scientific and operating personnel including the use of local resources, which are proposed by the bidder. Article 28 also states that if criteria other than price are being used for determining the best tender bid, the value equivalent thereof is to be specified in the tender documentation. Consideration of price shall constitute not less than 50 per cent.

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

There are no specific mechanisms for small and medium enterprises.

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

According to article 25 of the Law every bidder is entitled to submit only one bid per lot.

30 Must a contracting authority take alternative bids into account?

See question 29.

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

Tender bids must be submitted in accordance with the requirements of tender documentation. Bidders have a right to change their tender bids until the term allocated for filing thereof ends. Such amendments may be considered by a contracting authority if received before the end of the term for filing tender bids. If any tender bids do not correspond to the specified qualification requirements, a contracting authority is obliged to decline the non-compliant tender bids and notify the participant within seven calendar days.

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

A contracting authority shall accept a tender bid that is found to be the best and best suited to satisfy its needs as a result of assessment undertaken in accordance with the tender documentation. For the list of criteria see question 27.

33 What constitutes an 'abnormally low' bid?

The current legislation does not define this particular term, but in case of an 'abnormally low' bid the anti-competitive collusion aimed at the distorting of the tender's results can be found.

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

Not relevant in this jurisdiction.

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

Registers of unfair competitors are not maintained under the current legislation so bidders with past irregularities cannot be determined. At the same time, pursuant to article 17 of the Law, a contracting authority shall reject the proposal of a bidder if it (as a natural person) or its officers have an outstanding conviction for a crime, which is connected to the procurement procedure, or for any other lucrative crimes. Hence, in order to be eligible to bid, the bidder must be discharged or released from the conviction in the order established by law.

Review proceedings and judicial proceedings

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

The current legislation enables the tender results to be challenged by filing an according complaint with:

- the purchaser;
- the Antimonopoly Committee of Ukraine (the AMC has special

- authority in the public procurement sector); or
- the court.

Upon receiving a complaint, the purchaser may voluntarily rectify the issues regarding the procurement procedure, including a temporary suspension of the tender.

Complaints regarding public procurements are reviewed in the AMC by a dedicated administrative panel. The conclusion of procurement contracts during the review of the complaint in the AMC is forbidden. Following the review, the AMC may oblige the purchaser to cancel the tender results entirely or partially, provide documents, remove discriminatory terms, etc.

The AMC decisions may be appealed to the Kiev district administrative court. Disputes regarding the procurement contracts may also be submitted to court. The court may rule to cancel the tender results and invalidate the procurement contract.

It should be mentioned that only tender participants and third parties whose rights and interests are directly affected by the purchaser's decision are entitled to file a complaint, regardless of where the complaint is filed.

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

If a complaint is submitted to the Antimonopoly Committee of Ukraine (AMC), according to article 18 it has to adopt a decision within 30 working days from the moment of receiving the complaint. It is also stated that the moment of the receipt is defined by the moment of registration of such a complaint by the AMC. As regards court reviews of a complaint, it takes approximately two to four months in the court of first instance, and up to three months in the appellate and cassation court.

38 What are the admissibility requirements?

Two categories of review applications may be distinguished: those filed before conclusion of the contract and the ones contesting the tender results.

Each tenderer that believes it has suffered or is likely to suffer losses caused by violation of procurement procedure by the contracting authority may contest such acts. Violation of the rules of tender procedures, resolutions passed, acts or omissions of the contracting authority are contested by the tenderers. Exempt from such review are the choice of procedure made by a participant and the decision of a contracting authority to decline all tender bids.

The three major areas allowing judicial review comprise breach of the rules of procurement procedure by the contracting authority, violation of competition law (discrimination against participants) and non-compliance of tender documentation with legal requirements, the last being the most common ground of objection (eg, omission of essential terms in the tender documentation).

Referring to review in a judicial proceeding, it is important that violated rights and interests and the relevant provisions of the law should be specifically articulated, along with the causal relationship between particular violations of procurement procedure. It is also important that unlawful decisions made by the contracting authorities be expressly indicated.

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

An application for review before conclusion of the contract shall be filed within 14 days from the day on which the subject has received a message about a relevant decision or act of the purchaser, which violates his rights, or from the day on which he became (or ought to have been) aware of his rights being violated. Complaints about

Update and trends

The Law on Public Procurement was recently amended by the Law on Amendments to Certain Legislative Acts of Ukraine on Public Procurement which was criticised by legal experts due to the possibility of increased corruption in this area. The problem may be caused by two key provisions which were amended, namely the revision of the businesses that are subject to the Law as purchasers (the Law is no longer applicable to a large number of legal entities that were obliged to apply the procedure of public procurement) and the changes to the rules of public procurement in the procedure of a single bidder which became more commonly used. The Bill which proposes to change the applicability of the law to certain types of entities was introduced at the end of 2011.

Also, as mentioned in question 3, in December 2012 the Bill proposing to amend the Law was introduced. It is intended to extend the list of cases excluded from state procurement procedure, among them tenders regarding the conclusion of labour agreements, air carriage services, mediation, arbitration services, educational services provided abroad etc. It is envisaged to introduce the possibility of purchasing foodstuffs and catering services according to an abbreviated tender procedure and to determine cases when a client could cancel a purchase by one participant.

It should also be noted that the question of preference of domestic manufacturers in the procedure of public procurement is also discussed. The relevant Bill was registered in the parliament at the end of the 2011. The Bill proposes to amend the Law with a provision stipulating the obligation of the purchaser to give advantages to bidding offers of domestic manufacturers. Therefore in

case the bidding parties' prices together with other criteria are equal the preference will be given to the domestic manufacturer. However, the amendments will not concern procurement of those goods, services or works which are not provided or produced by domestic manufacturers. There are also some competition related issues which may arise in case these amendments come into force but we are sure that the Bill and future law will be carefully analysed in order meet all the requirements prescribed by the national antitrust legislation. Due to the recent tendencies to apply special privilege conditions for domestic manufacturers in all areas of the economy it became more popular among large global companies to localise their manufacture in Ukraine (for example, in the pharmaceutical market). Therefore we strongly believe that such changes can contribute much to national economies.

The question of the very low threshold value of contracts required to apply the procedure of public procurement is also one of the most frequently discussed issues in national legal practice. Therefore in March 2012 the Bill amending domestic rules on procurement in specific areas such as natural gas and oil, energy, electricity, drinking water and rail transport infrastructure was introduced before the parliament. The Bill proposes to increase the threshold value of contracts concluded by enterprises with special or exclusive rights which operate in the areas mentioned above and which conclude contracts for their own means of up to 2.5 million hryvna (approximately €237,760) for products or services purchase and up to 5.5 million hryvna (approximately €523,000) for work purchases.

tender documentation can be submitted in any term, but not later than the last day for submitting bids. Decisions of the AMC or purchaser can be appealed to the court within one month from the day when the decision was delivered or the interested party found out about the decision.

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

According to article 18 of the Law an application for a review does not suspend the procurement procedure, but the AMC may adopt such a decision. The AMC can do it on its own initiative or upon receiving a relevant application from the complainant. However it should be noted that conclusion of procurement contracts during the review of the complaint in the AMC is forbidden in any case.

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

Under article 29 of the Law, a contracting authority shall notify all unsuccessful bidders in writing within three working days of the ten-

dering results, with indications of the grounds for rejection of their proposals.

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

A contracting authority shall send or provide tender documentation to a participant free of charge within three working days from the day an application for provision of necessary documents is received.

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

The number of lodged review applications has substantially increased over a recent period. Subject to frequent objections are government procurement procedures in the coal industry, purchase of computer and office equipment, furniture, medical equipment, etc. However, the number of applications sustained remains at a very low level, and 20 to 35 per cent of complaints are not admitted at all.

Arzinger

Sergiy Shklyar
Oleksander Dyakulych

sergiy.shklyar@arzinger.ua
oleksander.dyakulych@arzinger.ua

Eurasia Business Centre
75 Zhylyanska St 5th floor
Kiev 01032
Ukraine

Tel: +380 44 390 55 33
Fax: +380 44 390 55 40
www.arzinger.ua

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

Judicial practice proves that an existing contract may be terminated by a court decision if a suit challenging the procurement procedure in question is lodged and finally sustained.

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

Legal protection in this case resembles that in the instance above (question 44). Specifically, control of procedures is exercised by the authorised entity, the Ministry of Economic Development and Trade, and the State Treasury. The latter performs its functions by maintaining a record of data on government procedures, conducted by verifying that the existing procurement contracts comply with the relevant reports on the results of the procurement procedures undertaken. In practice, the State Treasury ascertains whether the procurement contracts are concluded in accordance with the Law; if not, it decides that the payments should not be allowed.

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

There is a general rule on damages reimbursement which may also be applicable. Those rules are prescribed by the Civil Code of Ukraine according to provision of which a person or entity who suffered damages may claim to the court for remedies. Lost profits reimbursement is also possible under national legislation. However it should be noted that there is very little relevant practice in cases related to reimbursement of damages and lost profit caused by violation of procurement law, therefore such claims do not seem to be successful.

It should be noted that the Law also establishes responsibility of the tender committee's members for procurement law violation. Therefore, an interested party whose rights or interests were harmed by such violation may appeal to law enforcement authorities in order to bring perpetrators to responsibility.



 **Freshfields Bruckhaus Deringer**

Annual volumes published on:

- | | |
|-----------------------------------|------------------------------|
| Air Transport | Licensing |
| Anti-Corruption Regulation | Life Sciences |
| Arbitration | Merger Control |
| Banking Regulation | Mergers & Acquisitions |
| Cartel Regulation | Mining |
| Climate Regulation | Oil Regulation |
| Construction | Patents |
| Copyright | Pharmaceutical Antitrust |
| Corporate Governance | Private Antitrust Litigation |
| Corporate Immigration | Private Equity |
| Dispute Resolution | Product Liability |
| Dominance | Product Recall |
| e-Commerce | Project Finance |
| Electricity Regulation | Public Procurement |
| Enforcement of Foreign Judgments | Real Estate |
| Environment | Restructuring & Insolvency |
| Foreign Investment Review | Right of Publicity |
| Franchise | Securities Finance |
| Gas Regulation | Shipping |
| Insurance & Reinsurance | Tax on Inbound Investment |
| Intellectual Property & Antitrust | Telecoms and Media |
| Labour & Employment | Trademarks |
| | Vertical Agreements |



For more information or to purchase books, please visit:
www.GettingTheDealThrough.com



Strategic research partners of the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



The Official Research Partner of the International Bar Association