Public Procurement World - Belgium

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# 1. The Laws

## a. What is the applicable legislation?

The Belgian public procurement legislation primarily consists in the Act of 17 June 2016 regarding public procurement (the "Public Procurement Act") and its implementing regulations. The most important implementing regulations are the Royal Decree of 18 April 2017 regarding procurements in the traditional sectors and the Royal Decree of 18 June 2017 regarding procurements by entities operating in the 'utilities' sectors, i.e. water, energy, transport and postal services sectors.

The exposition in this chapter mainly focuses on public procurements in the traditional sectors. Rules applicable in the utilities sectors are largely similar and follow the same basic principles, but generally offer more flexibility to the contracting authority.

The above regulations are supplemented by the Act of 17 June 2013 regarding motivation, information and legal remedies for public procurement contracts.

The Royal Decree of 14 January 2013 sets the general rules of performance of public procurement contracts.

Separate acts and implementing decrees specifically cover concession contracts, as outlined under *2.h.*, as well as public procurement in the defense and security sectors, as discussed under *1.d.*

Finally, all public procurement and concession contracts are also subject to the principles enshrined in the EU Treaties and the Belgian Constitution or developed in the European or Belgian case law, as discussed under *1.c.*

## 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”)?

Yes. Current Belgian public procurement law mainly transposes EU directives, namely Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, Directive 2014/23/EU on the award of concession contracts, Directive 89/665/EEC on legal remedies for the public sector, and Directive 92/13/EEC on legal remedies for the utilities sector.

In accordance with the above directives, Belgian public procurement regulations provide for more stringent requirements for procurement contracts of which the estimated value equates or exceeds the European thresholds. These thresholds are, for the years 2016 and 2017, EUR 5,225,000 for works contracts, EUR 209,000 for all supply and most services contracts, which is lowered to EUR 135,000 for some centralized federal authorities, and EUR 750,000 for social and certain other specific services. Contracts with an estimated value below these thresholds are under the applicable Belgian legislation subject to a lighter regime, which nevertheless safeguards compliance with the general principles of non-discrimination, proportionality, transparency and competition, as outlined under *1.c.*

In addition, Belgium is also a party to the WTO Government Procurement Agreement of 15 April 1994 (GPA). Under this binding international treaty, Belgium must open public procurement markets to foreign companies from outside the EU in accordance with the GPA's basic rules regarding publication of calls for competition, award procedures and non-discrimination. The scope of application is however limited to contracting authorities and contracts listed in the annexes to the GPA.

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

Traditionally, the principles of non-discrimination, transparency and free competition are listed in the EU directives and Belgian legislation as general principles underlying all public procurement procedures. Since the implementation 2014 directives, the principle of proportionality has been added as a fourth general principle of Belgian public procurement law.

It is important to note that these general principles are not only included in the legislation implementing the procurement or concession directives, but are to a large extent also safeguarded by the EU treaties and/or Belgian administrative jurisprudence. As a result, they also apply to government contracts falling outside the scope of public procurement or concession law or not reaching the thresholds for European or Belgian publicity.

The European principles of free movement, non-discrimination, transparency, proportionality and mutual recognition apply to contracts that are sufficiently relevant for the internal market. Belgian principles of good administration such as the duty of care, the obligation to state reasons and the principles of equality and proportionality apply to contracting authorities which are considered as public authorities under Belgian administrative law.

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

Yes. The Belgian Federal State has implemented EU Directive 2009/81/EC on defense and sensitive security procurement by the Act of 13 August 2011 regarding public procurement of works, supplies and services related to defense and security and its implementing Royal Decree of 23 January 2012.

This procurement regime is less liberalized and offers more possibilities for contracting authorities to ensure certainty of supply and the confidentiality of classified or security-related information.

The limited scope of application of the defense and security procurement regime is not determined by the identity of the contracting authority, but by the specific military or classified nature of the procurement contract.

# 2. Application of the Statutory Procurement Laws

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

Belgian public procurement regulation in the traditional sectors applies to "contracting authorities", which are defined by art. 2, 1°, of the Public Procurement Act in a twofold way.

Firstly, a non-exhaustive group of traditional contracting authorities are listed explicitly: the federal State, the Regions and Communities, the local authorities (provinces and municipalities) and associations consisting of one or more of such public entities.

Secondly, the Belgian legislator also enacted a *catch-all* clause, which gives an abstract definition of a contracting authority. Not only public entities but also many private companies or associations qualify as contracting authorities under this definition, which is further discussed under *2.b.* below.

A different personal scope of application is used for the public procurement regime applicable to the utility sectors. This is further discussed under *2.b.* below.

Examples of public agencies covered by the law are: Federal Real Estate Agency (*Régie des Bâtiments/Regie der Gebouwen*), the National Social Security Agency (*Office national de Sécurité sociale/ Rijksdienst voor sociale Zekerheid*), the National Social Insurance Institute for Self-employed Workers (*Institut national d'Assurance sociales pour travailleurs indépendants/Rijksinstituut voor de sociale Verzekeringen der Zelfstandigen*).

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

The *catch-all* definition in art. 2, 1°, c) of the Public Procurement Act considers as contracting authorities each entity that cumulatively (a) has been established for meeting needs in the general interest without an industrial or commercial character, (b) is a legal entity and (c) is controlled by one or more other contracting authorities via dominant management supervision, receiving more than 50 % of funding from public sources and/or appointment of a majority of the members of an administrative, supervisory or managerial board. This definition matches the definition of "bodies governed by public law" used in the EU directives. The precise scope of the concept of a contracting authority has given rise to a large amount of case law by the European Court of Justice.

As a consequence of the broad definition of contracting authorities, many Belgian companies and associations, regardless of their private-sector origin, are considered as contracting authorities and are subject to the public procurement regulation for the traditional sectors. Examples are state-owned entities, hospitals, educational and research institutions, cultural institutions and certain NGO's.

Legal entities subject to the public procurement regulation in the sectors of water, energy, transport and postal services fall into two different groups, i.e. (i) the so-called "public undertakings", which are active in the aforementioned utility sectors and are subject to a dominant control by contracting authorities as defined by art. 2, 1° of the Public Procurement Act, and (ii) the private entities which operate in one of the aforementioned sectors on the basis of one or more "special or exclusive rights" awarded on a statutory or administrative basis via an award procedure not preceded by adequate publicity and/or not based on objective grounds.

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

Yes. The procurement by a contracting authority of works, supplies or services from a private or public legal entity can be exempted from public procurement obligations when the conditions for so-called "in-house control" are met.

Firstly, the control by the controlling entity or entities over the other entity needs to be exercised in a way similar as the control these entities can exercise over their own departments. Secondly, more than 80 % of the activities of the controlled entity must be carried out in the performance of tasks entrusted to it by the controlling entity or entities, or by other legal persons under such control. Thirdly, there can be no direct private capital participation in the controlled legal person, with the exception of a non-controlling and non-blocking participation which does not exercise a decisive influence and which is required by Belgian legislation. As a result, several contracting relationships may qualify for the so-called "in-house control" exemption.

Furthermore, non-institutional public-public cooperation between contracting authorities without a relationship of control, is also exempted from public procurement regulation if the subject matter of the contract aims to ensure that the authorities perform their public service missions with a view to achieving common objectives, if the cooperation is implemented solely by public interest considerations and if the cooperating authorities perform less than 20 % of the concerned activities on the market.

Lastly, a transfer or a delegation of powers between contracting authorities, in accordance with Belgian public law, is also exempted from the scope of public procurement regulation.

## d. Which types of contracts are covered?

Belgian public procurement legislation applies to contracts for procuring works, the supply of products and/or the performance of services. Contracts such as the sale of goods, the purchase of shares, as well as concessions fall outside its scope. The Public Procurement Act also lists several exemptions, such as employment contracts, contracts for works, supplies or services regarding public telecommunication networks, certain contracts for financial and legal services and service contracts regarding audiovisual media and regarding acquiring or leasing real estate. Those contracts are not subject to public procurement rules but contracting authorities are nevertheless required to comply with the general principles of non-discrimination, transparency, free competition and proportionality.

To be considered as a public procurement subject to the legislation, the contract requires a 'consideration' for the contractor. Such consideration does, however, not necessarily consist of a payment obligation but may also take another form, where the contractor will retrieve a financial benefit from the performance of the contract.

In addition to traditional single procurement contracts, public procurement regulations also cover framework contracts (please refer to *2.f.* below) and design contests. Concession contracts are subject to distinct albeit similar sets of rule (please refer to *2.h.* below).

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

Based on Directive 2014/24/EU, the Royal Decree of 14 January 2013 now includes several possibilities subject to strict conditions which allow changes to an existing contract without the requirement of a new procurement procedure:

changes are possible to the extent that these have been foreseen in clear, precise and unequivocal review clauses in the tender documents;

the contract can be expanded to supplementary works, supplies or services with a maximum cost of 50 % of the original contract value, if a change of contractor would be technically or economically impossible or would cause a significant inconvenience or a substantial duplication of costs;

a contract can be changed on the basis of new circumstances that were unforeseeable by a diligent contracting authority, if the value of the change has a maximum cost of 50 % of the original contract value;

a contract can also be changed without a new procurement procedure if the value of the change is below certain minimum thresholds;

the contractor can be replaced as a result of a corporate restructuring (including a merger, acquisition, takeover, …) or insolvency, if the new entity meets the original selection criteria, if there are no other changes to the contract and if this is not aimed at circumventing the public procurement regulation;

lastly, all non-substantial changes to the contract are allowed; substantial changes are defined in the Royal Decree of 14 January 2013 in accordance with the *Pressetext* jurisprudence of the European Court of Justice.

All these changes can under no circumstances result in a change of the overall nature of the contract. If this happens, a new call for tender is warranted.

The actual application of the above rules is subject to a case-by-case review of the situation, including the content of applicable tender documents, which may provide for different procedures or conditions.

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

Framework agreements, which constitute the framework for future procurements during a given period of time and on the basis of pre-agreed terms, are allowed but need to be awarded in accordance with public procurement regulation.

In principle, framework agreements have a maximum duration of 4 years. They can be entered into between one or more clearly identified contracting authorities and one or more contractors. Where a framework agreement has been awarded to multiple contractors and where not all the conditions for the individual orders have been detailed in the framework agreement, the award of individual orders requires a new competitive award procedure limited to these contractors.

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

Non-institutional public-private cooperation is subject to the regulatory framework for public procurement contracts for works, supplies or services or for concession contracts, to the extent that these contractual arrangements include such contracts.

Institutional public-private cooperation, which involves the joint creation by the public and private partner(s) of a "special-purpose vehicle", is subject to public procurement and concession regulation if the participating contracting authority simultaneously awards to the new legal entity a procurement or concession contract.

Regardless of public procurement and concession regulations, it is worth noting that all phases of both contractual and institutional public-private cooperation remain subject to the fundamental principles discussed under *1.c.*

## h. How are concessions dealt with?

EU Directive 2014/23/EU on the award of concession contracts has been implemented in Belgium by the Act of 17 June 2016 regarding concession contracts and the Royal Decree of 25 June 2017. This regulatory framework applies to concessions for works or services in both the traditional, utility and defense and security sectors.

The scope of the concessions regulation is limited to concession contracts that are characterized by the transfer of the operating risk of constructions or services to the concessionaire. Furthermore, the scope is limited to (i) services concessions with a value in excess of EUR 5.225.000 and (ii) works concession with a value above the same threshold which are awarded in the utility sectors either by public undertakings for other purposes than their public service missions or by private entities operating on the basis of "special or exclusive rights".

The concession contracts legislation is based on the same basic principles as the public procurement law, but is less detailed and gives contracting authorities greater autonomy to choose and organize the award procedure. The legislation lists mandatory minimum requirements, which for example relate to the preparation of the concession contract, the contract notice and transparency of the proceedings, as well as exclusion, selection and award criteria. Certain rules are specific to the nature of concession contracts, such as the limitation of the term of concessions which have a longer duration than 5 years to the estimated time necessary for recovering investment costs together with a profit margin.

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

It is prohibited for contracting authorities to design a procurement with the aim to exempt it from the regulation or to limit competition artificially. For contractors, it is in general prohibited to make arrangements that can distort normal competition. A violation of these broad prohibitions needs to be curated if the contract has not yet been concluded and can lead to several sanctions afterwards.

The fraudulent distortion of competition in tender proceedings is a criminal offense. The same goes for usual offenses I that field such as forgery and public or private bribery. Furthermore, public procurement contracts are also subject to the general rules and enforcement mechanisms of antitrust law.

As mentioned, the regulation imposes several limitations to changing the contractor or amending the contract during the execution phase, frames strictly the "in-house" exemption and prohibits practices such as artificially dividing contracts in order to fall under certain thresholds.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

In accordance with Directive 2014/24/EU, contracting authorities may opt for different contract award procedures.

The open procedure (*openbare procedure/procédure ouverte*), in which all interested candidates may submit a tender in response to a call for competition, is always allowed;

The restricted procedure (*niet-openbare procedure/procédure restreinte*), is also always allowed. During the first stage, all interested candidates may submit a request to participate in response to a call for competition and the contracting authority subsequently selects suitable candidates for the second stage. During the second stage, the selected candidates can submit their tenders and the contracting authority subsequently makes an award decision.

The competitive negotiated procedure (*mededingingsprocedure met onderhandeling/procédure concurrentielle avec négociation*) is initially similar to the restricted procedure. However, after the selected candidates have submitted their initial tenders, these can form the basis of negotiations between the contracting authority and the candidates, which allows much more flexibility than the restricted procedure. Multiple rounds of negotiation with updated offers and elimination of certain candidates, are possible.

The choice for the competitive procedure with negotiation needs to be motivated on the basis of one or more regulatory criteria. However, these criteria have been formulated in such a broad way that this procedure can now be applied for all but the truly standard procurement contracts with a value above certain minimum thresholds.

The simplified negotiated procedure with prior publication (*vereenvoudigde onderhandelingsprocedure met voorafgaande bekendmaking/procédure négociée directe avec publication préalable*) is similar to the competitive negotiated procedure but it does not have a separate selection stage. All interested candidates immediately submit their bid on which basis negotiations can start. Several rounds of negotiations are possible, but only if they were foreseen in the original call for tenders.

The simplified negotiated procedure with prior publication is allowed for supply and services contracts with an estimated value below the European thresholds (see *1.b*) or for works contracts with an estimated value below EUR 750,000.

The competitive dialogue (*concurrentiegerichte dialoog/dialogue compétitif*) is also similar to the competitive negotiated procedure, but instead of starting negotiations regarding a predetermined contract, the selected candidates enter into a dialogue with the contracting authority in order to develop one or more solutions which can satisfy the needs of the contracting authority. When the contracting authority has identified the solution(s) that are capable of meeting its needs, the candidates at stake are invited to submit a tender on the basis of their solution.

The competitive dialogue is allowed on the basis of the same criteria as the competitive negotiated procedure, with the exception of the criteria concerning maximum thresholds for the estimated contract value.

The innovation partnership (*innovatiepartnerschap/partenariat d'innovation*) is a multi-staged procedure which allows the combination of research and development with subsequent procurement if the developed innovative services, supplies or works would meet predefined performance and maximum cost standards.

If the contract value is less than EUR 135,000 or if certain other conditions are fulfilled, it is possible to award a contract on the basis of a negotiated procedure without prior publication (*onderhandelingsprocedure zonder voorafgaande bekendmaking/procédure négociée sans publication préalable*), which is further discussed under *7.a.*

A large group of service contracts with a lower need for competitive award procedures, the so-called "social and other specific services", can be at all times awarded on the basis of the simplified negotiation procedure with prior publication and on the basis of the negotiation procedure without prior publication if the estimated contract value is less than EUR 750,000.

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

In Belgium, the existing e-procurement and e-notification platforms are already widely used by contracting authorities.

On the basis of the new Public Procurement Act, it is now mandatory to use electronic communication for all communications, submissions and sharing of documents during a tender procedure. It is only still possible to use non-electronic communication and physical methods of submitting and sharing documents and objects where a contract with an estimated value below the European thresholds is awarded on the basis of a negotiated procedure without prior publication, or if one of the limited regulatory exceptions can be invoked.

Furthermore, the following procurement methods and tools are always electronic:

the dynamic purchasing system is an electronic process for procuring commonly used works, supplies or services, which are widely available on the market and the characteristics of which meet the contracting authority's requirements; it is open during its period of validity to any potential candidate that satisfies the selection criteria;

electronic auctions can be used for ranking prices or certain elements of tenders or for procuring under a multi-party framework contract;

electronic catalogues are a way for presenting (parts of) tenders and updates of catalogues can be used as an additional method for procuring under a multi-party framework contract.

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

Contract notices published at EU level are available in the TED-database, which makes the public procurement supplement to the Official Journal of the EU accessible online: <http://ted.europa.eu/TED/main/HomePage.do>

Contract notices are always published at the national level in the *Bulletin der Aanbestedingen/Bulletin Officiel des Adjudications*, which is accessible online on the e-Notification platform: <https://enot.publicprocurement.be/changeLanguage.do?language=en-GB>

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

Yes. Before a contracting authority evaluates a candidate and its bid in light of the selection and award criteria, it needs to verify whether or not the bidder needs to be or could be excluded.

The Public Procurement Act lists several mandatory grounds for exclusion, such as convictions for certain very serious crimes, convictions for various economic crimes or failures to pay certain amounts of taxes or social security contributions. The mandatory grounds are applicable during a term of 5 years starting on the date of the definitive conviction for such offenses.

The Public Procurement Act also establishes several optional grounds which allow a contracting authority to choose whether or not to exclude concerned candidate(s), such as violations of environmental or employment law, insolvency, inadequate performance of a previous public procurement contract, complicity in antitrust violations or supplying misleading information. The contracting authority needs to apply these exclusion grounds in accordance with the fundamental principles of public procurement law. And they can only be applied during a term of three years starting from the date of the concerned infringement.

# 4. Bidder Selection

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

Yes. Candidates who are not excluded on the basis of one of the mandatory or optional grounds for exclusion and who meet the selection criteria determined by the contracting authority, have the right to submit a bid which will be evaluated in light of the contract award criteria (see *6.a.*). The Public Procurement Act lists several mandatory and optional grounds for exclusion. Regarding these as well as the possibility to "self-clean", see *4.c.* and *4.d.*

The selection criteria which the contracting authority must stipulate in the contract notice or tender documents, can be distinguished into three groups. They need to relate to and be proportionate to the subject matter of the contract.

First, selection criteria may relate to the suitability of a candidate to pursue the professional activity, such as holding the required license, membership of a professional association or trade registry registration.

Secondly, selection criteria may require from a candidate to prove his economic and financial capacity to perform the contract, such as submitting certain annual turnover or other accounting information or enjoying an appropriate level of risk indemnity insurance.

Thirdly, selection criteria may relate to the technical and professional ability to perform the contract, such as possessing the necessary human and technical resources and demonstrating the required experience on the basis of references from past contracts

Subject to certain conditions, candidates may rely on the capabilities of third parties in order to establish their required economic and financial capacity as well as their technical and professional ability.

The new Public Procurement Act makes it mandatory to use the European Single Procurement Document ("ESPD"), which is essentially a self-declaration by the candidate that no exclusion ground applies to him and that he meets all applicable selection criteria. The contracting authority needs to accept this as preliminary proof, but may ask candidates, at any stage, to submit all or parts of the supporting evidence. Contracting authorities are also required to use as much as possible the European e-Certis database to verify certificates.

Lastly, contracting authorities may limit the number of otherwise qualified candidates that they will invite to participate in the tender stage of a restricted procedure, of a competitive negotiated procedure, of a competitive dialogue or of an innovation partnership. This reduction of candidates needs to be clearly indicated in the contract notice together with the objective and non-discriminatory criteria or rules that will be used to this end.

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

Yes. The Royal Decree of 18 April 2017 includes a "qualification system", which a contracting authority may organize for similar procurement contracts. After an announcement is published, potential candidates may at all times request to be admitted to the qualification system by providing proof that they meet the selection criteria. Once admitted to the qualification system, a candidate is eligible for all contracts based on the qualification system.

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

No. Blacklists specifically related to public procurement do not exist. But to the extent certain candidates are in a situation corresponding with one or more exclusion grounds, this will, of course, be visible in some databases such as the national criminal register.

Based on Directive 2014/24/EU, a "corrective measures" exemption has been introduced in Belgian public procurement law as a self-cleaning mechanism.

Candidates subject to a mandatory or optional grounds for exclusion are indeed offered the possibility to prove that they have taken sufficient corrective measures in order to remedy their untrustworthiness. To that end, the candidate needs to prove that (i) it has compensated or undertaken to compensate all damages caused by its misconduct, (ii) it has clarified the facts and circumstances comprehensively by actively collaborating with the investigating authorities, and (iii) it has taken adequate preventive measures.

These corrective measures are evaluated by the contracting authority, taking into account the seriousness of the misconduct, and if they are deemed sufficient, the concerned candidate shall no longer be excluded from the procurement procedure.

## 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?

Possibly yes. The contracting authority needs to take appropriate measures to prevent the distortion of competition resulting from the involvement of a potential candidate in the preparation of the public procurement procedure (i.e. research, experimentation, study or development).

The contracting authority can decide to share with the other candidates all relevant information exchanged during the involvement and/or fix adequate time limits for submitting tenders. Only if such measures do not suffice to remediate the distortion of competition, is the contracting authority allowed to exclude the economic operator that participated to the preparatory phase of that procurement. However, in such instance the operator has the opportunity to justify that its participation to the preparatory phase will not grant it an advantage affecting or distorting the normal conditions of competition.

Furthermore, specific rules apply to the conflicts of interest resulting from connections between public officials involved in the tender proceedings and one or more potential candidates, as well as the conflicts of interest resulting from the employment by a potential candidate of an individual who has worked during the last two years for the contracting authority.

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

As a general rule, candidates have the right to form consortia. Both natural persons and all types of companies and associations, including temporary associations, have a right to bid. The contracting authority can, however, require that the contractor, possibly a consortium, assumes a specific legal form after the award of the contract, if this would be necessary for the proper performance of the contract. In addition, the contracting authority can clarify in the contract notice or tender documents how consortia can meet certain selection criteria. To the extent that other conditions would be imposed on consortia than those applicable to individual bidders, this differential treatment needs to be based on objective grounds and be proportionate.

Lastly, it is worth noting note that it is generally not allowed to submit tenders simultaneously as a member of a consortium and on an individual basis.

Candidates also have the right to use subcontractors but this right can be restricted.

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

The possibility for one or more members to leave a consortium during the procurement procedure is generally regulated by the tender documents.

As a general rule, leaving members of a consortium will not be allowed to participate to the tender on an individual basis as they need to comply with time limits for submitting candidacies or tenders and, as mentioned under *4.f.*, it is in principle forbidden to participate in a procurement procedure simultaneously as part of a consortium and on an individual basis.

However, the recent jurisprudence of the EU Court of Justice that, if a consortium is dissolved after submission of a tender but before the award decision as a consequence of the bankruptcy of one of its constituting members, the contracting authority may allow the remaining member to proceed in the procurement process alone, if it individually meets all selection criteria and if this does not affect the competitive position of other candidates.

Furthermore, in 2016, the Belgian Council of State allowed a member of a consortium, which was confronted with the unwillingness of the other constituting member of the consortium to proceed, to submit the BAFO on behalf of another consortium, newly formed with a different company. This was motivated on the basis of several very case-specific considerations, most importantly, the fact that there was only one other tenderer and that competition would disappear if a changed consortium could not proceed.

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

Separate legal entities which are nevertheless related, are in principle entitled to simultaneously participate in a procurement procedure. However, it is forbidden for them to conclude any type of agreement which violates antitrust law or to act in a way which could distort normal competitive circumstances. This is not only safeguarded by provisions of general competition law, but also explicitly imposed in the Public Procurement Act as an obligation for all bidders.

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

There are no special regulations or explicit requirements relating to foreign bidders.

Only businesses registered in the EU automatically benefit in principle from the right to participate in Belgian public procurement procedures. In general, contracting authorities cannot discriminate against EU businesses on the basis of nationality. In particular, they cannot refuse supporting documents issued in another country when these may offer similar guarantees and they cannot exclusively require specific brands, trademarks or patents without accepting equivalents.

Potential candidates from outside the EU only have access to Belgian public procurement procedures if the contracting authority and the type of contract fall within the scope of application of the WTO GPA (see *1.b.*) or if they enjoy this right on the basis of unilateral or multilateral agreements between the EU, Belgium or a Belgian Region or Community, on the one hand, and their country, on the other hand.

# 5. Specifications

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

Technical specifications included in the tender documents need to be formulated in compliance with the fundamental principles of non-discrimination, transparency, competition and proportionality. In particular, they cannot constitute an unjustified obstacle to opening up the market. Furthermore, technical criteria for all procurement intended for use by natural persons should take into account accessibility for disabled persons.

They are formulated in terms of sufficiently clear and detailed performance or functional requirements, by reference to international or common standards (by decreasing order of precedence) or by using combinations of both methods. References to international or common technical standards in the tender documents, always need to be followed expressly by the words "*or equivalent*".

Lastly, tender specifications cannot refer to a specific origin or production method which characterizes the products or services provided by a specific company, nor can they refer to trademarks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products, save for specifications for which there is no other sufficiently precise and intelligible description, where such reference is justified by the subject matter of the contract and where it is followed by the words "*or equivalent*". However, the new regulation allows contracting authorities to require specific reports or certificates issued by labels (*keurmerk/label*) for the works, supplies or services with specific environmental, social or other characteristics which it wants to procure, if the label meets certain conditions.

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

No. Bidders are not allowed to change elements of the tender specifications and contract conditions, unless in the form of an accepted variant (see *6.c*). Unlawful changes to the contract automatically lead to the rejection of a tender if the so-amended aspects of the contract are considered as essential. If they are not, the contracting authority has to decide whether or not to reject the tender in accordance with the fundamental principles of public procurements.

Traditionally, variants are used to modify technical specifications or to add elements to the contract but not tot to change its legal or financial terms. Furthermore, variants can never be accepted when they would change essential aspects which might make it impossible to further compare tenders. As a result, while variants of specifications are under certain circumstances possible, modifications of the contract terms are almost certainly never allowed.

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

The protection of Small and Medium Enterprises ("SME's") is one of the main objectives of Directive 2014/24/EU. As a consequence, several rules and exemptions in the current Belgian regulation aim to avoid that only larger companies participate in public procurement procedures.

One of the most important tools to this end is the new incentive for contracting authorities to divide contracts into lots wherever possible. If they do not divide a contract with an estimated value above the European thresholds for traditional federal authorities into any lots, they are obligated to explicitly motivate this choice in the procurement documents. Other examples are the general limitation of the minimum annual turnover selection criterion to twice the estimated contract value and the introduction of the ESPD, which should reduce for SME's the burden of demonstrating eligibility.

# 6. Contract Award

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

The general award criterion applicable to all public procurement procedures is the "most economically advantageous tender". In the tender specifications, the contracting authority can define in three possible ways what it deems to be economically most advantageous for the intended procurement:

first, a contract can be awarded on the basis of the exclusive criterion of the lowest price;

secondly, a contract can be awarded on the basis of the lowest costs, taking into account the cost-effectiveness such as the lifecycle costs; this is broader than the price-criterion and encompasses also other economic costs related to the procurement, for example usage costs such as energy, maintenance costs, transport costs, removal costs, as well as pollution and recycling costs;

thirdly, a contract can be awarded on the basis of the best price-quality ratio; this shall be assessed by the contracting authority on the basis of sub-criteria such as functional quality, design, organisation, delivery, accessibility or after-sales services.

Sub-criteria defining cost-effectiveness or price-quality ratio need to relate to the subject matter of the contract at stake. They may not result in an unlimited freedom of choice for the contracting authority and need to be accompanied by specifications that allow the information in the tenders to be effectively evaluated.

For contracts with an estimated value equal to or above the European thresholds, contracting authorities have to specify the relative weight which they give to each of the identified sub-criteria. When this is not possible, the sub-criteria need to be ranked in order of decreasing importance. Below these thresholds, this is not required. Consequentially, if the sub-criteria have not been weighted or ranked, they are presumed to each have similar value.

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

Yes. If a price appears to be abnormally low or abnormally high, the contracting authority must to request a written clarification from the relevant bidder. If the contracting authority considers that the clarification given does not offer a satisfactory economic explanation, it must reject the tender. Otherwise, the tender can continue to be taken into consideration in the procurement procedure but the contracting authority needs to motivate in the award decision why the offered bid price of the concerned tender is not abnormal.

Unless specified differently in the procurement documents, the above obligations are not applicable in the competitive negotiated procedure, the simplified negotiated procedure with prior publication nor in the negotiated procedure without prior publication for supplies or services contracts below the European thresholds or for works contracts with a value of less than EUR 500,000.

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

Yes. In the regulation, additional alternative bids are called "variants". Variants can be requested or authorized in the procurement documents, which then need to state the applicable minimum requirements and how they need to be submitted. Variants which have not been explicitly requested or authorized by the contracting authority, are only allowed for contracts below the European thresholds.

# 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. The negotiation procedure without prior publication only requires from a contracting authority to contact several potential candidates and to comply with the fundamental principles of non-discrimination, transparency, competition and proportionality when negotiating with candidates. If contacting several potential candidates is not possible, this has to be explicitly motivated by the contracting authority.

This procedure is only allowed if the contract value is less than EUR 135,000 or if one or more other specific regulatory conditions are met, such as a unsuccessful preceding tender procedure, a strict necessity resulting from unforeseeable urgency or a legal or technical monopoly. However, social and other specific services can be awarded on the basis of the negotiation procedure without prior publication if the estimated contract value is less than EUR 750,000.

Procurement contracts with a minimum value below EUR 30,000 are only subject to the general principles of the first section of the Public Procurement Act and can be awarded simply on the basis of an accepted invoice.

# 8. Remedies and Enforcement

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

Yes. The following remedies are available under Belgian public procurement legislation: (i) suspension and/or (ii) annulment of administrative decisions and (iii) statement of absence of effect of a contract.

As a matter of law, any person having an interest in the award of a public contract and affected by a decision of the contracting authority (i.e., the decision to award the contract to another bidder but also any preparatory decision having a decisive impact on the situation of the claimant), may apply for the suspension and/or annulment of the award decision before either the Council of State-or judicial courts (see *8.c*).

The Council of State or judicial courts will then verify whether a breach of the law in general or of the public procurement rules in particular justifies the suspension and/or the annulment of the administrative decision at stake.

The suspension of an administrative decision prevents the contracting authority from giving any effect to the said decision. For instance, the suspension of the award decision implies that the parties cannot enter into the contract. The suspension of an administrative decision will last until (i) the Council of State or the judicial courts rule on the annulment of the same decision, or (ii) the time limit to file a plea for annulment against the said decision expires.

The annulment of an administrative decision has for effect to make that decision disappear from the legal order *ab initio*.

Where a public contract has already been entered into, no plea for suspension or annulment can validly be filed any longer. In that case, interested parties can, however, still file a plea to have the said contract declared without effect. Such a plea, however, is only possible (i) where the contracting authority has violated the rules allowing interested parties to file suspension and annulment pleas effectively (e.g., non compliance with the mandatory 15-days *standstill* period between the award decision and the conclusion of the contract or non-compliance with the prohibition to enter into the awarded contract pending a suspension procedure), (ii) where the contracting authority has concluded a contract with an estimated value above the European thresholds without publishing beforehand a contract notice at the European level, or (iii) where the contracting authority has violated the rules applicable to the award of contracts in the frame of a framework agreement. A statement of absence of effect can result in the annulment of the contract *ab initio*, or the annulment of the part of the contract still to be performed in combination with a fine. If there are overriding reasons of general interest, the Council of State or judicial courts can also decide to limit the duration of the contract or to impose a fine upon the contracting authority.

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

Yes. In addition to the above-mentioned remedies, a plaintiff can also claim damages before the Council of State or judicial courts , and this regardless of the fact that a contract was entered into or not.

The plaintiff must prove that the contracting authority has committed a violation that caused him a prejudice in the sense that, without such violation, it should have been awarded the procurement or should have had a reasonable chance to be awarded therewith. Damages may cover the loss of profit or a loss of chance and a compensation for the expenses incurred by the plaintiff for the preparation of its bid.

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

Where the contracting authority is an entity with public authority (e.g., the state, a region, a municipality…), the Council of State (*Conseil d'Etat / Raad van State*) is the exclusive forum before which public procurement disputes are heard.

Where the contracting authority is another public or private entity subject to public procurement legislation (e.g., public companies, hospitals…), any claim must exclusively be filed before the judicial courts .

The distinction between such a 'public authority' and 'another public or private entity' is sometimes difficult and depends on various factors.

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

Yes. As a rule, a plea for annulment must be filed within 60 days after the publication or notification of the said decision to the claimant or after the latter took knowledge of the said decision.

A plea for suspension (in extreme urgency) must be filed within 15 days after the publication, the notification or the knowledge of the said award decision so as to suspend the award proceedings and prevent the conclusion of the contract.

A claim for damages must be filed within 5 years after the publication, the notification or the knowledge of the award decision.

A plea for a statement of absence of effect must be filed (i) within 30 days as from the day after the publication of an award notice in the Belgian Official Gazette if the contract was awarded without publicity and if the award notice contains a justification therefor, (ii) within 30 days after the day after the communication of a reasoned decision informing the interested candidates and bidders that the contract was awarded to another bidder, when the contract was awarded with prior publicity or (iii) maximum 6 months following the award of the contract if the said award was not published in an award notice or communicated to the interested parties, as per (i) or (ii).

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

Claimants must have a personal, current, certain, direct and legitimate interest.

Before the Council of State, when a legal person, the claimant must also demonstrate that the decision to file the plea has been taken by its legal representatives (i.e., most of the time, by the board of directors), prior to the filing of the plea. Where the legal person is represented by a lawyer admitted to plead before Belgian courts, such decision by the relevant persons within the company as well as the lawyer's power of attorney are presumed.

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

Any violation of the law *sensu lato* can theoretically be the ground for starting a review proceeding.

In particular, for the suspension or annulment of an administrative decision relating to the award of a public procurement, the following grounds are the most common:

incompetency of the contracting authority (e.g., the decision has been taken by the mayor where it should have been taken by the municipality council);

lack of justification (any administrative decision must be properly motivated and the formal justification thereof should be included in the decision);

violation of public procurement laws (e.g., award of a contract without publicity where a prior publication of a contract notice in the Belgian Official Gazette and in the Official Journal of the European Union was required);

violation of any other law (including international and EU laws, Belgian Constitution, Belgian laws and decrees, regional or local decrees…);

violation of the prohibition of any discrimination between bidders;

violation by the contracting authority of its own rules and procedures (e.g. as set out in tender documents).

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

As a rule, the filing of a plea for suspension or annulment of an administrative decision has no suspensive effect and do not affect ongoing procurement procedures.

However, Belgian public procurement law provides for a *stand still* mechanism, after the award decision has been made. According to that rule, the contracting authority cannot enter into a contract with the awarded bidder before the end of a 15-day *stand still* period, starting on the day on which the award decision has been notified to the other bidders involved.

During the *stand still* period a plea for suspension can be submitted against the award decision. If so, the contracting authority cannot enter into the contract before the final decision of the competent court (i.e. the Council of State or the president of the Court of first instance) on the suspension of the disputed decision. If the suspension is confirmed, it will last until the competent court rules on the annulment of the same decision.

The filing of a plea for suspension or annulment or even of a plea for a statement of absence of effect has no suspensive effect on existing contracts (i.e. contracts which have already been entered into between the contracting authority and the awarded bidder, even if the conclusion of the contract occurred in violation of the law or of the*stand still* period).

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

The suspension of an administrative decision prevents the contracting authority from giving any effect to the said decision. The suspension of the award decision implies that the parties cannot enter into the contract until the competent court rules on the annulment of the same decision. In practice, contracting authorities will most of the time decide in that case to withdraw the suspended decision without waiting for a decision on the annulment and to take a new decision (taking into account the grounds for the suspension) or even to launch a new procurement procedure.

The annulment of an administrative decision has for effect to make that decision disappear from the legal order *ab initio*. If an award decision would be annulled, the contracting authority can either take a new decision (taking into account the grounds for the annulment) or launch a new award procedure. Obviously, no contract can be entered into based on an annulled award decision.

However, neither the suspension, nor the annulment of an award decision would have any consequence on existing contracts (i.e. contracts which have been entered into between the adjudicating authority and the awarded bidder, even if the conclusion of the contract occurred in violation of the law or of the *stand still* period). Even if, in very few cases, judicial Courts decided to annul contracts based on the annulment of the corresponding award decisions, these are isolated decisions, which are very unlikely to be reproduced now that the statement of absence of effect has been introduced in Belgian law.

Indeed, the consequence of a favorable decision of the Council of State or of judicial Courts on a plea for statement of absence of effect could be the annulment of the contract *ab initio*, or the annulment of the part of the contract still to be performed. As mentioned, the Council of State or judicial courts can also decide to limit the duration of the contract or to impose a fine upon the contracting authority.

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

Suspension proceedings can take only a couple of days, in case of urgency, and in any case no more than 6 months.

Annulment proceedings usually take up to 5 years before the Council of State (with no appeal possible) Before judicial court, the same proceedings could take 1 to 2 years before in first instance and 3 to 5 more years in case of an appeal.

Absence of effect proceedings take between 6 months and 1 year before the Council of State. Before judicial courts, the same proceedings could take 1 to 2 years before in first instance and 3 to 5 more years in case of an appeal.

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

Yes. If the tender procedure includes a prior selection phase, non-selected candidates must be informed of their non-selection immediately after the selection decision has been made. Invitations to submit an offer cannot be sent to selected candidates before the non-selection decisions have been communicated to non-selected candidates.

At the end of the procedure, unsuccessful bidders must be notified of the non-award decision. The contracting authority must do so immediately after the adoption of its motivated award decision. The notification to the unsuccessful bidders must *inter alia* contain the justification of the non-award decision.

## k. Are review proceedings common?

Yes. Review proceedings (suspension and annulment) are very common in Belgium. The statement of absence of effect proceedings is more recent and less known but becomes more and more common.

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

No. Since the possibility to claim damages in relation to procurement proceeding is relatively new in Belgium, damage claims are not very common yet. It is however expected that they will become more common in the future.

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

n/a

# 9. Other Relevant Rules of Law

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

We refer to the references to antitrust law and criminal law under question *2.i.* above. Furthermore, contracting authorities which are public authorities are also subject to general administrative law and public budget regulations.

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

Yes. The general rules for the performance of public contracts are set out in the Royal Decree of 14 January 2013 regarding the performance of public contracts. This Royal Decree governs matters such as subcontracting, financial guarantees, intellectual property rights, changes to the contract, payment and termination rights, etc.

# 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?

Yes. We refer to question *1.d* above.

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

No. However, the subjection of private hospitals to public procurement rules in Belgium is a very complex question.

Under the previous Public Procurement Act (applicable between December 1993 and 1 July 2013), private hospitals where expressly excluded from its scope. The same exemption applied to public hospitals for their tenders not exceeding the thresholds for the European publicity.

However, since 2013 (i.e. the entry into force of the previous public procurement Act), as well as in the 2017 public procurement Act, that exemption was removed, so that private hospitals are now for the first time subject to public procurement law (i) if they have been created to pursue general interest needs other than industrial or commercial, and (ii) if they are mainly financed by public funds (not necessarily by the state or by public laws entities). In practice, most hospitals fulfil these conditions but some of them still ignore – or refuse to comply – with the law.

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

We refer to the public procurement regime applicable to the utilities sector under questions *1.a-b.* and *2.a-b.* above.

# 11. Looking Ahead

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

Since Belgian public procurement law has very recently been amended, we do not expect the law to be changed until the adoption of a new EU directive on public procurement matters.

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