Public Procurement World - Malaysia

8. Remedies and Enforcement

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# 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).

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