

Public Procurement

Contributing editor
Sally Roe



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GETTING THE
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Public Procurement 2016

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Legislative framework

1 What is the relevant legislation and who enforces it?

In February 2016, the Bulgarian parliament approved an entirely new Public Procurement Act (PPA), in force as of 15 April 2016, which revokes and replaces the previous PPA of 2004. The legislation is furthermore detailed in a Regulation for Implementation of the Public Procurement Act, adopted by the Council of Ministers (Bulgarian government). The current regulation has been in force since 1 July 2006 but a new one is in the process of approval (and expected to be published in April 2016).

In 2008, the Bulgarian parliament approved the Prevention and Disclosure of Conflicts of Interest Act (PDCIA; promulgated in the State Gazette, issue 94 of 2008, as amended from time to time), which also contains provisions relevant to the public procurements.

In December 2015, the Bulgarian parliament also approved the Law on Management of Funds from European Structural and Investment Funds, which applies in cases where the beneficiaries of such funds are not contracting authorities under the PPA.

The following governmental authorities are in charge of controlling and supervising the implementation of and compliance with the PPA:

- the Public Procurement Agency (the PP Agency), currently defined as a body under the minister of finance, implementing state policy in the area of public procurements and exercising ex ante and ongoing control of public procurement procedures, in accordance with the provisions of Part 7 of the PPA;
- the National Audit Office and the State Financial Inspectorate Agency – two bodies responsible for carrying out the external ex post control with respect to the implementation of the PPA and performance of public procurement contracts (pursuant to articles 238–242, PPA and the constitutional laws establishing each of these bodies); and
- the Commission for Protection of Competition (CPC), which is the administrative body responsible for review procedures in the case of appeals against decisions, acts or inactions of contracting authorities.

Finally, the decisions of the CPC are subject to review and appeal before the Supreme Administrative Court.

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

The 2016 PPA transposes the new Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Directive 2014/24/EU) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Directive 2014/25/EU). It also includes provisions on public procurement in the fields of defence and security, in line with Directive 2009/81/EC of the European Parliament and of the Council, and on review procedures, in line with review directives.

In addition, the PPA regulates the award of procurement contracts with values below the thresholds set forth in the EU directives.

3 Are there proposals to change the legislation?

A substantial legislative change has most recently been implemented by the enactment of the new PPA (see question 1). Later on, a new regulation

for the implementation of the PPA, as well as some other pieces of secondary legislation, are expected to be approved by the government.

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

All provisions relating to sector-specific procurement have been incorporated in the 2016 PPA. Therefore, now the PPA encompasses both the general regime and the specific rules related to awarding of contracts by entities operating in the different utilities sectors, as well as contracts relating to the fields of defence and security.

Applicability of procurement law

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

The approach of the Bulgarian PPA is to define the entities for which the public procurement procedures are mandatory. Accordingly, the PPA rules do not apply to entities not specified in the law.

The entities expressly defined as contracting authorities are set out in article 5 of the PPA and are divided into two main categories: public and sectoral, each following the principles established in Directive 2014/24/EU and Directive 2014/25/EU respectively. In addition to typical state, regional and local authorities, and public law organisations, the list of public contracting authorities includes such entities as: diplomatic and consulate offices of Bulgaria abroad, the standing missions of Bulgaria at international organisations and health institutions owned by the state or by municipalities, where more than 50 per cent of their financing comes from the state or municipal budget, or the budget of the National Health Insurance Fund. However, pursuant to a specific exclusion, the PPA shall not apply to contracts concluded between the National Health Insurance Fund and healthcare providers in the meaning of article 58 of the Health Insurance Act (article 14(8) PPA).

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

There could be variations in the interpretation with regards to ‘public law organisations’ and ‘public enterprises’, owing to the very broad definitions of such entities. In case of doubt, the opinion of the Bulgarian PP Agency is sought; however, it is not considered as an official interpretation and would not be binding if a dispute is brought to court on these grounds.

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

The PPA contains rules relating to the calculation of the threshold value of contracts in accordance with the provisions of the EU directives and regulations.

The specific threshold values of contracts are defined in article 20 PPA within several categories, for some of which the law establishes national levels that are lower than the ones set forth in the EU legislation. Several categories of thresholds are set forth on the basis of the type of contracting authorities and of the procurement procedures. Another specific feature of the Bulgarian PPA is that, for general procurements (public contracting authorities), different threshold values are defined depending on whether the place of performance of the contract will be inside or outside the territory of Bulgaria.

Public procurements with values below the EU thresholds may be awarded under simplified rules set forth in articles 176–195 PPA.

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

In general, the extension of an existing public procurement contract is governed by the rules relating to the amendments to such contracts (see question 9). There is an express provision prohibiting the conclusion of open-ended public procurement contracts, as well as of contracts that renew automatically (article 113(4) PPA).

Pursuant to article 113(3) PPA, the duration of procurement contracts concluded on the basis of a framework agreement may exceed the duration of such agreement:

- by not more than one year – in cases where additional time is necessary for the complete performance under the contract; or
- by more than one year – when the contract is for supporting activities, such as warranty service or training of personnel.

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

The 2016 PPA contains detailed provisions on the possible amendments to an existing public procurement contract, without requiring a new procurement procedure (article 116 PPA), which follow the respective provisions of the EU directives (in particular, article 72 of Directive 2014/24/EU and article 89 of Directive 2014/25/EU).

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

Such possibility is allowed by exception by the provision of article 116(1)4 PPA. It states that a modification of a public procurement contract is permitted where there is a need of replacement of the original contractor by a new one, in any of the following cases:

- the original contractor is unable to continue with the performance of the contract and the possibility for contractor's substitution is provided for in the tender documentation and in the contract in clear, precise and unequivocal review clauses referring to the occurrence of specific conditions; or
- there is universal or partial succession, following corporate restructuring of the original contractor by virtue of takeover, merger, spin-off or split, or change in its legal form, liquidation or insolvency, when all of the following conditions are met:
 - with respect to the new contractor there are no grounds for exclusion from the procedure and it fulfils the initially established selection criteria; and
 - the change of the contractor does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the law.

This exception applies to framework agreements as well.

11 In which circumstances do privatisations require a procurement procedure?

The PPA does not explicitly include provisions relating to privatisation of public enterprises. Since April 2009, an amendment to the privatisation law was re-enforced allowing the contractors for services related to privatisation procedures to be appointed under another special procedure, approved by ordinance of the Council of Ministers. This is now revoked by the 2016 PPA – therefore, the privatisation bodies will have to engage contractors by conducting public procurement procedures.

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

In 2012, the Bulgarian parliament approved the Public-Private Partnership Act (PPPA), in force as of 1 January 2013. The PPPA provides that the selection of a private partner has to be conducted by a public procurement procedure in accordance with the PPA, as supplemented by certain specific requirements established in the PPPA. In 2016, the PPPA was substantially amended following the adoption of the new PPA. As yet, there is no practice on the implementation of the PPPA.

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

Works and services concessions are currently regulated by the Concessions Act (CA) of 2006 and the Rules of its implementation (both as amended from time to time). The CA defines the works and the service concessions fully in line with the definitions provided in Directive 2004/18/EC. Since 2008, concession contracts may be awarded only by open procedure, very similar to the open procedure under Directive 2004/18/EC.

In fulfilment of the obligation for transposing Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, there is a new draft law, which is expected to be reviewed and approved by the end of April 2016.

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

The exclusions from the scope of the PPA are classified into three categories:

- exclusions that are common for both public and sectoral contracting authorities (article 13 PPA);
- specific exclusions applicable to public contracting authorities only (article 14 PPA); and
- specific exclusions applicable to sectoral contracting authorities only (article 15 PPA).

These exclusions are in line with the ones provided for in Directive 2014/24/EU and Directive 2014/25/EU, respectively. In particular, the provisions of article 14(1) points 5–8 PPA refer to exclusions related to contracts between entities within the public sector, corresponding to article 12 of Directive 2014/24/EU.

There is one specific exclusion (article 17(2) PPA), pursuant to which the award of activities in forest areas for the creation of forests or for timber and non-timber forest product extraction shall be conducted in accordance with the Forestry Act.

The procurement procedures

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

Article 2(1) PPA declares explicitly that public procurements shall be awarded in accordance with the following principles:

- equal treatment and no discrimination;
- free competition;
- proportionality; and
- publicity and transparency.

These principles are further developed in the law by specific requirements for the contracting authorities and the candidates, as well as for the choice, preparation and conduct of different procedures. For example, the contracting authority is not allowed to include in the resolution, the notice or the tender documentation conditions or requirements giving priority or unreasonably limiting the participation of certain operators in the public procurement procedure (article 2(2) PPA). The contracting authority is also obliged to circulate any clarification with regards to procedure to all candidates and to enclose them in the tender documentation, without specifying the name of the candidate who made the enquiry (article 33 PPA).

The technical specifications should provide equal access of the candidates to participation in the procedure and should not create unreasonable obstacles to competition (article 49 PPA).

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

The PPA contains provisions requiring impartiality of the contracting authority upon awarding a public procurement contract. Firstly, the contracting authority is required to appoint an independent jury for assessing and ranking designs in design contests, and, in regard to other procurement procedures – a commission for the selection of bidders, assessment of bids and conducting of negotiations or dialogues. To ensure impartiality, the law prohibits members of juries and commissions to be in a conflict of interest situation with respect to candidates or bidders (articles 80(7) and 103(2) PPA) and includes a specific definition of the term 'conflict of interests' (in paragraph 2, point 21 of the supplementary provisions of PPA,

transposing the 'conflict of interests' concept of the EU directives and containing reference to the PDCIA as special law).

An important guarantee for the protection against unlawful actions of the contracting authority is the right of each candidate or bidder to appeal decisions, actions or inactions of the contracting authority before the Commission for Protection of Competition, which is further subject to judicial control exercised by the Supreme Administrative Court.

17 How are conflicts of interest dealt with?

Since 1 January 2009, the rules of the PPA have been supported by the PDCIA. Article 3 of PDCIA lists 25 categories of public officers, for which there are numerous restrictions and requirements regarding identification and prevention of conflicts of interest set out in the PPA and other laws.

The conflict of interest is dealt with through the requirements that the members of the tender commissions and juries, and their consultants, have no material interest in awarding the contract to a given candidate or bidder, and that there are no relationships with candidates, bidders, their subcontractors or members of their bodies, and lack of private interest in the meaning of the PDCIA. In addition, the existence of a conflict of interest of a candidate or bidder with respect to the contracting authority represents grounds for the exclusion of such candidate or bidder from participation in the procedure (article 54(1)7 and article 157(1)3 PPA). The contracting authority is also allowed not to accept a proof of technical and professional ability submitted by a candidate, if it originates from a person having a legitimate interest that may lead to an advantage in the meaning of article 2(3) of the PDCIA.

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

The 2016 PPA contains specific and detailed rules relating to the organisation and preparation of a public procurement procedure, as well as the communication of relevant information and documents to economic operators and the general public (Chapters 5 and 6 of the PPA). The contracting authorities are allowed to use external expert assistance in the preparation phase, in particular, for the preparation of technical specifications and standard forms of tender documents. Any possible prior involvement of a bidder is first of all dealt with through the provisions preventing conflict of interest (discussed in questions 16 and 17). Furthermore, pursuant to article 44(3) PPA the contracting authority is required to undertake actions ensuring that persons that have participated in preliminary consultations or preparation of a public procurement procedure shall not have any priority over other bidders. Such actions should include as minimum: the publication on the buyer profiles of the entire information related to the preparation of the procedure or of links to relevant sources; and setting appropriate time limits for the receipt of bids and requests to participate. The contracting authority is obliged to extend the deadlines, if only one bid or request is filed and it is submitted by a person that has participated in the consultations or preparation of the procedure (article 44(4) PPA). Finally, if the said actions cannot ensure compliance with the principle of equal treatment, the bidder having a prior involvement in the preparation of the procedure may be excluded from participation (article 44(5) PPA).

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

According to the statistics provided by the PP Agency, during the last few years around 70 per cent of the public procurements under the PPA have been contracted following open procedures. In the 2014 annual report of the PP Agency it is noted that 8,478 out of a total 11,894 procedures were completed through open tenders. The rest are distributed as follows: 3,021 negotiated procedures without prior publication, 359 negotiated procedures with prior publication, 21 restricted procedures and 15 design contests.

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

There is an express provision (article 101(11) PPA), according to which related persons may not participate as separate candidates or bidders in one and the same procedure. The law contains definitions of 'related persons'. Pursuant to another provision, the contracting authority must exclude from participation in the procedure candidates or bidders that are related parties (article 107, point 4 PPA).

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

The PPA regulates a negotiated procedure with prior publication of a contract notice (articles 162 and 165-167 PPA) and a negotiated procedure without publication of a contract notice (articles 79 and 164 PPA), and most recently - a competitive procedure with negotiation (article 76 PPA), in line with the respective provisions of Directive 2014/24/EU and Directive 2014/25/EU.

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

Public contracting authorities may choose using the competitive dialogue upon fulfilment of certain conditions set out in article 73(2) PPA, and the procedure has to be conducted in accordance with the rules set forth in article 77 PPA, which are in compliance with article 30 of Directive 2014/24/EU.

Pursuant to article 132 PPA, sectoral contracting authorities are free to use the competitive dialogue procedure, which has to be conducted in accordance with article 136 PPA (in line with article 48 of Directive 2014/25/EU).

The contracting authorities in the field of defence and security may only use the competitive dialogue in cases of particularly complex contracts (article 163 PPA). The public procurement is considered complex when, for objective reasons, the contracting authority cannot define the technical specifications or the financial or the legal framework of the contract. In these cases, the procedure to be applied is the one applicable for the public contracting authorities (ie, article 77 PA). In a public procurement through competitive dialogue, the bids shall be assessed on the sole award criterion for the most economically advantageous bid.

This form is very rarely used in Bulgaria. From a search in the Public Procurements Register, there have only been five procedures of this type since 2006, and all of them have been terminated without awarding a contract.

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

A framework agreement can be concluded between one or more contracting authorities and one or more contractors with the purpose of setting out in advance the terms of the contracts that the parties intend to conclude within a given period, including with regard to price and, where appropriate, the quantity envisaged. The period of the framework agreement may be no longer than four years, when signed with a public contracting authority, and no longer than eight years, when signed with a sectoral contracting authority; such period can be longer only in exceptional cases, for which the contracting authority has to provide reasons in the notice. The terms and requirements for conclusion of framework agreements are set out in articles 81 and 82 of PPA in compliance with article 33 of Directive 2014/24/EU and article 51 of Directive 2014/25/EU. Specific rules are set forth in regard to framework agreements concluded in the field of defence and security (article 169 PPA).

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?

A contracting authority may conclude a framework agreement with several suppliers (article 81(2) PPA). If the framework agreement sets out all the terms governing the provision of the works, services and supplies concerned, the contracts shall be concluded in accordance with these terms. Where such framework agreement is concluded with more than one supplier, it must also set out the conditions for determining to which of the suppliers any particular contract shall be awarded (article 82(1) PPA).

Where the framework agreement is concluded with several suppliers and does not set out all the terms governing the provision of the works, services and supplies, the award of each particular contract shall be made following an internal competition among the suppliers that are parties to the framework agreement. A procedure for conducting such internal competition is set out in article 82, paragraphs (3) to (8) of PPA, largely in line with the respective provisions of Directive 2014/24/EU and Directive 2014/25/EU.

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

In principle, the members of a bidding consortium may not be changed in the course of a procurement procedure. Despite the lack of an explicit prohibition, this is based on the understanding that a contract may be awarded only to a bidder in its status as of the time of the bid submission. The only exception is related to the possibility for the contracting authority to require the establishment of a new legal entity where the winning bidder is a consortium of natural or legal entities (or a mixture of both). This is allowed only if it is considered needed for the performance of the procurement contract and such need has to be justified in the decision of the contracting authority for opening of the procurement procedure.

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

Pursuant to article 49(1) PPA, the technical specifications should ensure equal access of the candidates and bidders to participation in the procedure and should not create unreasonable obstacles to the competition. Technical specifications shall not refer to a specific model or source, or a particular process that characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products (article 49(2) PPA). In accordance with the EU directives, such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract is not possible; in such cases, the reference shall be accompanied by the words 'or equivalent/s' (articles 48(2), 49(2) and 50 PPA).

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

The contracting authority is obliged to set out all qualification requirements and selection criteria, including requested documents, in the first procurement notice. After that, the tender commission appointed by the contracting authority for review, assessment and ranking of the bids may only assess the compliance of the bidders with already announced requirements and criteria.

Chapter 7 of the PPA is entirely dedicated to the bidder requirements and contains detailed provisions with respect to the grounds for exclusion of bidders, the selection criteria and the acceptable proofs for technical and professional ability. Most of these provisions are mandatory and therefore limiting the discretion of contracting authorities in assessing the bidders.

28 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 PPA does not expressly provide for any preferential terms for the participation of small and medium-sized enterprises in public procurement procedures. By virtue of article 46(3) PPA, the Council of Ministers is entitled to designate areas in which contracting authorities will be obliged to divide public procurements into lots according to specialised sectors of activity of SMEs and their capacities.

A specific preference is given to specialised enterprises or cooperatives of disabled people (articles 12 and 190 PPA in accordance with article 20 of Directive 2014/24/EU): they have a preserved right to participate in procedures included in a list scheduled to the Integration of Persons with Disabilities Act. The contracting authority must specify this condition in the procurement notice and to include in separate lot each product or service included in that list.

As a general rule, a contracting authority is allowed to decide whether to divide the procurement into lots (article 46(1) PPA). In the procurement notice, the contracting authority has to specify whether bids can be submitted for one, more or for all lots. Where bids can be submitted for more than one lot, the contracting authority may limit the number of lots a single bidder can be awarded (article 46(5) PPA). This possibility, together with the requirement to define the selection criteria in accordance with the principle of proportionality, facilitates the participation of small and medium-sized enterprises.

Another option for small and medium-sized enterprises is to participate in public procurement procedures as subcontractors (article 66 PPA).

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

A contracting authority may allow or request submission of alternatives in the bids, and this has to be specified in the notice or invitation for a given procurement (article 53, PPA). In such cases, the contracting authorities have to specify in the tender documentation the minimum requirements the alternative bids have to comply with, as well as the specific requirements for their submission. The selection and assessment criteria should be able to be applied in a uniform way both to bids containing alternatives and to ones that do not contain alternatives.

30 Must a contracting authority take alternative bids into account?

If the contracting authority has allowed or requested submission of alternative bids and such bids are submitted, they have to be assessed; in such cases, only those alternative bids meeting the established minimum requirements are taken into consideration.

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

The PPA stipulates that the bidders must adhere exactly to the tender specifications announced by the contracting authority (article 101(5) PPA). The contracting authority shall exclude from the procedure a bidder, whose offer is not in compliance with the announced tender specifications (article 107, item 2(a) PPA). However, there is also a rule that any requirement referring to a specific standard, specification, technical approval or other technical reference must also refer to their equivalents (see question 26). Where the tender documentation contains references to specific standards, the contracting authority may not reject a bid only on the basis that works, supplies or services proposed do not comply with the referred standard or specification, or assessment, etc, provided that the bidder proves that proposed solutions satisfy in an equivalent manner the requirements defined by the technical specifications (article 50, paragraphs (1) and (2) PPA). A similar principle applies with respect to required certificates of registration in official lists of approved economic operators or certificates issued by certification bodies (article 68 PPA).

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

In accordance with article 67 of Directive 2014/24/EU and article 82 of Directive 2014/25/EU, Bulgarian law established as main rule that the contracting authorities shall base the award of public contracts on the most economically advantageous tender (article 70(1) PPA). Pursuant to article 70(2) PPA, such tender shall be identified on the basis of one of the following award criteria:

- lowest price;
- level of costs, considering cost-effectiveness over the life cycle of the product, service or works concerned; or
- best price-quality ratio, which shall be assessed on the basis of criteria including the level of price or costs proposed, as well as qualitative, environmental and social aspects.

Where the award criterion is level of costs or best price-quality ratio, the assessment indicators have to be linked to the subject matter of the public contract in question. They should not confer an unrestricted freedom of choice to contracting authorities and must ensure real competition (article 70(5) PPA).

The criterion chosen by the contracting authority has to be specified in the procurement notice or invitation and in the tender documentation, together with an evaluation methodology.

33 What constitutes an 'abnormally low' bid?

A bid is considered 'abnormally low' when it contains a proposal that is related to the price or costs, is subject to assessment and is more than 20 per cent more favourable than the average value of the proposals in the other bids on the same element (article 72(1) PPA).

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

In accordance with article 72 PPA, in the case of an abnormally low bid, the contracting authority must request a detailed written justification of the mode of formation of the excessively favourable proposal, defining a reasonable term for response (not less than three working days after the bidder receives the request). The circumstances on which the justification may be based and the other requirements to be considered when dealing with abnormally low bids are set out entirely in accordance with the provisions of article 69 of Directive 2014/24/EU and article 84 of Directive 2014/25/EU.

It is important to note that the deadline for submission of justification is set forth in the law; it is five days from the receipt of the request of the contracting authority (article 72(1) PPA).

The justification may be rejected and the bidder excluded from the procedure, where the submitted justification is not supported by sufficient proofs (article 72(3) PPA).

Pursuant to article 72(4) and (5) PPA, the bid shall be rejected where the contracting entity establishes that:

- the abnormally low price or costs are proposed because of non-compliance with applicable environmental, social and labour law, collective agreements or international environmental, social and labour law provisions listed in Annex 10 to the PPA, or
- the bid is abnormally low because the bidder has obtained state aid, where the bidder is unable to prove, that the aid in question was compatible with the internal market within the meaning of article 107 TFEU.

In the above cases and if the bidder does not provide the requested written justification in the specified period, the contracting authority shall exclude such bidder from the procedure (article 107, item 3 PPA).

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?

In general, the PPA establishes grounds for exclusion of a bidder from a tender procedure in line with the 2014 EU directives. The new 2016 PPA introduces a set of measures for proving reliability, the application of which may result in a bidder regaining suitability and avoiding exclusion from the procedure. These measures are set out mainly in article 56 PPA but there are also provisions relevant to this matter within articles 57 and 58 PPA, all corresponding to the respective provisions of article 57 of Directive 2014/24/EU and article 80 of Directive 2014/25/EU.

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?

Any person having a legitimate interest can submit an appeal against any decision, act or inaction of a contracting authority relating to public procurement procedures, set out in the law. The appeals are submitted before an administrative body, the CPC, with a copy to the respective contracting authority (article 199(1), PPA). According to article 216 PPA, the decisions of the CPC are subject to appeal before a three-member panel of the Supreme Administrative Court (SAC). The judgment of the latter is final (article 216(5), PPA).

A specific case of appeal is set out in article 221 PPA. It refers to situation where a notification is received from the European Commission pointing out violations of a contracting authority in the conduct of a procurement procedure prior to the conclusion of a contract. Where the contracting authority concerned maintains that there is no violation, the PP Agency, if it considers that the alleged violation results from an act of the contracting authority, is entitled to file an appeal with the CPC (article 221(6) PPA).

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

The PPA establishes short deadlines with regard to the administrative and judicial proceedings for review. Thus a dispute may be finally resolved within about three months. The CPC must make a decision within 15 days of the institution of the proceedings, except for the cases related to procurements that are with values above the thresholds established in the EU directives (as per article 20(1) PPA), for which the deadline is one month.

The decision together with its motivation must be prepared and announced within seven days after it has been made (article 212 PPA).

The decision of the CPC can be further appealed before the SAC within 14 days after its notification to the parties. The proceeding at the SAC is one-instance and is governed by Chapter 12 of the Bulgarian Administrative Procedure Code (Cassation Proceedings). The SAC has to issue its ruling within one month, and it is final.

38 What are the admissibility requirements?

The appeal has to meet the following requirements:

- it must be submitted within 10 days, which runs from different moments depending on the specific action or decision appealed;
- the appellant must have a legitimate interest in the appealed matter; and
- the appeal must be written in Bulgarian and include all details specified in article 199(2) PPA.

If the appeal does not meet the formality requirements, the CPC notifies the appellant and gives it three days to fix the irregularities.

The CPC does not institute a proceeding if:

- the appeal is submitted after the expiry of the 10-day period;
- the irregularities with regard to formality requirements are not fixed within the three-day period;
- the appeal was filed prematurely - with respect to certain acts of the contracting authority; or
- the appeal is withdrawn before the institution of the case.

In the above cases the CPC sends the appeal back to the appellant by a ruling, which is subject to appeal before the SAC within three days of its notification to the appellant.

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

The deadlines relating to the review of appeals are as specified in questions 37 and 38.

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

According to article 203(4) PPA, an appeal against the decision declaring the winning bidder shall have an automatic suspensive effect, unless its provisional enforcement is allowed by the CPC or with respect to certain specific cases listed in the same provision.

In all other cases, the appeal does not have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract (article 203(1) PPA). However, a suspension may be declared by the CPC as an interim measure. To this effect, the appellant must make an explicit motivated request together with the appeal. There are certain cases listed in article 203(2) PPA, in which a request for suspension is not allowed.

The interim measure is only an option and depends on the CPC decision in each particular case. Upon deciding, the CPC should estimate the unfavourable consequences of the delay and the risk of damaging both the public interest and the interests of the parties involved. The CPC has to decide on the interim measure request within seven days from the institution of the proceeding. The CPC decision on the interim measure is also subject to appeal before the SAC within three days from the notification to the parties, and the court has to review such appeal and rule thereon within 14 days. The appeal does not suspend the proceedings before the CPC.

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

All bidders, including the unsuccessful ones, must be notified of the decision of the contracting authority for awarding the contract within three days of its approval (article 43 in relation to article 22(1)6 PPA). The contracting authority is also obliged to publish all its decisions (as well as all other documents) relating to the procurement procedure on its buyer profile (article 42 PPA). Pursuant to article 112(6) PPA, the contracting authority shall sign the contract within one month of entry into force of the award decision or of the ruling allowing its provisional enforcement but not before the expiry of 14 days of the notification to all bidders of the same decision. Furthermore, a public procurement contract may not be concluded before all procedural decisions of the contracting authority come into effect, unless

Update and trends

In April 2016, an entirely new Public Procurement Act (PPA) enters into force, revoking and replacing the previous PPA of 2004, and transposing Directive 2014/24/EU and Directive 2014/25/EU. Another new act was approved – the Law on Management of Funds from European Structural and Investment Funds, which shall apply in cases where the beneficiaries of such funds are not contracting authorities under the PPA. Two other important pieces of legislation are in an advanced process of preparation and approval: a new Regulation for Implementation of the Public Procurement Act and a new Concessions Act. Meanwhile, the statistics show a slight decrease in the total number of procurement procedures and signed contracts, and a substantial decline in the number of review procedures in the period 2014–2015, a trend that is expected to continue during 2016.

its provisional enforcement is allowed or in few specific cases listed in the law (article 112(8) PPA).

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

Pursuant to article 42 PPA, each contracting authority is obliged to maintain a buyer profile on its website and to publish information on the progress and results of procedures (without prejudice to the applicable restrictions in connection with preserving commercially sensitive information and competition rules). In particular, all decisions, notices and invitations relating to opening a procurement procedure, the tender specifications, the contract award decision, the records of the tender commission, as well as the signed procurement contracts and framework agreements have to be published on the buyer profile.

Access to another bidder's offer may only be granted in the case of appeal of the awarding decision, in which case the contracting authority is obliged to submit the entire documentation to the appeal body and the appellants can review the file. However, even within the review procedures, there are provisions aiming to protect the secrets of any commercial or other party (eg, article 208(3) PPA).

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

The CPC publishes regular statistics on its website about the appeals submitted under the PPA. For a long period, each year there was a small increase in the number of appeals. However, since 2014 the number of submitted appeals have been decreasing – in 2014 the number of appeals was 1,735, while in 2015 this was 914. At the same time, based on statistics published by the PP Agency, the total number of announced procurement procedures during 2014 was 11,881 and in 2015 it was 11,111, and the number of signed contracts was respectively 24,872 in 2014 and 22,328 in 2015. These statistics show a substantial decrease in the number of appeals in general and in proportion to the total number of procurement procedures and signed contracts.

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?

In view of the suspensive effect of appeals against the decision declaring the winning bidder (as mentioned in question 40) and the provisions of article 112, paragraphs (6) and (8) PPA (see question 41), a public procurement contract may not as a rule be concluded until the review procedure is finished with a final act of the CPC or SAC respectively. If a contract is concluded in violation of the law, such contract is voidable (article 224(1) in relation to article 119(1) PPA). A claim seeking voidance of a procurement contract may be submitted by any person having a legitimate interest (as specified in article 119(1)3 PPA), in accordance with the general civil procedure rules, within two months of the announcement of the contract in the Public Procurements Register or of becoming aware thereof, but in any case not later than one year after its conclusion (article 225(1) PPA). When the contract is concluded before the completion of the review procedure, the two-month period starts from the date of entry into force of the repealing decision (article 225(2) PPA). If the contract is declared void, each of the parties must return to the other party everything received from that party or, if this is impossible, its money equivalent.

However, the contract may remain in effect in certain cases, where there is an enforceable decision of the CPC imposing a sanction of 10 or 3 per cent of the contract value on the contracting authority, depending on the type of violation (article 224(2)1 in relation to article 215(5), PPA).

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

The PPA provides for legal protection in cases where a contract has been awarded without any procurement procedure (if such was mandatory) or in breach of certain key provisions of the law on the grounds of article 224(1)1 in relation to article 119(1) points 1 and 2 PPA. In this case, any person having a legitimate interest may claim voidance of the contract, as described in question 44.

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.

In accordance with article 218 PPA, any person having a legitimate interest may claim damages suffered as result of violations in the course of a procurement procedure and conclusion of a procurement contract. The claims are to be submitted in accordance with the provisions of articles 203(1), 204, paragraphs 1, 3 and 4, and article 205 of the Administrative Procedure Code (APC).

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