Public Procurement

Contributing editor
Totis Kotsonis

2018

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Public Procurement 2018

Contributing editor
Totis Kotsonis
Eversheds Sutherland

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2005
Fourteenth edition
ISBN 978-1-78915-060-5

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

CONTENTS

Preface

Public Procurement 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of Public Procurement, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **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 Angola, Cape Verde, Chile, Mozambique, Panama, São Tomé and Príncipe and Tanzania.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, Totis Kotsonis of Eversheds Sutherland for his assistance with this volume.

GETTING THE DEAL THROUGH

London
May 2018

Malta

Antoine Cremona and Clement Mifsud-Bonnici

Ganado Advocates

Legislative framework

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

The European Union (EU) 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 the EU (TEU) and the Treaty on the Functioning of the EU (TFEU), and, in specific cases, secondary legislation, namely a number of directives.

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

- the 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 principal piece of legislation that formed Malta's legal framework for public procurement is the Financial Administration and Audit Act (Chapter 174 of the Laws of Malta). The framework was revamped in 28 October 2016 to transpose the 2014 EU directives on public procurement. The key applicable regulations are the following:

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

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

The Director of Contracts has also issued rules entitled the General Rules Governing Tendering. These are usually included in the procurement documents published by contracting authorities. The bidders must abide by these rules. These rules are periodically amended, the latest version being 2.2, which was published in January 2018.

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) – to our knowledge, this 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.

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 either 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 (ECJ), will apply. This means that a procurement process is required which observes the general principles of EU public procurement law.

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 2014 EU Directives. The Public Sector Regulations have been amended a few times since then, but those amendments were mostly immaterial.

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.

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.

A public contract with an estimated value up to €144,000, in the case of the Public Sector Regulations, and up to €443,000, 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 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 €144,000, in the case of the Public Sector Regulations, or €443,000, in the case of the Utilities Regulations, then the procurement process is generally managed by the Director of Contracts and must be in any of the procurement procedures in the law, the preferred option being, the open/

restricted procedure. Naturally, there are exceptions. Specific contracting authorities identified in the law are allowed to manage the procurement process irrespective of the value of the public contract to be awarded.

Public Sector Regulations.
If the estimated value of the public contract exceeds €5.548 billion in case of works, €144,000 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.
If the estimated value of the public contract exceeds €5.548 billion in case of works, €443,000 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 €5.548 billion, 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 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 €144,000, 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:
  - 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
  - would cause significant inconvenience or substantial duplication of costs for the contracting authority:
  - 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 Official Journal of the EU (OJEU);
- where all of the following conditions are fulfilled:
  - 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;
  - any increase in price is not higher than 50 per cent of the value of the original public contract;
  - provided that notice of such a modification is be published in the OJEU;
- 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 paragraph; or
  - universal or partial succession into the position of the initial contractor, following corporate restructuring (such as a takeover, 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
  - 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 that is less than 10 per cent (for a service/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 Contract's 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 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. Such illegal contractual modifications (including 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.

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 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 the 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 ECJ on modification of contracts and it is clear that the 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. 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

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 €144,000 (in the case of the Public Sector Regulations) and €443,000 (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 from 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 €144,000 shall be published through eTenders, 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 the Tenders Electronic Daily (TED) website.

Utilities Regulations

Public contracts with an estimated value exceeding €443,000 shall be published through eTenders. If the estimated value of the public contract exceeds the Utilities Value Thresholds, then the notices are to be submitted for publication on TED.

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: the suitability of a bidder 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 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' (see question 14) 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?

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 which wishes to award a public contract governed by the Public Sector Regulations and with its estimated value exceeding €144,000, 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 candidate 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.

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 '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:

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

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

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.

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 must act independently and impartially during the pre-procurement stage, throughout that procurement process up to the award and performance of the public contract.

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 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'.

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'.

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

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

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.

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 negotiation with bidders, such as the competitive dialogue and the competitive procedure with negotiation.

The use of these procedures 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, in particular within the utilities sector.

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 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 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.

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, 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.

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 mechanisms to enable small and medium-sized enterprises to participate in procurement

processes more effectively, whether intentionally so 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.

We have also noticed an increasing trend where contracting authorities do not insisting on the submission of a bid bond in procurement procedures for public contracts with values that are not significant.

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 €144,000, in the case of the Public Sector Regulations, and €443,000, 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 €144,000, and in the Utilities Regulations the estimated contract value exceeds €443,000.

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.

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 submitting variant bids, if such bids 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 that puts forward an offer that is not compliant with the tender specifications or insists that their terms of business are adopted will 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 in 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 using the 'most economically advantageous tender' basis. In practice, this means that award criteria may take into account 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.

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 €144,000 and in the Utilities Regulations where the estimated value of the public contract exceeds €443,000.

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. 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. Having said that, 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 Public Contracts Review Board is generally open to consider such claims, in particular, when there is a risk of a successful bidder underpaying employees.

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

As highlighted in question 31, 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

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.

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, 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 (eg, rejections or awards) within 10 days.

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 appeals in connection with a procurement process.

A recent amendment to the Public Sector Regulations has vested the PCRB with the same powers of a court of civil law (ie, the First Hall, Civil Court). It is not clear exactly how the PCRB intends to exercise these powers, but it is envisaged that it will be able to compel witnesses to appear before it, to issue interim orders and also to fine any defaulting party if it fails to adhere to any of the PCRB's decisions.

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

An appeal hearing is scheduled within approximately one month from 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. The hearing will be scheduled within a span of two months from the date of filing of the appeal. There will be only one hearing where oral legal submissions (and usually no further evidence) are made. 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 interested persons.

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 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. 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.

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. If the bidders are not notified of the award decision, 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?

Owing to issues relating to confidentiality, trade secrets, sensitive commercial information and bid-rigging risks, contracting authorities generally turn down such requests. Similarly, we are not aware of any instance in which the PCRB has allowed such access to a bidder either during challenge proceedings.

To our knowledge, no application for such information under the Freedom of Information Act (Chapter 496 of the Laws of Malta) has been successful to date.

Update and trends

The industry is still adapting to the legislative overhaul introduced in October 2016, but has made significant progress to date.

We have noticed that there is a drive from the Department of Contracts to move away from award criteria based on 'cheapest offer that is administratively and technically compliant' and more towards a best-price-quality ratio approach. Contracting authorities are getting more comfortable with these formulae. There are also other efforts by the department to close gaps in the electronic public procurement system and to facilitate the use of such system in line with advances in technology, in particular in the submission of bid bonds.

We have also observed an increase in applications before the Commercial Sanctions Tribunal to blacklist economic operators that are found to breach Malta's labour laws. The Labour Office is main driver of these applications.

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

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 159 decisions in 2015, 129 decisions in 2016, and 104 decisions in 2017. Some of these decisions are in turn challenged before the Courts of Appeal. We have also observed an increase in review applications filed before the lapse of the deadline for submissions of offers, the pre-contractual remedy, in the past few months.

We did not observe a similar culture or appetite in procurement processes in connection with concessions, privatisations and PPPs.

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 a submitted offer and for judicial costs incurred for lodging the appeal.

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

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

See question 44.

In addition, 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 needs to be in writing, properly detailed with findings and reasons, and communicated to the awardee. The awardee is then entitled to challenge such a decision before the PCRB. We are aware of

at least one instance in which the Director of Contracts has exercised this power and the case remains pending before the PCRB.

Therefore, it is not to be excluded that an interested party draws the attention of any such illegal public contracts to the Director of Contracts with a view that such power is exercised in that context.

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 is without charge.

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

GANADO
ADVOCATES

Antoine Cremona **agcremona@ganadoadvocates.com**
Clement Mifsud-Bonnici **cmifsudb@ganadoadvocates.com**

171 Old Bakery Street
Valletta
VLT1455
Malta

Tel: +356 2123 5406
Fax: +356 2122 5908
www.ganadoadvocates.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-78915-060-5