

# Public Procurement

*Contributing editor*  
**Totis Kotsonis**



2017

GETTING THE  
DEAL THROUGH 

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DEAL THROUGH 

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*Contributing editor*  
**Totis Kotsonis**  
**Eversheds Sutherland**

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# Malta

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## Legislative framework

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

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

The EU procurement acquis has been transposed into Maltese law. This consists mainly of four key directives: Public Sector Directive (Directive 2014/24), the Utilities Directive (Directive 2014/25), the Concessions Directive (Directive 2014/23), the Remedies Directives (Directive 1989/665 as amended) and the Utilities Remedies Directive (Directive 1992/13 as amended).

The national legal framework relating to public procurement is enacted under the Financial Administration and Audit Act (Chapter 174 of the Laws of Malta) as the principal piece of legislation. The framework was revamped in 28 October 2016 to transpose the new 2014 EU Directives on public procurement. The key applicable Regulations are the following:

- the Public Procurement Regulations of 2016 (Subsidiary Legislation 174.04) (Public Sector Regulations);
- the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations of 2016 (Subsidiary Legislation 174.06) (Utilities Regulations);
- the Concession Contracts Regulations of 2016 (Subsidiary Legislation 174.10) (Concessions Regulations); and
- the Emergency Procurement Regulations of 2016 (Subsidiary Legislation 174.09) (Emergency Regulations) (collectively the Malta Regulations).

The Director of Contracts has also issued rules entitled the General Rules Governing Tendering. These are, most of the time, part and parcel of the procurement documents published by the contracting authority and the bidders must abide by these rules. These rules are periodically amended and the latest version (2.0) was last amended in November 2016.

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

As indicated in question 1, there are specific regulations on the utilities sector and concession contracts.

The Public Procurement of Contracting Authorities or Entities in the fields of Defence and Security Regulations of 2011 (Subsidiary Legislation 174.08) regulates public procurement relating to 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), which, to our knowledge, 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 applied to any works or services concessions issued by the Maltese government or any contracting authority on an opt-in basis.

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### 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 its scope, whether by way of subject-matter or value threshold—even if the contract is not of a certain cross-border interest.

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

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### 4 Are there proposals to change the legislation?

The national legislative framework was overhauled on 28 October 2016 with the introduction of the Malta Regulation to transpose the new 2014 EU Directives. We are not aware of any further proposals for amendment.

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## Applicability of procurement law

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

As far as we are aware, there is no jurisprudence on this point. The Public Sector Regulations do list the contracting authorities subject to those Regulations in Schedule 1, but this list is not meant to be exhaustive. Several wholly and partially government-owned limited liability companies are on that list, such as Enemalta plc, Gozo Channel (Operations) Ltd and WasteServ Malta Ltd.

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### 6 Are contracts under a certain value excluded from the scope of procurement law? 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.

## Public Sector Regulations

A public contract with an estimated value up to €135,000 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 and calls for quotes to direct orders that are managed by the contracting authority itself. A contracting authority may not use the following forms of procurement in case of department tenders: competitive dialogue, competitive procedure with negotiation, dynamic purchase systems, electronic auctions and negotiated procedure without public notice.

Once the value of a public contract exceeds €135,000, then the procurement process is generally managed by the Director of Contracts and must be in any of the forms identified by the Public Sector Regulations, the preferred option being, the open or restricted

procedure. Naturally, there are exceptions. Specific contracting authorities identified by the Public Sector Regulations are allowed to manage the procurement process irrespective of the value of the public contract to be awarded.

If the estimated value of the public contract exceeds €5.225 million in case of works, €135,000 in case of supplies and services and €750,000 in case of 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.

### Utilities Regulations

A public contract with an estimated value up to €418,000 is specifically regulated by a relatively light-touch regime loosely referred to as 'departmental tender procedures', which varies from open/restricted calls for tenders, calls for quotes to direct orders that are managed by the contracting authority itself. A contracting authority may not use the following forms of procurement in case of department tenders: competitive dialogue, competitive procedure with negotiation, dynamic purchase systems, electronic auctions and negotiated procedure without public notice.

Once the value of a public contract exceeds €418,000, then the procurement process is managed by the Director of Contracts and must be in any of the forms identified by the Public Utilities Regulations, the preferred option being the open/restricted procedure. Naturally, there are exceptions. Specific contracting authorities identified by the Utilities Regulations are allowed to manage the procurement process irrespective of the value of the public contract to be awarded.

If the estimated value of the public contract exceeds €5.225 million in case of works, €418,000 in case of supplies and services and €1 million in case of 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 €5.225 million a number of procedural guarantees apply, mainly, prior information concession notices and contract award notices.

## 7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Contractual modifications to public contracts are allowed, naturally, 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 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 €135,000, 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. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They 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, provided that, any increase in price shall not exceed 50 per cent of the value of the original contract and that notice of such modification must be published in the OJEU:
  - 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; or

- would cause significant inconvenience or substantial duplication of costs for the contracting authority;
- where all of the following conditions are fulfilled, provided that notice of such modification must be published in the OJEU:
  - the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
  - the modification does not alter the overall nature of the contract; and
  - any increase in price is not higher than 50 per cent of the value of the original public contract;
- where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:
  - an unequivocal review clause or option in conformity with the first bullet point in this question;
  - universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the Public Sector Regulations; or
  - in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors; and
- where the modifications, irrespective of their value, are not substantial, that is, if the modification renders the public contract materially different in character from the one initially concluded. Any contractual modification which is less than 10 per cent (service/supply contract) or 15 per cent (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 that automatically presume that there is a substantial modification, and therefore, a new procurement procedure is required.

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

Any contractual modification that is consented to without the prior approval of the Director of Contracts or in spite of the Director of Contracts' refusal is illegal and any compensation paid to the economic operator may be clawed back. Such illegal contractual modifications (and even where the Director of Contracts should not have given his or her approval) may be subject to a challenge 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.

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

## 8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

There has been no Maltese jurisprudence on modification of public contracts. Based on our experience, economic operators do not usually have appetite to spend time, energy and cost to challenge such changes. There have been a number of notable judgments delivered by the CJEU on modification of contracts, and it is clear that the new 2014 EU Directives have amended the provisions on modification of contracts to align the law closer to those judgments.

## 9 In which circumstances do privatisations require a procurement 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 a pure 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 TEU and TFEU may be satisfied by such a competitive award process so long as it is open, non-discriminatory and transparent.

The government of Malta has consistently, although there are exceptions, launched and managed competitive award processes for privatisations. This is generally tasked to the Privatisation Unit, which was set up in June 2000.

#### **10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement 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 such a competitive award process so long as it is open, non-discriminatory and transparent.

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

#### **Advertisement and selection**

#### **11 In which publications must regulated procurement contracts be 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 €135,000 (in the case of the Public Sector Regulations) and €418,000 (in the case of the Utilities Regulations), except for the negotiated procedure without a prior call;
- contract award notice: This is also mandatory and contains the results of the public procure, must be published within 30 days of the decision to award or conclude the procurement process; and
- voluntary ex ante transparency notice: This is also a voluntary notice which 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 EU and must contain a minimum standard of information as per the Malta Regulations.

#### **Public Sector Regulations**

Public contracts with an estimated value exceeding €135,000 shall be published through e-Tenders ([www.etenders.gov.mt](http://www.etenders.gov.mt)), the government of Malta's e-procurement platform. If the estimated value of the public contract exceeds the public sector value thresholds, then the notices are to be submitted to the Publications Office of the EU for publication on TED (<http://simap.ted.europa.eu/>).

#### **Utilities Regulations**

Public contracts with an estimated value exceeding €418,000 shall be published through e-Tenders ([www.etenders.gov.mt](http://www.etenders.gov.mt)), government of Malta's e-procurement platform. If the estimated value of the public contract exceeds the utilities value thresholds, then the notices are to be submitted to the Publications Office of the EU for publication on TED (<http://simap.ted.europa.eu/>).

#### **12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender 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 also 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 relating to the suitability to pursue the professional activity, the economic operators' economic and financial standing and its technical and professional ability.

The contracting authority is also obliged to exclude an economic operator which is subject to a mandatory ground of exclusion, in particular, a conviction of the economic operator for participation in a criminal organisation, corruption, fraud and money laundering. The contracting authority is also obliged to exclude an economic operator who is subject to a blacklisting decision issued by the Director of Contracts. An economic operator who is subject to a mandatory ground of exclusion or a blacklisting decision may undergo a self-cleaning process to be able to participate in procurement processes.

#### **13 Is it possible to limit the number of bidders that can participate in a tender procedure?**

Yes. The number of potential economic operators invited to participate in a procurement process can be limited only in the cases of a restricted procedure, competitive procedure with negotiation, innovation partnership and the competitive dialogue. This limitation remains 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 and with its estimated value exceeding €135,000, 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 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. Again, the principle of promoting genuine competition is the guiding principle.

#### **14 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?**

An economic operator may undergo what is known as a 'self-cleaning' process to remove of the effects of a mandatory 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:

- (i) has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- (ii) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (iii) 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 (iii) shall be evaluated by contracting authority taking into account the gravity and particular circumstances of the circumstances of the criminal

offence or misconduct. Where the measures are considered to be 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.

This 'self-cleaning' procedure applies to the mandatory grounds of exclusion, but it may also be used as a defence before the Commercial Sanctions Tribunal if an economic operator appeals from a blacklisting decision of the Director of Contracts.

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### The procurement procedures

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

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.

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

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

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

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#### 17 How are conflicts of interest dealt with?

A contracting authority must exclude an economic operator in case of a conflict of interest. A conflict of interest is widely defined to include 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 have 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'.

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

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'.

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

This varies from sector to sector and according to the value of the contract, but open procedures appear to be preferred.

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#### 20 Can related bidders submit separate bids in one 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, in particular, submit an offer in its individual capacity and also as a member of a joint venture or consortium.

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

There are a number of procurement procedures that allow a degree of negotiations with bidders, among others, the competitive dialogue and the competitive procedure with negotiation.

The use of any of these procedures requires the prior 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 adaptation of readily available solutions;
- the works, services or supplies require design 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 or because of the risks attaching 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 quite flexible, the Malta Regulations require that the contracting authority establishes, at the very outset, a minimum framework that is known to all participating bidders and procedure to guarantee equal treatment throughout the procurement procedure. There may be subsequent stages where bidders are disqualified and negotiations or dialogue with the remaining bidders are intensified, until there is the submission of the final offer for adjudication.

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#### 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?

Based on a random sample taken from the e-Tenders platform, the competitive procedure with negotiation appears to be regularly used, in particular, in the utilities sector.

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

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

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#### 24 May a framework agreement with several suppliers be concluded?

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 party to the framework agreement. The law also allows for a hybrid framework agreement that may, in respect of certain prescribed public contracts, be subject to a competitive process and in respect of other prescribed public contracts not subject to a competitive process. The law provides a minimum structure for such subordinate competitions within the context of framework agreements.

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#### 25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement 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, the same members are to perform the public contract. The General Rules require this since the members of the joint venture or consortium 'as a whole' must satisfy the selection criteria indicated in the procurement documents.



### Update and trends

The industry is currently digesting the legislative overhaul introduced in October 2016 and economic operators and their legal advisors are starting to grapple with new right, obligations and remedies which have been introduced.

In recent years, there has been a significant drive by the government of Malta to promote concessions and public private partnership.

#### 26 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

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

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. This option is frequently pursued by contracting authorities.

Contracting authorities are now required to indicate in the procurement documents the main reasons for their decision not to subdivide into lots, when the estimated value of the public contract exceeds €135,000 in the case of the Public Sector Regulations and €418,000 in the case of the Utilities Regulations.

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

#### 27 What are the requirements for the admissibility of variant bids?

Variant bids are allowed where in the Public Sector Regulations the estimated contract value exceeds €135,000 and in the Utilities Regulations the estimated contract value exceeds €418,000.

The contracting authority must clearly state in the procurement documents the minimum requirement to be met by the variants and any specific requirement 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.

#### 28 Must a contracting authority take variant bids into account?

A contracting authority must take into account variant bids if they were allowed in the procurement documents. However, the contracting authority must disqualify a bidder from the procurement procedure if variant bids were submitted even though they were not allowed.

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

The consequences naturally depend on the nature of the procurement procedure and terms of the tender. In principle, any bidder who puts forward an offer that is not compliant with the tender specifications or otherwise insists that their own standard terms of business are adopted, should be disqualified in the interests of equal treatment.

#### 30 What are the award criteria provided for in the relevant legislation?

A contracting authority possesses a considerable margin of discretion at law when setting the award criteria so 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 on the test of most economically advantageous tender (MEAT). In practice, this means that award criteria may take into account either just the cheapest offer or the price or cost along with clearly indicated quality criteria, the 'best-price-quality-ratio'. The 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, including 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; or
- after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

#### 31 What constitutes an 'abnormally low' bid?

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 where the estimated value of the public contract exceeds €135,000 and in the Utilities Regulations where the estimated value of the public contract exceeds €418,000.

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 words 'abnormally low tender' are not defined at law and it seems that the word 'appear' defeats the imposition of an obligation in the first place.

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

See question 31. The contracting authority must demand an explanation if it 'appears' that an 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

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

The Public Contracts Review Board (PCRB) 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.

Firstly, any interested party may file an appeal at any time before the close of the call for competition to challenge any discriminatory technical, economic or financial specifications or any ambiguities in the procurement documents or clarifications or generally any illegal decisions taken by the contracting authorities.

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 within 10 days, in particular, rejection or award decisions.

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.

#### 34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

The PCRB is solely competent to rule on appeal applications in connection with a procurement process.

#### 35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The appeal hearing is scheduled within approximately one month of the filing of the appeal and all submissions and evidence will be heard in one hearing. Following the conclusion of the hearing, the PCRB must deliver the decision within a span of six weeks, but in general, it is delivered within one week.

Following the delivery of the PCRB's decision, the interested party may lodge an appeal before the Courts of Appeal. A hearing will be scheduled within a span of two months from the date of filing of the

appeal, in which oral legal submissions (and usually no further evidence) are made. It is the policy of the PCRB that only one hearing will be held. Following the conclusion of the oral hearing, the Court of Appeal must deliver its judgment within a span of four months.

### 36 What are the admissibility requirements?

Bidders are expressly indicated in the law as having 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 an 'interested person'. In the case of an appeal filed before the close of a call for competition, any interested person has standing to file the appeal since presumably no offers or tenders were submitted at that stage. In the case of an appeal filed against a decision of the contracting authority, the interested person must show that he or she has or has had an interest in or he or she 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.

### 37 What are the time limits in which applications for review of a procurement decision 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 appeal before the PCRB at any time before the close of the call for competition if the objection relates to the procurement process. 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 from the date of that decision.

The interested party may lodge an appeal before the Courts of Appeal from a decision of the PCRB within 20 days of its delivery.

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

Any appeal lodged by an interested party whether before the PCRB or before the Courts of Appeal will suspend the procurement process, including, the conclusion of the public contract in line with the standstill obligation. An application for a new trial (retrial) of a judgement delivered by the Courts of Appeal may also be filed, but this is an extraordinary and extreme remedy that can only succeed on very limited grounds (fraud, manifest error of law, breach of due process and so on). Such an application for a new trial will only trigger standstill if the party specifically demands for it. This application for a new trial cannot be exercised if the public contract has already been executed.

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

This is not applicable.

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

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

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

No, such requests are generally turned down by contracting authorities due to issues relating to confidentiality, trade secrets, sensitive commercial information and bid-rigging risks. To our knowledge, no application to obtain such information under the Freedom of Information Act (Chapter 496 of the Laws of Malta) has been successful to date.

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

We would say that there is a culture of challenging decisions by contracting authorities before the PCRB, but this naturally varies from sector to sector. The PCRB delivered 164 decisions in 2014, 159 decisions in 2015 and 129 decisions in 2016. Some of these decisions were, in turn, challenged before the Courts of Appeal.

We have not observed a similar culture or appetite in procurement processes in connection with concessions, privatisations and public private partnerships.

### 43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

This claim for damages is based on a claim based on the institute of pre-contractual responsibility and it may only be exercised once the remedies reviewing a contracting authority's decision is exhausted.

A recent case, *Norcontrol IT Limited et v Department of Contracts* delivered by the Court of Appeal on 29 April 2016 awarded damages for the preparation of offer submitted and for judicial costs incurred for lodging the appeal.

Following this case, the General Rules Governing Tenders (and procurement documents generally) introduced a specific clause that excludes liability of the contracting authority, but it is yet to be seen whether this exclusion of liability will be upheld by the Maltese courts.

### 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?

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

This right may be resorted to when the contracting authority:

# GANADO

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- is awarded 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 the standstill obligation.

This demand may be accompanied by a claim for compensation of damages suffered by the aggrieved party.

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

See question 44.

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**46 What are the typical costs of making an application for the review of a procurement decision?**

This very much depends on the particular circumstances of the case. Any appeal lodged before the PCRB and before the lapse of the deadline for the submission of tenders will be without charge. Any appeal lodged before the PCRB and after the submission of tenders has closed will be subject to the payment of a deposit depending on the value of the public contract. This is calculated on the basis of 0.5 per cent of the estimated value of the contract, but in any case shall not be less than €400 and not more than €50,000. This deposit may be refundable at the discretion of the PCRB. This excludes any professional legal fees which are not recoverable in case of a successful challenge.

Any appeal lodged before the Court of Appeal will be subject to approximately €500 in court registry fees and judicial costs. This amount excludes any professional legal fees that are only in part recoverable in case of a successful challenge.

## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Agribusiness  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Automotive  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Commercial Contracts  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
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Electricity Regulation  
Energy Disputes  
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Executive Compensation & Employee Benefits  
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Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
High-Yield Debt  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Legal Privilege & Professional Secrecy  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
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Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
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Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
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