Public Procurement World - Malaysia

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# 1. The Laws

## a. What is the applicable legislation?

There is no specific legislation in Malaysia that governs the government procurement process. Government procurement processes in Malaysia are largely governed by the treasury instructions and treasury circulars ("**Treasury Instruments**") issued by the Malaysian Ministry of Finance ("**MOF**"). As a matter of prevailing jurisprudence, the Treasury Instruments do not have a force of law.

However, there are legislations that contain provisions which apply to certain aspects of government procurement such as:

the Financial Procedure Act 1957 ("**FPA**") which provides for, among others, the control and management of the public finances of Malaysia.

the Government Contracts Act 1949 ("**GCA**") which provides for the making of contracts on behalf of the Government, and the Governments of the States.

In view of the above, all of our responses herein in relation to questions on public procurement law, procurement legislation and other similar references are based on the Treasury Instruments unless otherwise stated.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

No.

## c. What are the basic underlying principles of the legal framework?

The principles for government procurement in Malaysia are public accountability, transparency, best value for money, open competition and fair dealing.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

No.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

The Treasury Instruments apply to all instances where procurement is funded using public money. Examples of public agencies covered by the Treasury Instruments are government hospitals and various ministries carrying out procurement using public money.

## b. Which private entities are covered by the laws?

We are not aware of any private entities in Malaysia which are covered by the Treasury Instruments.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

No.

## d. Which types of contracts are covered?

All contracts for works, supplies and services.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

Any amendments to an existing government contract can be made subject to the following key conditions for variation as set out in the Treasury Circulars:

For supply and service contracts:

the contract must still be in force at the time of application for variation;

the variation does not involve changes to the price and other conditions in the contract;

extension can only be granted once and up to 2 years;

for supply contracts, additional quantity must not exceed 50% of the original contract subject to a maximum additional value of RM 7.5 million and further subject to the value of the overall contract not exceeding RM 25 million;

for service contracts, additional value must not exceed 50% of the original contract subject to a maximum additional value of RM 7.5 million and further subject to the value of the overall contract not exceeding RM 25 million.

For work contracts:

the contract must still be in force at the time of application for variation;

the variation does not change a significant part of the original scope of work;

for additional work, the execution must be carried out at the contract construction site;

for replacement work, the variation must be within the scope of the original contract and the original work as outlined in the original contract scope must be identifiable in the replacement works.

Such changes do not involve a new procurement procedure.

## f. What is the applicable regime for framework agreements?

There is no applicable regime for framework agreements in the Treasury Instruments.

## g. What is the applicable regime for public-private partnerships (PPPs)?

Public-private partnerships are governed separately by the Public Private Partnership Unit ("**UKAS**") in the Prime Minister's Department. There is neither a specific legal framework nor legislation for PPPs in Malaysia. There are guidelines on PPPs which seek to clarify the key principles of Malaysia's PPP programmes. The Treasury Instruments may apply where a PPP is funded using public money.

## h. How are concessions dealt with?

There is no separate regime for concessions. Where a concession is funded using public money, the Treasury Instruments may apply.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

The Competition Act 2010 ("**CA**") prohibits any agreement that has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services. The CA further provides that a horizontal agreement between enterprises which has the object to perform an act of bid rigging is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services. The Malaysian Competition Commission can impose a financial penalty of up to 10% per cent of the worldwide turnover of an enterprise over the period during which an infringement occurred.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

As a general rule, any company that seeks to supply goods or services to any Government agency must first register with the MOF as a supplier through an electronic registration system via the MOF website (known as the "ePerolehan" website). An exception to this registration rule is if the value of the procurement is below RM 20,000, to which there is no requirement for the supplier to be registered with the MOF.

For contracts between RM 20,000 and RM 50,000, quotations for contracts can be sought from any local supplier company registered with the MOF (regardless of Bumiputera status);

For contracts between RM 50,000 and RM 100,000, quotations must only be sought from Bumiputera companies registered with the MOF;

For contracts between RM 100,000 and RM 500,000, quotations for contracts can be sought from any local supplier company registered with the MOF (regardless of Bumiputera status) but price preference must be conferred upon Bumiputera companies registered with the MOF.

For contracts above RM 500,000 an open tender must be issued by the relevant procuring agency.

## b. What status do electronic means/procedures have?

All procurement of supplies and services by the Federal Government are required to be carried out using the electronic government procurement system known as the *ePerolehan* system.

## c. Where are contract notices, i.e. calls for bid, published?

For supplies and services, quotation and tender notices are published on the e-perolehan website:

<http://home.eperolehan.gov.my/makluman-tender-sebutharga-ebidding>

For works, tender notices are published on the Construction Industry Development Board's ("**CIDB**") e-advertisement website:

<http://eiklan.cidb.gov.my/>

## c. Can certain prospective bidders be excluded from the competition?

Yes.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Yes. Public agencies must comply with various procurement principles and policies, such as, among others, utilisation of local products and best value for money.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Yes, prequalification is an option. The Ministry/Department may specify pre-qualification criteria and advertise the tender to invite bidders to enter the tender process. Interested bidders may buy the documents that elaborate on the specific criteria required by each bidder to qualify for further evaluation. If necessary, briefing sessions may be carried out. The tender documents will then only be sold to shortlisted companies that pass this initial evaluation stage.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

Yes, bidders may be blacklisted for breaching any registration requirements (e.g., falsification of information/document, failure to comply with registration requirements, failure to update company's information) and/or breach of tender/contract conditions (e.g., falsification of information/document, price collusion, failure to comply with contractual obligations etc.) "Blacklisted" bidders may be barred from participating or accepting any public procurement offer for up to 5 years. We do not have information on the conditions for unlisting as this information is not publicly available.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

The Treasury Instruments are silent in this regard and we have not seen any company being involved in the set-up of a public procurement procedure. However, the Treasury Instructions generally prohibit any public officer who has a personal interest in a procurement process from dealing with the same.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

Yes. However there may be certain limitations where the relevant procuring public agency may stipulate specific requirements. For example, in respect of the method of combination (i.e., on a project basis or by way of a consortium), local equity requirements etc.

## g. Can members of a bidder consortium be changed during a procurement procedure?

This would depend on the terms and conditions of the bid (i.e., initial selection criteria etc.) which will vary from bid to bid. It may or may not specify prohibitions on the changing of the members of a bidder consortium during a procurement procedure.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

Yes. Limitations do apply including the prohibition under the CA against bid-rigging (i.e., related bidders taking turns to win bids).

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

In respect of procurement for supplies and services, foreign companies are required to establish a local company for the purposes of registration with the MOF in order to be eligible to participate in public procurements in Malaysia. As for contracts for works, foreign contractors are required to register with the CIDB.

# 5. Specifications

## a. Are there any rules on the specifications?

Yes. The Treasury Instructions provide that specifications must be clear in order to provide certainty as to the requirements of the Government of Malaysia ("**GOM**"). In addition, trading names and brand names must not be used in specifications (e.g. Nike). Where the use of such a name is unavoidable, the words "or equivalent" must be included after the name (e.g., Nike or equivalent).

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

This would depend on the terms and conditions of the bid. Bidders who do not comply with the prescribed specifications will be disqualified.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

No.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

Yes. In general, the procuring public agency is required to select the bid or offer that provides the best value for money, fulfils the stipulated specifications and where the goods or works can be completed within the desired timeframe.

## b. Are there any limitations regarding the offered bid price?

Yes, if the bid price is 30% less than the procuring agency's estimated price, the bid will be considered as too low and may not be considered for the tender.

## c. Are there any rules on alternative bids?

No.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

Yes. Pursuant to the Treasury Instruments, procurement worth less than RM 20,000 can be made by way of direct purchase. Additionally, there are various exemptions under the Treasury Instruments to competitive bidding including instances where, among others, there is an urgent need for the procurement and any delay would prejudice and negatively affect the public interest, the supply is so specialised that only one company is able to make such supply and the procurement involves security devices or certain strategic projects that have to be kept confidential.

As per our response to question 1(a) above, kindly note that the Treasury Instruments do not have a force of law as a matter of prevailing jurisprudence.

## b. What are the consequences for violation of the competitive bidding requirement?

Violations of the bidding requirements under the Treasury Instruments by public agencies may result in any decision made by the public agency being subjected to judicial review although we have not seen any cases in this regard.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

Yes. The Treasury Circulars provide for complaint mechanisms handled by the MOF. The Treasury Instructions also provide for an internal audit mechanism which, among others, requires controlling officers to notify the relevant officials of any non-compliance with the procurement procedures.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

Yes. This includes civil law damage (i.e., for breach of contract etc.) claims and, potentially, application for judicial review (i.e., for wrongful exercise of powers by a public authority).

## c. Is there a specific forum before which procurement disputes are heard?

No.

## d. Are there any timing requirements for the review?

The Malaysian Limitation Act 1953 applies to proceedings against the Government of Malaysia. Accordingly, actions cannot be brought against the government after the expiration of six years from the date on which the cause of action accrued for actions founded on a contract with the government.

The Malaysian Limitation Act 1953 applies not just to actions under contract, but also to actions under tort and certain ancillary types of actions. As mentioned above, there is no specific, regulatory enforcement mechanism or forum in relation to public procurement, other than complaint and audit mechanisms.

However, assuming that there is no contract entered into and a bidder is seeking recourse for not being awarded a contract, unless the bidder could somehow rely on tort, it may be a matter for judicial review, which is a general recourse available against public bodies, although this has never been invoked in a public procurement case. Under judicial review, the deadline to appeal to the High Court is 3 months from the decision that the bidder is aggrieved by.

## e. What are the main preconditions for review?

Generally, key pre-conditions for judicial review include:

there must be a complete cause of action;

the applicant must have locus standi;

the claim is brought within the prescribed limitation period;

the court must have jurisdiction to try the case.

## f. What are admissible grounds for starting a review proceeding?

The various grounds for bringing a judicial review claim include, among others, irrationality, procedural impropriety and illegality.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

No, unless interim relief has been sought from court.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

If the applicant is successful in bringing a judicial review claim, the applicant may seek any combination of remedies including mandamus, prohibition, quo warranto, certiorari, declaration, injunction and monetary compensation, although note that this has not been tested in the courts in Malaysia for public procurement cases.

## i. How long does a judicial proceeding for review take?

A judicial review proceeding would typically take about six to eight months from the date of filing of the cause papers to the date of judgment.

## j. Must unsuccessful bidders be notified before the award? If so, when?

No.

## k. Are review proceedings common?

Not common in the context of proceedings against public agencies in respect of violation of the Treasury Instruments. As per our responses to question 7(b) above, we have not seen any judicial review proceedings against public agencies in respect of violation of the Treasury Instruments.

## l. Are damage claims in relation with procurement procedures common?

No.

## m. What are the leading court decisions involving procurement disputes?

There are various court decisions dealing with various aspects of disputes arising out of public procurement in Malaysia. This includes, among others, issues in relation to capacity of a public officer to enter into a contract with a successful contractor (see *Macrotac Enterprise & Ors v. Pengarah Pendidikan Negeri Selangor & Ors* [2010] 8 CLJ 592 where the court held that any government contract entered into by a person without the written authorisation of a public agency is void) and legality of an agreement to provide services to influence decision of a public decision maker to award a procurement contract (see *Merong Mahawangsa Sdn. Bhd. v Dato' Shazryl Eskay bin Abdullah* [2015] AMEJ 1279 where the court held that such contracts are not legally enforceable on grounds of public policy).

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

There is no further legislation relating specifically to procurement by public agencies. However, Malaysia's anti-corruption laws would naturally apply, in particular the Penal Code (i.e., prohibition against taking of gratification, other than legal remuneration, by a public servant in respect of an official act) and the Malaysian Anti-Corruption Commission Act 2009.

## b. Does a specific contract law apply for public contracts?

Yes. Government contracts are governed under the GCA.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

No.

## b. Are there any specific laws or practices that apply in the defense sector?

No.

## c. Are there any specific laws or practices that apply in the health care sector?

No.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

No.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

Not at this time.

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