

# Public Procurement

An overview of regulation in  
37 jurisdictions worldwide

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 Freshfields Bruckhaus Deringer

# 2013



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## Public Procurement 2013

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<b>Global Overview</b> Hans-Joachim Prieß, Diana Harvey and Pascal Friton <i>Freshfields Bruckhaus Deringer LLP</i>	<b>3</b>
<b>The role of integrity pacts in curbing public procurement corruption</b> Peter van Veen <i>Transparency International UK</i>	<b>8</b>
<b>Albania</b> Alban Caushi and Xhet Hushi <i>Kalo &amp; Associates</i>	<b>11</b>
<b>Austria</b> Axel Reidlinger and Stephan Denk <i>Freshfields Bruckhaus Deringer LLP</i>	<b>16</b>
<b>Brazil</b> Flávio de Mendonça Campos <i>Campos, Fialho, Canabrava, Borja, Andrade, Salles Advogados</i>	<b>22</b>
<b>Bulgaria</b> Boryana Boteva and Emilia Petkova <i>Sabev &amp; Partners Law Firm</i>	<b>29</b>
<b>Canada</b> Paul M Lalonde <i>Heenan Blaikie LLP</i>	<b>37</b>
<b>China</b> Melissa Thomas and Christian Zeppezauer <i>Freshfields Bruckhaus Deringer LLP</i>	<b>43</b>
<b>Cyprus</b> Chrysanthos Christoforou <i>Andreas Neocleous &amp; Co LLC</i>	<b>51</b>
<b>Czech Republic</b> Hynek Peroutka <i>Peterka &amp; Partners</i>	<b>56</b>
<b>Denmark</b> Jesper Kaltoft <i>Bech-Bruun</i>	<b>64</b>
<b>Estonia</b> Kristina Laarmaa and Jaak Parre <i>Law Firm Varul</i>	<b>72</b>
<b>European Union</b> Hans-Joachim Prieß and David Broomhall <i>Freshfields Bruckhaus Deringer LLP</i>	<b>79</b>
<b>Finland</b> Hanna Laurila <i>Dittmar &amp; Indrenius</i>	<b>88</b>
<b>France</b> Pascal Cuche, Marc Lordonnois and Juliette Deslandres <i>Freshfields Bruckhaus Deringer LLP</i>	<b>94</b>
<b>Germany</b> Hans-Joachim Prieß, Pascal Friton and Eva-Maria Meister <i>Freshfields Bruckhaus Deringer LLP</i>	<b>103</b>
<b>Ghana</b> David Oforu-Dorte, Isabel Boaten and Ferdinand Adadzi <i>AB &amp; David</i>	<b>112</b>
<b>Hungary</b> Mariann Erdei and Petra Tasi <i>Oppenheim</i>	<b>118</b>
<b>India</b> Sumeet Kachwaha <i>Kachwaha and Partners</i>	<b>123</b>
<b>Ireland</b> Patrick McGovern <i>Arthur Cox</i>	<b>128</b>
<b>Italy</b> Tommaso Salonico <i>Freshfields Bruckhaus Deringer LLP</i>	<b>136</b>
<b>Kenya</b> Jairus Mohammed Nyaoga and Anthony Guto Mogere <i>Mohammed Muigai Advocates</i>	<b>141</b>
<b>Kosovo</b> Atdhe Dika and Vegim Kraja <i>Kalo &amp; Associates</i>	<b>147</b>
<b>Latvia</b> Sintija Radionova <i>Red, Attorneys at Law</i>	<b>152</b>
<b>Lithuania</b> Robert Juodka, Tomas Venckus, Evaldas Petraitis and Januš Kizenevič <i>Law Firm Varul</i>	<b>158</b>
<b>Macedonia</b> Jasmina Ilieva-Jovanovikj and Dragan Dameski <i>Debarliev Dameski &amp; Kelesoska Attorneys at Law</i>	<b>164</b>
<b>Mexico</b> Roberto Hernández García <i>COMAD SC</i>	<b>170</b>
<b>Netherlands</b> Winfred Knibbeler, Nadiah Al-Ani and Alvaro Pliego Selie <i>Freshfields Bruckhaus Deringer LLP</i>	<b>176</b>
<b>Norway</b> Trygve Olavson Laake <i>Difi – Agency for Public Management and eGovernment</i>	<b>183</b>
<b>Portugal</b> João Amaral e Almeida and Paula Bordalo Faustino <i>Sérvulo &amp; Associados</i>	<b>191</b>
<b>Russia</b> Pavel Karpunin <i>Capital Legal Services LLC</i>	<b>196</b>
<b>South Africa</b> Phoebe Bolton <i>Stellenbosch University</i>	<b>201</b>
<b>Spain</b> Javier Gómez-Acebo and Manuel Martínez <i>Freshfields Bruckhaus Deringer LLP</i>	<b>208</b>
<b>Sweden</b> Fredrik Linder, Emma Berglund and Mikael Dubois <i>Hamilton Advokatbyrå</i>	<b>215</b>
<b>Switzerland</b> Bernhard C Lauterburg and Philipp Zurkinden <i>Prager Dreifuss Ltd</i>	<b>222</b>
<b>Ukraine</b> Sergiy Shklyar <i>Arzinger</i>	<b>229</b>
<b>United Kingdom</b> Sally Roe and Diana Harvey <i>Freshfields Bruckhaus Deringer LLP</i>	<b>234</b>
<b>United States</b> Alan WH Gourley and Adelia Cliffe <i>Crowell &amp; Moring LLP</i>	<b>242</b>
<b>Venezuela</b> José Gregorio Torrealba R <i>Hoet Peláez Castillo &amp; Duque</i>	<b>249</b>

# Albania

## Alban Caushi and Xhet Hushi

Kalo & Associates

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### Legislative framework

#### 1 What is the relevant legislation and who enforces it?

Public procurement in Albania is governed by Law No. 9643 dated 20 November 2006 as amended by the Law No. 9800, dated 10 September 2007 (the PPL). The PPL has been supplemented by several subordinate acts dealing with the public procurement rules, electronic procurement, etc. The PPL defines the Public Procurement Agency (PPA) as the central body responsible for public procurement. The PPA operates as a regulatory authority and manages the national procurement system. Until April 2010, it was also responsible for the administrative review of complaints, a function that has now been transferred to the new Public Procurement Commission (PPC).

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

The PPL is based mainly on the provisions of EU Directive 2004/18, but it can be argued that it also reflects some influences from other sources, such as the UNCITRAL model law on public procurement, the World Bank guidelines and the WTO Government Procurement Agreement (GPA). The PPL does not provide any preferential treatment rules. All suppliers, independent of their origin, are to be treated equally. The equal and impartial treatment of all economic operators has also been imposed by the rules concerning access to information on the envisaged contracts. It is noteworthy that the amendments introduced in 2009 and 2010 confirm the path of the Albanian public procurement legal framework towards alignment with the EU procurement directives. The incorporation within the scope of coverage of the PPL of entities operating in the utilities sectors, with a new chapter devoted to the procedures to be applied in these sectors, also brings the PPL largely into line with EC Directive 2004/17. For the most part, the PPL is consistent with the EU directives, although it can be argued that some elements of the PPL cannot be said to entirely reflect the provisions of the EU directives. This can be seen most notably in the conditions guiding the use of restricted procedure and in the procedures applying to the procurement of consultancy services.

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

To the best of our knowledge, we are not aware of any imminent amendments to the PPL.

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

The PPL applies to all contracts for supplies, services or works awarded by contracting authorities, unless explicitly exempted. It must be noted that procurement by the Ministry of Defence is also largely governed by the PPL, although the procurement of military equipment is governed by a special decision of the Council of

Ministers (Decision 1403/2008), which in any case applies objective procurement procedures, but without publication. As with other contracting authorities the Ministry of Defence purchases uniforms and fuel through the centralised procurement mechanism of the Ministry of the Interior.

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### Applicability of procurement law

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

The PPL applies to all central and local institutions, bodies established for general public interest having legal personality and financed in the most part by the state, regional or local authorities, and associations established by one or several institutions or bodies as described above. The PPL is not applicable to private entities, foundations or associations in which the state does not have a direct or indirect influence through ownership, majority of shares or voting rights. The PPL applies to all entities classified as contracting authorities, namely all of the following:

- the state: this covers, inter alia, government departments and ministers and their subordinated institutions;
- local and regional authorities: for example, municipal authorities and regional authorities;
- associations formed by the above bodies; and
- bodies governed by public law; ie, financed by public funds.

The concept of a body governed by public law is a 'catch-all' provision designed to bring within the PPL procuring entities that are potentially subject to governmental influence. The concept is defined in article 3 to cover a body that has legal personality and is:

- financed, for the most part, by a contracting authority;
- subject to management supervision by a contracting authority; or
- has a board, more than half of whose members are appointed by a contracting authority, and which is 'established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character'.

This last condition basically excludes from the definition certain entities that supply goods on a market – for example, a local authority company set up to operate a theme park along commercial lines might be excluded. It should also be noted that some state companies (eg, those supplying water or electricity) are now covered by the PPA under the so-called 'framework agreements' introduced to reflect the provisions of the EU Utilities Directive.

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

The PPL gives a broad definition of the contracting authorities, including independent institutions, to the extent that they receive

funds from the state budget and the state has a controlling interest through either share control or a majority of representatives in the decision-making structures of such institutions. In addition, the PPL provides that even associations or foundations that are created by central or local institutions will be subject to the public procurement legislation, provided, however, that their major flow of funds derives from the state budget.

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

The PPL provides for two levels of thresholds: low and high. Furthermore, the PPL provides that the level of each threshold will be adjusted on a two-year basis. The high thresholds are approximately €8 million for works and €1.3 million for goods and services) and require advertising in international media and longer time limits. However, the procedures are the same as those applied above the low value thresholds. Thus, even for rather low-value contracts (approximately €80,000 for works and €50,000 for goods and services), fully competitive procedures are applied. The contracts are advertised on the website of the PPA and are fully accessible to any bidder, wherever it is located, and the time limits are a minimum of 30 days from publication on the website (for open procedures).

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

Yes. In all cases the extension to an existing procurement contract requires the initiation of a new procurement procedure.

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

Minor amendments to the procurement contract not affecting the basic conditions that were the grounds for awarding the contract can be made only with the prior approval of the contracting authority and do not require the initiation of a new procurement procedure.

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

Yes. The transfer of the public procurement contract to a third party can be made only with the approval of the contracting authority.

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

In cases of privatisation procedures, a specific law dealing with the privatisation procedures, timing and award criteria is required to be enacted by the parliament. The privatisation procedures are effected through public auction and do not follow the public procurement procedures.

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

In Albania, PPPs are governed and regulated by Law No. 9663, dated 18 December 2006 ('On Concessions') as amended, which has been supplemented by a special decision dealing with the procedures for the award of concessions. The Law on Concessions is not applicable in case of procurement of construction, goods or services which are regulated under the PPL. With the inclusion of the EU Utilities Directive into the PPA, public undertakings are now considered to be part of the public procurement rules. Public undertakings include undertakings over which public authorities may exercise, directly or indirectly, a dominant influence, by virtue of their ownership, financial participation in the entity, or the rules which govern it

(article 3(14)(1)). A dominant influence is presumed when contracting authorities hold the majority of the subscribed capital, where they control the majority of the votes attached to the shares, or where they can appoint more than half the members of its administrative, managerial, or supervisory body.

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

The PPL is not applicable in cases when a different law regulates the area of concessions dealing also with the services concession. All type of concessions will be regulated under the Law on Concessions.

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

The PPL provides that its provisions will not be applied in cases of public service contracts entered between two or more contracting authorities based on an exclusive right granted to them by law. For example, the local government units are allowed by law to sign cooperation agreements between them and to provide specific public services based on the conditions and provisions of such a mutual cooperation agreement.

### The procurement procedures

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

Yes. The PPL provides that its purpose is to ensure efficiency of public procurements, good use of public funds, a decrease in procedural expenses, real competition in public procurements, equal and non-discriminatory treatment of all bidders in tenders, integrity and transparency of procurement procedures and also the right to administrative and judicial review of decisions.

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

The PPL provides that the contracting authority will not establish any criteria, requirement or procedure, with respect to the qualification of bidders, that discriminates against or between suppliers or contractors or against their categories.

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

As regard to the conflict of interest rules, the contracting authorities will reject a tender or a request for participation if the bidder has a conflict of interest. Bidders are obliged to submit with the offer a self-declaration stating that they are aware of the conflict of interest legislation and no high public official holds any interest whatsoever in the legal entity submitting the bid. The Code of Ethics (approved by Law No. 9131, dated 8 September 2003 ('On the rules of ethics in the public administration'), as amended) and the Law on Prevention of Conflict of Interest in the Exercise of Public Functions, No. 9367 dated 7 April 2005, as amended, complete respectively the legal framework for civil servants and public employees, and for those involved in administrative decision-making, namely, managers in public administration and other state institutions. The law defines the conflict of interest as a conflict between the public duty and the private interest of a public official, in which he has private interest, direct or implicit, that affects, could affect or seems to affect the performance of his public duties and responsibilities in an unfair manner.

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

The PPL provides that the Public Procurement Agency is entitled, inter alia, to approve and publish standard tender documents for the procurement of goods and services and for each type of procurement procedure (open, restricted, negotiated with or without publication of the contract notice, request for proposal, design contest) which will ultimately be used by the contracting authorities. Nevertheless, the bidder cannot directly participate in the preparation of the tender documents, but the PPL provides for an indirect participation, meaning that each bidder is entitled to request an explanation and amendments to the standard tender documents, and if the contracting authority approves such request, the modified tender documents will be made available to all bidders and the deadline for submission of the bid will be postponed.

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

As reported by the Public Procurement Agency, of over 3,000 tender procedures in 2012, almost 60 per cent followed an open procedure and 30 per cent followed the request for proposal procedure (for procurement of goods and services below the lowest threshold).

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

The public procurement regulations supplementing the PPL explicitly prohibit a bidder from taking part in the bid of another bidder for the same contract under whatever capacity. Participation by a single bidder in more than one offer for the same contract will result in a non-compliant bid and ineligibility of the bidder. The PPL does not provide any definition for the term 'related bidder', thus two or more bidders that are related between them, either through ownership or voting rights, can submit separate bids for the same procurement procedure.

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

The PPL has specific provisions dealing with the regulation of the negotiated procedure. The negotiated procedure can only be used in exceptional and clearly defined circumstances (for a work contract, research purposes, particular intellectual services, additional works not exceeding 20 per cent of the value of the contract, etc). The negotiated procedure can be conducted with or without the prior publication of a contract notice. The rules regarding transparency and confidentiality must be strictly applied, for example:

- all negotiations should be held separately with each bidder;
- no information whatsoever that has been obtained from one bidder should be revealed to another;
- solutions submitted by one bidder should not be revealed to third parties;
- each bidder should be subject to the same requirements and be given the same information;
- equality of treatment among all bidders must be ensured; and
- all proceedings must be recorded.

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

It must be noted that the PPL does not have any provision for the competitive dialogue procedure introduced in the EU directives in 2004.

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

The latest amendments brought to the PPL included provisions regarding the framework agreements in both public and utilities sectors reflecting the provisions of the EU Directives 2004/17 and 2004/18. The PPL provides that even in cases of framework agreements, the provisions of the law should be followed unless otherwise provided. The law clearly states the conditions to be met and the procedures to be followed when contracting authorities procure framework agreements.

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

The PPL provides that, in cases of procurements under a framework agreement that covers several different activities, they will be regulated as per the legal provision that regulates the primary activity intended. However, the choice between granting a single contract and different contracts for each activity should not be made with the purpose of excluding such a contract from the provisions regulating the framework agreements or other provisions of the PPL.

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

The PPL and its supplementing regulations provide that the members of the bidding consortium, prior to entering into a tender procedure, should have established the consortium and submit with their bid the consortium agreement detailing the leading members and duties and responsibilities of each consortium member. The consortium members cannot be changed once the bid has been submitted.

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

The standard tender documents are drafted by the PPA pursuant to the provision of the PPL, and reflect the principles of equality of treatment and fairness, and in respect of the general civil legislation in Albania. Thus, no risky requirements are included in the tender documents and each potential bidder is allowed to access online each set of standard tender documents applicable for procurement of works, goods or services.

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

It can be assessed to a high degree that the qualification criteria contained in the PPL are consistent with those of the EU directives. They include references to the personal situation of the bidder, technical and professional capability, professional suitability, economic and financial standing and quality assurance standards, including environmental management standards. The PPL does provide the option of making the award on the basis of the lowest price or the most economically advantageous tender and it can be argued that general practice seems to incline towards the lowest price criterion.

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

Pursuant to the decision regulating the public procurement rules, in cases of contracts made up of a set of homogenous goods, works or services serving a similar purpose, and where the combined value is such that only a few bidders would be able to provide them all, the contract must be divided into lots. Such a method may especially be used with the aim of encouraging the participation of small

and medium-sized businesses, or decreasing the administrative costs. However it should be noted that the division of the public procurement contract into lots shall not be made with the purpose of avoiding the levels of the low thresholds provided for in the secondary legislation.

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

Pursuant to the provisions of the PPL, the contracting authority is entitled to authorise alternative bids in cases where the award criterion is the most economically advantageous tender. Even in cases where the contracting authority does authorise the use of alternative bids, the bidder will rely on the provisions of the tender documents which in all cases are of a binding nature. However, depending on the provisions of the tender documents, in cases where the alternatives have been authorised, the contracting authority will indicate in the tender documents the minimum requirement for each alternative bid and any other requirements for their submission.

**30** Must a contracting authority take alternative bids into account?

The contracting authority must take into account the alternative bids only when the submission of such is indicated in the tender documents and when the award criterion is the most economically advantageous tender.

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

In cases where the bidders do not comply with the binding specifications of the tender documents, or they submit their own standard terms of business, the contracting authority will reject their bid as not responsive.

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

The PPL provides the option of making the award on the basis of the lowest price or the most economically advantageous tender. In practice, it can be argued that contracting authorities seem to incline towards the lowest price criterion.

**33** What constitutes an 'abnormally low' bid?

The PPL contains explicit provisions on abnormally low offers; offers that, due to their favourable terms, raise a suspicion that the supplier will not be able to perform according to the terms offered. The PPL provides that a contracting authority, prior to rejecting such an offer, will first seek written explanations and allow rejection only if there is no good reason for the favourable terms. This is to prevent contracting authorities rejecting bids that appear low but actually reflect cost advantages. It is not, on the other hand, designed to safeguard contracting authorities' financial interests by preventing them from accepting risky bids.

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

Pursuant to the PPL, the contracting authorities, prior to rejecting an offer as abnormally low, should request written clarification on certain issues, such as: whether the offer reflects the economics of the construction method, the manufacturing process or the services provided; information regarding the technical solutions chosen and/or any exceptionally favourable conditions available to the bidders for the execution of the work, or for the supply of 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.

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

The PPL provides that the names of the bidders which, due to past irregularities, have been excluded by the public procurement procedures will be published by the PPA, together with the specific length of time in which such bidders will not be allowed to participate in tender procedures. The PPL does not provide for any 'self-cleaning' mechanisms.

**Review proceedings and judicial proceedings**

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

The PPL establishes that the PPC is the highest body in the field of procurement, which examines appeals on public procurement procedures in compliance with the requirements of the PPL. The PPC is a public legal body subordinate to the Council of Ministers and financed by the state budget. Each appeal lodged to the PPC incurs a fee. The respective methods of payment and amounts are established upon a decision by the Council of Ministers. This fee is refundable to the winning side. The decision of the PPC can be challenged to the first instance court by lodging a complaint against the administrative review of the PPC.

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

The timing of an administrative review depends on the complexity of the case, but in general and from the reports of the PPA, the PPC has showed a high level of professionalism and has finished the administrative review process in a very short period. However, the judicial review can take more time depending on the complexity of the case, among other factors.

**38** What are the admissibility requirements?

The PPL provides that the complaint brought before the PPC should follow the template complaint form attached to the tender documents. The complaint form has different sections providing for the identification of the tender procedure, details of the complainant, a statement of facts, the alleged breach, the evidence in support of the complaint, documentary evidence, a copy of the bid submitted, the request addressed to the PPC, etc. The PPC, in reviewing the complaint lodged by any interested party, should follow the basic principles of the administrative review such as: procedural fairness, conflict of interest rules, evidence and procedure (burden of proof), protection of confidential information, discretion and an easily understandable draft of the decision, grounded in the provisions of the PPL.

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

There are two instances in the public procurement appeal procedure.

**Review**

The interested party must file an objection to the contracting authority concerned, in writing, within seven days from the day the interested party became aware or should have become aware of the alleged breach of the PPL.

**Administrative appeal**

If the contracting authority fails to examine the objection within seven days, or rejects the objection, the interested party may file a written appeal to the PPC within a further seven days. It is obligatory

that a written copy of the appeal be simultaneously notified to the contracting authority.

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

Yes. The PPL provides that upon submission of the complaint by the interested party, the contracting authority suspends the continuation of the procurement procedure. Only in certain cases, and upon the issuing of an interim decision from the PPC authorising the continuation of the procurement procedures, can the contracting authority continue the procurement procedures before publication of the final decision from the PPC.

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

As provided in the PPL and in the subordinate legislation completing the law, the standard tender documents have different annexes that include the winner notification form, which provides details for the relevant tender procedure, the details of the successful offer, the names and reasons of the disqualified bidder, the deadline for the conclusion of the contract, etc. The PPL provides that the winner's notification form should be published on the website of the PPA and in the public procurement bulletin, both electronically accessible, following the approval of the final ranking of the bidders by the head of the contracting authority.

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

Yes, all bidders have access to the procurement file via the website of the PPA.

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

It must be noted that detailed procedures for the administrative review have been approved by the Council of Ministers, thus allowing equality of treatment to every interested party alleging a breach of their interest during a tender procedure. Certainly, if we look at the report published by the PPA, it seems that the number of unsuccessful bidders filing a complaint has increased slightly as compared with the years 2008 and 2009, mainly because the review procedures can be made online and because of the increase in the professionalism of the members of the PPC.

**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?

Under the PPL, this remedy is not available to the PPC since the law provides for an automatic stoppage of the tender procedures upon filing of the complaint. However, article 58(6) of the PPL states that the contract is considered null and void if it is concluded:

- prior to the publication of the contract notification award by the contracting authority in the Public Procurement Bulletin; or
- prior to conclusion of the review proceedings.

Although the tribunal could issue a declaration of nullity of the contract, it would have no legal effect. Only the court's decision on nullity of the contract has legal consequences for the parties.

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

The de facto award of a contract without procurement procedures is very unlikely to happen in practice. A specialised institution has been established to deal with the financial review of the budget and expenditures of each central and local public institution in Albania, namely the Supreme State Audit. Therefore, the contracting authorities cannot award any public contract without following the procurement procedure, as such a contract will be declared null by the Supreme State Audit and the responsible persons acting on behalf of the contracting authorities will be charged with a criminal offence.

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

Under Albanian law the complainant can claim not only the invalidity of the procurement procedures but also for damage suffered as result of the unlawful actions of the contracting authority. This process can be done either ex ante (prior to the conclusion of the procurement contract) or post factum (in the event that the contract has been signed). The claim should be filed with the competent court and the amount of compensation shall be determined by the court upon the issuing of a final and binding decision that is enforceable by law.



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