

Public Procurement

An overview of regulation
in 43 jurisdictions worldwide

Contributing editor: Hans-Joachim Prieß

2009



Published by
Global Competition Review
in association with:

AB & David Law
Al-Jadaan & Partners
Aluko & Oyeboode
Anderson Mōri & Tomotsune
Andreas Neocleous & Co LLC
Arthur Cox
Arzinger
Attorneys at Law Miro Senica in odvetniki
Barretto Ferreira, Kujawski, Brancher e Gonçalves Sociedade de Advogados (BKBG)
Beiten Burkhardt
Boga & Associates
CMS Cameron McKenna LLP
COMAD, SC, Firma de Abogados
Difi – Agency for Public Management and eGovernment
Eversheds Saladžiūis
Freshfields Bruckhaus Deringer
Grasty Quintana Majlis & Cia
Hamilton Advokatbyrå
Kachwaha & Partners
Kelemenis & Co
Krogerus Attorneys Ltd
Lett Law Firm
Liepa, Skopina / Borenus
Luther Karasek Köksal Consulting AŞ
McManus, Schor, Asmar & Darden, LLP
Mohammed | Muigai Advocates
Paul Varul Attorneys-at-Law
Peterka & Partners
Sabev & Partners Law Firm
Sêrvulo & Associados
Vilau & Mitel Attorneys-at-Law
Walder Wyss & Partners Ltd
WKB Wiercinski, Kwiecinski, Baehr

Public Procurement 2009

Contributing editor
Hans-Joachim Prieß
Freshfields Bruckhaus Deringer

Business development manager
Joseph Samuel

Marketing managers

Alan Lee
Dan Brennan
George Ingledew
Edward Perugia
Robyn Hetherington
Dan White
Tamzin Mahmoud
Elle Miller

Marketing assistant

Ellie Notley

Subscriptions manager

Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistants

Nick Drummond-Roe
Charlotte North

Senior production editor

Jonathan Cowie

Subeditors

Jonathan Allen
Kathryn Smuland
Sara Davies
Laura Zúñiga
Ariana Frampton
Sarah Dookhun

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Public Procurement 2009

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd
2009

No photocopying: copyright
licences do not apply.

ISSN 1747-5910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of April 2009, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

**Law
Business
Research**

Global Overview Hans-Joachim Prieß, Diana Harvey and Annette Mutschler-Siebert <i>Freshfields Bruckhaus Deringer</i>	3
Albania Sabina Lalaj and Besa Tauzi <i>Boga & Associates</i>	8
Austria Axel Reidlinger and Stephan Denk <i>Freshfields Bruckhaus Deringer</i>	14
Belgium Tom Gevers <i>Freshfields Bruckhaus Deringer</i>	20
Brazil Fabio Ferreira Kujawski and Cláudia Santana Junqueira Franco <i>Barretto Ferreira, Kujawski, Brancher e Gonçalves Sociedade de Advogados (BKBG)</i>	25
Bulgaria Boryana Boteva and Emilia Petkova <i>Sabev & Partners Law Firm</i>	32
Chile José Francisco Sánchez and José Manuel Cruz <i>Grasty Quintana Majlis & Cia</i>	40
China Melissa Thomas and Miles Ma <i>Freshfields Bruckhaus Deringer</i>	47
Cyprus Chrysanthos Christoforou <i>Andreas Neocleous & Co LLC</i>	54
Czech Republic Barbora Urbancová <i>Peterka & Partners</i>	59
Denmark Torkil Høg and René Offersen <i>Lett Law Firm</i>	65
Estonia Aldo Kaljurand and Jaak Parre <i>Paul Varul Attorneys-at-Law</i>	70
European Union David Broomhall, Hans-Joachim Prieß and Victoria Harris <i>Freshfields Bruckhaus Deringer</i>	76
Finland Terhi Kauti <i>Krogerus Attorneys Ltd</i>	83
France Thierry Laloum and Juliette Deslandres <i>Freshfields Bruckhaus Deringer</i>	87
Germany Hans-Joachim Prieß and Annette Mutschler-Siebert <i>Freshfields Bruckhaus Deringer</i>	93
Ghana David Ofosu-Dorte, Isabel Boaten and Ferdinand Adadzi <i>AB & David Law</i>	100
Greece Ioanna Lazaridou-Elmaloglou <i>Kelemenis & Co</i>	104
Hungary Dóra Petrányi and Balázs Endreffy <i>CMS Cameron McKenna LLP</i>	109
India Sumeet Kachwaha <i>Kachwaha & Partners</i>	115
Ireland Patrick McGovern and Peter Curran <i>Arthur Cox</i>	119
Italy Marcello Clarich <i>Freshfields Bruckhaus Deringer</i>	126
Japan Yusuke Nakano <i>Anderson Mōri & Tomotsune</i>	131
Kenya Mohammed Nyaoga and Crispine Odhiambo <i>Mohammed Muigai Advocates</i>	136
Latvia Sandis Bertaitis and Ilze Bukaldere <i>Liepa, Skopina / Borenus</i>	142
Liberia David Ofosu-Dorte, Isabel Boaten and Ferdinand Adadzi <i>AB & David Law</i>	149
Lithuania Jonas Saladžius and Aušrys Šliavas <i>Eversheds Saladžius</i>	153
Mexico Roberto Hernandez Garcia <i>COMAD, SC, Firma de Abogados</i>	158
Netherlands Winfred Knibbeler and Paul Kreijger <i>Freshfields Bruckhaus Deringer</i>	165
Nigeria Gbenga Oyeboade and Olubunmi Fayokun <i>Aluko & Oyeboade</i>	171
Norway Trygve Olavson Laake <i>Difi – Agency for Public Management and eGovernment</i>	177
Poland Jerzy Baehr and Jakub Pokrzywniak <i>WKB Wiercinski, Kwiecinski, Baehr</i>	182
Portugal João Amaral e Almeida and Paula Bordalo Faustino <i>Sêrvulo & Associados</i>	188
Romania Madalina Paisa and Sorin Mitel <i>Vilau & Mitel Attorneys-at-Law</i>	192
Russia Falk Tischendorf, Kamil Karibov and Ekaterina Soboleva <i>Beiten Burkhardt</i>	199
Saudi Arabia Salem Al-Arjani and Yasser Al-Hussain <i>Al-Jadaan & Partners</i>	206
Slovenia Mateja Galič <i>Attorneys at Law Miro Senica in odvetniki</i>	211
Spain Javier Gómez-Acebo, Rafael Murillo, Ignacio Santabaya and María Hernández <i>Freshfields Bruckhaus Deringer</i>	216
Sweden Fredrik Linder and Emma Berglund <i>Hamilton Advokatbyrå</i>	222
Switzerland Micha Bühler <i>Walder Wyss & Partners Ltd</i>	228
Turkey Sidika Baysal Hatipoğlu and Zeynep Ünlü <i>Luther Karasek Köksal Consulting AŞ</i>	234
Ukraine Pavlo Barbul <i>Arzinger</i>	240
United Kingdom Sally Roe and Diana Harvey <i>Freshfields Bruckhaus Deringer</i>	245
United States Laurence Schor and Geoffrey T Keating <i>McManus, Schor, Asmar & Darden, LLP</i>	252

Albania

Sabina Lalaj and Besa Tauzi

Boga & Associates

Legislative framework

1 What is the relevant legislation and who enforces it?

The legislation governing public procurement procedures in Albania includes:

- Law No. 9643 dated 20 January 2006 ‘On public procurement’ as amended (hereinafter referred to as the PPL);
- Decision of Council of Ministers No. 1 dated 10 January 2007 ‘On public procurement regulations’ as amended (hereinafter referred to as the PPR); and
- other bylaws on specific areas of public procurement procedures.

The authority that supervises the enforcement of the PPL is the Public Procurement Agency (the PPA), which is entitled to undertake measures in the case of breach of the law either by economic operators or contracting authorities. The PPA carries out investigations on compliance with the relevant legislation and applies sanctions. It may also provide opinions concerning issues that have arisen during the course of a specific tender procedure.

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

Although Albania is not a member of the European Union, the legal framework applicable in the area of the public procurement is based on a model that complies with the ‘acquis communautaire’ and international standards. To this end the legal framework aims to consolidate the position of the state authorities in public procurement procedures and harmonise the applicable legislation with EU directives.

In this context, should any provisions of the domestic legislation not comply with any of the obligations undertaken by Albania by virtue of any international agreements entered into with other countries or international organisations, such agreements shall prevail over domestic legislation. Otherwise, domestic legislation shall apply with regard to public procurement procedures.

3 Are there proposals to change the legislation?

The legislation, regulations and administrative practice are prone to frequent change. However, to the best of our knowledge there are no proposals concerning any changes to the relevant legislation.

4 What is the relevant legislation for the procurement of military equipment?

The PPL applies to all public procurement procedures, including those related to national defence. In this context, exemptions are made for the following:

- if application of the provisions of the PPL would cause disclosure of information which would harm national safety;
- purchase of military hardware and services related thereto; or
- expenses related to nature disasters, hostilities, armed operations, military training and participation in military missions abroad.

Specifically, the procurement of military equipment is subject to provisions of the Decision of the Council of Ministers No. 336, dated 5 October 1991, which determines that the entity authorised to manage the purchase and sale of military equipment is the Military Import Export Company. No procedures related to such procurement are outlined in this Decision.

Applicability of procurement law

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

Pursuant to the provisions of the PPL on contracting authorities, entities that do not satisfy the following criteria are not qualified as contracting authorities:

- constitutional institutions and other central institutions, independent central institutions and local government units;
- any entity:
 - pursuing a public interest and having non-commercial character;
 - incorporated as a legal entity; or
 - financed, for the most part, by the state, regional or local authorities, or other public bodies; or administered by those bodies; or having an administrative, managing or supervisory board, where more than half of members are appointed by the state, regional or local authorities, or by other public bodies;
- organisations that are established by the above-mentioned authorities or public administration bodies; and
- any other public entity.

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

Subject to the definition of the contracting entity as provided in question 5, second paragraph, in practice there are disputes as to whether such kinds of entities qualify for the application of provisions of the PPL. Interpretation of such definition is done by the PPA.

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

With regard to public procurement contracts the PPL applies the maximum and the minimum threshold value to determine the pro-

curement procedure to be followed by the contracting authority. Subject to article 27 of the PPL the Council of Ministers revises the value of the thresholds every two years.

The threshold values recently approved are:

- the maximum threshold value:
 - 1.2 billion leke (approximately €9.2 million) for public work contracts;
 - 200 million leke (€1.53 million) for public supply contracts of both services and goods;
- the minimum threshold value:
 - 12 million leke (€91,900) for public works contracts;
 - 8 million leke (€61,300) for public supply contracts of both services and goods

The rules for the calculation of the contract value are detailed in the PPR.

Contracts with a value up to 400,000 leke per year (€3,060) are qualified as low-value purchases and are subject to 'simplified procurement procedures'.

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

Under the PPL the extension of an existing contract is subject to a new procurement procedure. If the supplies or the additional works or services do not exceed 20 per cent of the contract value, the contracting authority may use the 'negotiated procedure without publication of a contract notice'.

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

Pursuant to article 60 of the PPL the terms and conditions of the contract may not alter from those contained in the tender documents and the offer of the winning bidder. In addition, the standard bid documents provide for the obligation of the parties not to alter those terms and conditions of the contract that set up the grounds for the award of the contract.

If the amendment of an existing contract would substantially alter the terms and conditions that were the basis for the award of the contract, such amendment would be subject to a new procurement procedure.

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

The PPL does not address this issue. Considering the criteria for the award of a contract, in our experience, the transfer of a contract to another supplier or provider would require a new procurement procedure.

However, exceptions exist for public contracts awarded under the public framework agreement (PFA). Please see question 23.

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

Privatisations are generally governed by specific legislation and do not fall under the PPL.

-
- 12** In which circumstances do public-private partnerships (PPPs) require a procurement procedure?

The PPL and PPR do not contain specific rules governing PPPs. When a PPP contract gives rise to the procurement of services and falls

within the thresholds provided in the PPR, the PPL rules on service contract procurements shall become applicable.

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

Concession contracts in Albania are governed by Law No. 9663 dated 18 December 2006 'On Concessions' (the Concession Law) and relevant regulations approved upon the Decision of Council of Ministers No. 27 dated 19 December 2007 'On the approval of regulations on assessment and granting of concessions' as amended.

In accordance with the Concession Law, a concession is an agreement entered into between the contracting authority and the concessionaire by which means the concessionaire has the following rights and obligations:

- perform a business activity that otherwise would be performed by the contracting authority regarding a concession project, administration contract or other public services;
- undertake the risks or part of them in relation to the performance of the business activity; and
- receive a profit through direct payments by the contracting authority or through applications of fees collected by customers.

-
- 14** What are the rules and requirements for the award of an in-house contract without a procurement procedure?

The Albanian PPL does not provide for in-house arrangements.

The procurement procedures

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

The fundamental principles of tender procedures are provided under article 2 of the PPL, which defines that the award of public contracts is governed by the following:

- non-discrimination and equality of treatment of actual and potential bidders;
- transparency of procurement procedures; and
- proportionality of requirements and obligations imposed on actual and potential bidders.

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

In addition to the fundamental principles in question 15, the PPL provides for the obligation of the contracting authorities to treat all bidders equally and to avoid application of any criteria, requirement or procedures with respect to the qualification of economic operators that constitute discrimination against or among suppliers or contractors and their categories.

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

The PPL provides for the refusal of the offers or the tender participation in cases when the candidate or the bidder has a conflict of interest. On the other hand, pursuant to the PPR, the members of the procurement unit and the participating economic operators are under the obligation to declare the lack of conflict of interest prior to the opening of the offers.

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

The bidders are entitled to ask for explanations and propose amendments of the tender documentation to the respective contracting authority, not later than five days prior to the deadline for the submission of the bid. The contracting authority shall respond within three days from the request to enable bidders to make a timely submission of their bids, and without identifying the source of the request, communicating such clarification to all bidders to which it has provided the tender documents.

The bidders are not allowed to submit any kind of request upon expiry of the above-mentioned time limit.

In any event, when the tender documents are amended, the contracting authority shall extend the time limit for the bid submission. If the bidders disagree with the contracting authority's final decision, they can raise a complaint in front of the PPA.

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

In awarding their public contracts, contracting authorities shall apply the procedures set forth in the PPL, respectively: open procedures; restricted procedures; negotiated procedures, with or without prior publication of a contract notice; request for proposals; low purchases procedure; consulting services; and design contest.

The prevailing procedure used by contracting authorities is the open procedure.

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

Articles 32 and 33 of the PPL and PPR determine the rules for the conduct of a negotiated procedure. The negotiated procedure can be with or without prior publication of a contract notice.

When the value of the contract to be awarded exceeds the low-value thresholds, the contracting authorities may apply the negotiated procedure with prior publication of the contract notice, in the following cases.

Firstly, in the event of irregular tenders or submission of bids that are unacceptable under the PPL, in response to an open or restricted procedure, insofar as no substantial alteration is included in the contract, as provided in the PPR.

Secondly, in exceptional cases, when the nature of works, supplies or services or the risks attached thereto do not permit prior overall pricing, namely:

- in the case of service contracts, particularly intellectual services such as services involving the design of works, insofar as the nature of the services cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures; and
- in the case of works contracts, for works which are performed solely for the purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

When the value of the contract is under the low value thresholds, the contracting authority may apply negotiated procedures with prior publication of a contract notice in any case that they deem appropriate, provided that the procedure complies with the principles of equal treatment, proportionality and transparency.

For all contracts with a value that exceeds or is below the low value thresholds, the contracting authority may use negotiated pro-

cedure without prior publication of a contract notice only when the specific circumstances outlined by the PPL and PPR occur. Such circumstances shall be strictly construed. This procedure shall not be used to avoid competition or in a manner that would discriminate between candidates.

The selection of the economic operators, who shall be invited, should not be discriminatory. The contracting authority should, as frequently as possible, change the invited entrepreneurs.

- 21** When and how may the competitive dialogue be used?

Although very similar to the Directive 2004/18/EC, the Albanian PPL does not provide for the competitive dialogue procedure.

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

Pursuant to the provisions of the PPL, the PFA determines the general conditions related to the purchase of power or hydrocarbons, the procurement period (which shall not exceed 24 months), and when suitable, the conditions related to the price and quality of goods to be procured upon such agreement.

The PFA is concluded through open or restricted procedures and in exceptional cases may be conducted through the negotiated procedure without prior publication of the notice.

The procedures for the conclusion of contracts shall apply only between the contracting authority and the contractors, originally parties to the PFA.

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

The law does not provide a limitation on the number of PFAs that may be concluded.

Contracts concluded with several contractors and based upon PFAs may be awarded either by application of the terms set out in the PFA without opening competition, or, where not all the terms are set out in the PFA, with other terms referred to in the specifications of the PFA in accordance with the following procedures:

- for every contract to be awarded, the contracting authority shall notify in writing or in any other way provided in the PPL, the contractors capable of fulfilling the requirements for the contract implementation and the parties to the PFA;
- the contracting authority shall fix a time limit that is sufficiently long to allow the submission of bids for each specific contract, taking into account factors, such as the complexity of the subject-matter of the contract and the time needed to prepare and submit bids;
- the bids shall be submitted in writing or in any other way provided for in the PPL, and their content shall remain confidential until the time limit expires; and
- the contracting authority shall award each contract to the bidder that has submitted the best bid on the basis of the awarding criteria set out in the specifications of the PFA.

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

The offer may be submitted by a group of economic operators (ie, a consortium) in which one of them shall represent the others during the procedure and, if it is awarded the contract, during the contract performance. The group must be formally established upon a notarised agreement. The agreement must indicate the representative of

the consortium, percentage of participation in the consortium or specific work/service of each member, authorisation to the representative for the submission of the tender and eventually signing the agreement.

The offer must specify the part of service, work or supply that each member of the group will perform.

The PPL does not provide for the replacement of one of the consortium members during the tender procedure. Instead, the PPR provides that in the case of bankruptcy of the representative economic operator or other circumstances causing interruption of its activity, the contracting authority may continue the contract with another economic operator assigned as a representative of the group and proposed by the other non-representative members, provided that it has the legal, economical, financial and technical capabilities to perform the contract.

25 Are unduly burdensome or risky requirements in tender specifications prohibited?

The PPL provides for the obligation of the contracting authorities to prepare technical specifications for the purpose of giving a correct and complete description of the object of procurement and for the purpose of creating conditions of fair competition between all candidates and bidders and whenever possible these technical specifications to be defined to take into account accessibility criteria for people with disabilities or design for all users.

The PPL also requires avoiding referring in the technical specifications to a particular trademark or name, patent, design or type, specific origin, producer or service provider, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as 'or equivalent' are included in the specifications.

26 What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

The contracting authority qualifies the bidders pursuant to the criteria provided in the tender documentation or notice of the contract. The qualification criteria are the professional credentials, technical capacity, economic and financial situation and legal capacity. The contracting authority may also request different certifications issued by independent bodies attesting the bidder's compliance with quality or environmental standards.

The qualification requirements provided in the tender documents should be proportional and closely related to the object of the contract and should abide to the principle of non-discrimination.

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

The contracting authority must determine the qualification requirements in a manner that encourages the participation of small and medium business operators.

The PPR provides for the possibility of partition of the awards in 'lots' as a way to encourage small and medium business to participate in tender procedures and to decrease the contracting authority's administrative costs.

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

Alternative bids are permitted when the contracting authority has expressly indicated application of 'alternative bids' in the bidding documents as notified through the notification of the contract.

Alternative bids are permitted in cases when the requirement for qualification is the offer with the most economic convenience.

29 Must a contracting authority take alternative bids into account?

The contracting authority is obliged to evaluate the alternative bid only when the admissibility of alternative bids has been envisaged upon publication of the tender notice. In such case the contracting authority examines only the alternatives that fulfil the minimum requirements it has established.

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

If the tender specifications or the terms of business submitted by the bidder are at odds with or significantly different from the ones provided in the tender documents and contract notice, the contracting authority does not accept the offer.

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

The contracting authority awards the public contract to the economic operator that fulfils the qualification requirements and offers the lowest value. The evaluation of the qualification requirements refers only to requirements indicated in the bidding documents. Reference to qualification requirements not indicated in the bidding documents is not permitted.

The winning bidder is determined following the assessment of various requirements such as quality, price, technical advantages, esthetical and functional characteristics, environmental characteristics, functioning costs, economic efficiency, and maintenance after sale. In any case the above-mentioned requirements are considered in relation to the object of the public procurement contract, and should be objective, proportional and non discriminatory, as well as clearly defined in the public notification of the contract and the bidding documents.

32 What constitutes an 'abnormally low' bid?

The PPL does not provide definition of 'abnormally low' bid. However, when the contracting authority observes that the bid is abnormally low, the PPL defines the following criteria for the evaluation of the abnormally low bid value:

- the economics of the construction method, the manufacturing process or the services provided;
- the technical solutions chosen and any exceptionally favourable conditions available to the bidder for the execution of the work, supply of the goods or services;
- the originality of the work, supplies or services proposed by the bidder; and
- compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed.

The contracting authority verifies those constituent elements by consulting the bidder concerned, taking account of the evidence supplied.

33 What is the required process for dealing with abnormally low tenders?

Following examination of the information provided by the bidder, based on the criteria in question 32, the contracting authority may reject the bid if it deems that the bid does not satisfy the required criteria.

Update and trends

A hot topic in Albanian public procurement regulation is the e-procurement platform, a web-based application supporting the automation of tendering activities of the various ministries and contracting authorities. Electronic procurement is regulated by the Decision of the Council of Ministers No. 659, dated 3 October 2007 'On the approval of the electronic public procurement'.

Such method enables secure transactions among Albanian public institutions and the national and international business community.

The system offers secure, efficient, and transparent preparation and administration of all tender-related documents, removes unnecessary paperwork, and enables secure data flow throughout the entire process.

- 34** 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 'self-cleansing' an established and recognised way of regaining reliability?

The PPA can exclude an economic operator from participation in awarding procedures – without prejudice to criminal proceedings which may have started – for one to three years in the case of:

- serious misrepresentation and submission of documents containing false information for purposes of qualification;
- corruption;
- conviction for crimes such as association in a criminal organisation; corruption; fraud; money laundering; or falsification; or
- non-fulfilment of contractual obligations deriving from public contracts during the past three years.

The PPA publishes regularly the list of excluded economic operators and the period of their exclusion.

Only upon expiry of such period may the excluded economic operators resume participation in tender procedures.

Review proceedings and judicial proceedings

- 35** Which authorities may rule on review applications?

Review applications are filed with the contracting authority. Should the contracting authority fail to respond to the application within the time frame provided in the PPL, the applicant may appeal to the PPA. Should the PPA fail to examine the objection within the time frame provided in law or if the PPA rejects the appeal, the applicant may file an action with Tirana District Court.

- 36** How long does a review proceeding or judicial proceeding for review take?

Review applications shall be filed in writing with the contracting authority within five days from the day the complainant became aware or should have become aware of the alleged breach of the PPL.

Upon receiving the complainant's objection, the contracting authority suspends the tender procedure until the objection is fully examined and a decision is taken. Such decision is taken within five days from receiving the objection and its decision is notified to the complainant no later than the next working day.

Should the contracting authority fail to examine the objection within the time frame above or if the contracting authority rejects the objection, the complainant is entitled to file a written appeal with the PPA within five days from the first working day after the expiry of the time limit (five days) or, if objecting to a decision, five days from the day the complainant was informed of the decision.

Upon receiving the complainant's written appeal, the PPA shall respond within five days. When the contracting authority requires additional information for purposes of reviewing the objection, the PPA shall respond in writing within 20 days.

Following the completion of the administrative appeal, the interested party may file an action with Tirana District Court. The duration of the proceedings in the District Court may last approximately three to six months, the hearing of the appeal before the Court of Appeal takes place within six to 12 months from the filing date. In the Supreme Court the cases are not examined within one year.

- 37** What are the admissibility requirements?

Review applications shall be filed in writing with the contracting authority and within the aforementioned time limits. The interested applicant should use the standard form attached to the tender documentation, and should indicate its name and address, the reference of the contested tender procedure, legal basis and a description of the claims. If the application lacks the above-mentioned requirements, the contracting authority asks the applicant to complete the application, within 48 hours. If the applicant does not, the contracting authority does not accept the application and considers it as never having been filed. The same standards are applied to applications filed with the PPA.

- 38** What are the deadlines for a review application and an appeal?

Please refer to question 36.

- 39** Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure?

Yes. Pursuant to the provisions of article 63 of the PPL, upon receiving the application for review the contracting authority should suspend the procurement procedure pending a thorough examination of the request and issuance of a decision on the raised matter.

However, when the application for review is filed with the PPA and the latter deems that on the basis of the information available to the PPA, it appears likely that the complainant will not succeed in the complaint, or the suspension would cause disproportionate harm to the public interest, the contracting authority or the bidders allows the procurement procedure to continue.

- 40** Must unsuccessful bidders be notified before the contract with the successful bidder is concluded?

Pursuant to the provisions of the PPL the unsuccessful bidders are notified before the contract with the successful bidder is concluded.

The contracting authority notifies the successful bidder upon conclusion of the evaluation procedures and within 10 days from the notification of the award, the contracting authority sends a notice to the PPA for publication in the PP Bulletin, containing the following: names of candidates; value of their offers; names of any disqualified bidders and their offers; and the name of the successful bidder and its offer.

Thirty days following publication of the notice, contracting authority and the successful bidder proceed with the signing of the contract.

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

The applicants are not granted access to the procurement file. However, upon filing of the review application by any interested applicant, the procurement file becomes subject to review by the PPA.

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

Yes, it is customary for the disadvantaged bidder to file review applications with the contracting authority and appeals with the PPA.

43 May a contract be cancelled or terminated if the procurement procedure that led to its conclusion violated procurement law?

The PPA is entitled to order the cancellation of the contract awarding procedures only prior to the conclusion of a public procurement contract. The cancellation of an awarded contract in the event of violation of the PPL is not provided for in the PPL. If, following the conclusion of the public procurement contract, the PPA deems that

a decision or action taken by the contracting authority was in breach of any of the obligations set forth by the PPL, it is entitled to:

- issue an interpretation of the applicable rules or principles that apply to the subject matter of the complaint;
- issue a decision based on which the complainant who suffered loss or damage as a result of a breach of the PPL may claim damages before the court; or
- undertake measures against responsible persons, in accordance with the provisions of the PPL.

44 Is legal protection available in cases of a de facto award of a contract, namely, an award without any procurement procedure?

Legal protection is always available. The damaged party is entitled to challenge the administrative acts issued by the contracting authority, whereby the awarding authority has decided not to call a public tender procedure.

BOGA & ASSOCIATES

LEGAL • TAX • ACCOUNTING

Sabina Lalaj
Besa Tauzi

slalaj@bogalaw.com
btauzi@bogalaw.com

Deshmoret e 4 Shkurtit str
PO Box 8264
Tirana
Albania

Tel: +355 42 251050
Fax: +355 42 251055
www.bogalaw.com



Annual volumes published on:

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

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



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006



The Official Research Partner of
the International Bar Association