Public Procurement World - Thailand

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# 1. The Laws

## a. What is the applicable legislation?

The Regulations of the Office of the Prime Minister on Procurement, B.E. 2535 (1992), as amended (the "**Procurement Regulations**"), are the current applicable laws that establish uniform policies and procedures for the purchase of goods and hire of work by government agencies.

However, on 24 February 2017, the Government Procurement and Supplies Management Act, B.E. 2560 (2017) (the "**Procurement Act**") was promulgated in the *Government Gazette*. It will become effective 180 days after publication; that is, 23 August 2017.

Before the effective date, the Procurement Regulations and related regulations will remain effective to the extent that they are consistent with the Procurement Act, until the new regulations are launched. The Procurement Act specifies that regulations be issued within one year from the effective date. If the existing regulations are not applicable to a particular matter, the government agency must proceed as specified by the policy committee on public procurement and management of supplies (the **"Policy Committee"**).

## 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”)?

The Procurement Act does not relate to, or interact with, any applicable trade agreement.

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

The basic underlying principles of the Procurement framework are: value for money, transparency, efficiency and effectiveness, and accountability.

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

The Procurement Act generally applies to public procurement. Aerospace and defense procurement is not treated differently from other types of procurement. However, the Procurement Act provides exemptions that it will not be applied if government procurement is for munitions and services related to national security, from government to government, or procurement from foreign countries, subject to the laws of those countries that specify otherwise.

# 2. Application of the Statutory Procurement Laws

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

Government agencies are governed by the Procurement Act. The Procurement Act will be enforced to cover all agencies from central, regional, and local government; state enterprises under the budget procedures law; public organizations; state power monitoring organizations; independent organizations; constitutional bodies; administration offices of courts; government universities, parliamentary bureaus, or bureaus under the control of the parliament; governmental independent bodies; and other bodies as prescribed in the ministerial regulations issued under the Procurement Act.

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

Does not apply.

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

The Procurement Act does not provide an exemption to apply it for procurement between government agencies. In addition, a government agency may procure the supplies for other government agencies, as agreed upon.

## d. Which types of contracts are covered?

All types of contracts are governed by the Procurement Act, which include supplies agreement, service agreement, construction agreement, hire of consultants agreement and services of design work or construction supervision services agreement. If necessary, a contract to be signed by a government agency may contain terms or details that are different from the sample contract (provided by the Policy Committee, and approved by the Office of the Attorney-General), as long as they are as essential as those in the sample contract and do not cause disadvantage to the government agency. If the chief of a government agency finds that any additional or amended term would cause disadvantage to the agency, or has loopholes, the draft of the contract must be sent to the Office of the Attorney-General for consideration.

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

Contracts or written agreements that are executed may not be amended, except in the following circumstances, whereby the authorized person may exercise discretion to consider and approve an amendment:

When the government agency does not execute a contract using the standard form, or does not submit a draft contract to the Office of the Attorney-General for consideration and approval, the government agency must submit the contract to the Office of the Attorney-General for consideration and approval subsequently. Upon consideration and approval by the Office of the Attorney-General, or revisions to the contract per the Office of the Attorney-General's opinion, the contact will be deemed valid.

If it is necessary to amend the contract or written agreement, provided that the amendment does not adversely affect the interests of the government agency.

Amendment for the benefit of the government agency or the public interest.

Other circumstances as specified in the ministerial regulations issued under the Procurement Act.

If a government agency contemplates issues concerning disadvantages imposed upon the agency, or the lack of tightly drafted content as a result of an amendment to a contract or written agreement, the agency must send the draft amended contract to the Office of the Attorney-General for consideration and approval.

Amendment of a contract or written agreement must be in compliance with the Budget Procurement Act or other applicable law. If it is necessary to increase or decrease the financial limit, or increase or decrease the time required for delivery or operations, these must be agreed simultaneously.

In the case of amendment to a contract or written agreement to increase the financial limit, if upon combining the original financial limit with the increased financial limit, the person authorized to approve the procurement is changed, then approval for amendment of the contract or written agreement by the authorized person to approve the combined amount of financial limit is required.

In the case of amendment to a contract or written agreement to decrease the financial limit, approval by the authorized person to approve the original financial limit is required.

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

Government agencies must execute contracts using the form specified by the Policy Committee, subject to approval by the Office of the Attorney-General. The content and conditions may vary, subject to type of agreement.

The Procurement Act allows only one bidder to win a bid. The requirement for competition for a single order will depend on the type of procurement method undertaken, in accordance with the conditions and criteria specified under the Procurement Act. See details in item 3.(a) regarding procurement procedures.

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

The Private Investment in State Undertakings Act, B.E. 2556 (2013)(the "**PPP Act**") is the main law governing private-sector participation in state undertakings. The PPP Act defines state undertakings to include, among other things, an undertaking in which any or several state agencies, state enterprises, government agencies, or local administrations have the power and duty to engage in under the law.

A project with a value from Baht 1 billion or more, or any increased value as specified by a ministerial regulation, shall be in accordance with the rules and procedures stipulated in the PPP Act, and the rules and procedures for calculation of the project value shall be prescribed by the Private Investment in State Undertaking Policy Committee (the "**PPP Committee**").

A ministerial regulation dated 1 April 2016 was issued to increase the value of a project from Baht 1 billion to Baht 5 billion.

The PPP Act also empowers the PPP Committee to issue notifications prescribing the rules and procedures for private investment in a project with a value lower than Baht 5 billion, to be complied with by state agencies. Accordingly, the PPP Committee issued the Notification re: Principles and Procedures for Private-Sector Investment in Projects with a Value Lower than the Value Prescribed in section 23 of the PPP Act, dated 19 April 2559 (2016), to regulate projects with a lower value.

A project with a total investment lower than Baht 1 billion is defined as a "small project," while a project with total investment of Baht 1 billion to 5 billion is defined as a "medium-sized project."

## h. How are concessions dealt with?

The granting of a concession must follow the requirements under the PPP Act or specific laws governing the particular activity, e.g. the Petroleum Act; the Organization to assign Radio Frequency and to regulate the Broadcasting and Telecommunications Businesses Act; the Telecommunications Business Act; the Broadcasting and Television Business Act.

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

Officials must strictly comply with the Procurement Act. Any official who intentionally or negligently fails to comply, or acts in bad faith or beyond his or her power or duty, including circumstances that facilitate a person offering a price for work or obstructing fair competition, shall be deemed to have committed a disciplinary infraction and will be subject to civil or criminal liability, which may also relate to the Act on Offenses Relating to the Submission of Bids to State Agencies, B.E. 2542 (1999), generally referred to as the "Bid Rigging Act."

The Bid Rigging Act is intended to maintain and encourage competitive bidding processes, and focuses on conspiracies to reduce competition, including subcontract bid rigging and bid suppression. Violation of this law may lead to severe criminal penalties.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

Under the Procurement Act, three main procurement methods must be used, in accordance with the conditions stipulated:

**General invitation method**: A government agency may invite general entities that have the qualifications specified by the government agency, to submit a proposal.

**Selection method**: A government agency may invite at least three particular entities that have the qualifications specified by the government agency, to submit a proposal, unless there are fewer than three entities that meet the qualifications.

This method can be used if there are special circumstances or conditions – for example, an article being procured that has special characteristics or is especially complex, or must be manufactured, sold, constructed, or serviced by a highly skilled person, or which, by the nature of its use, or technical specifications, must be of a brand name.

**Specific method**: A government agency may invite one specific entity that has the qualifications specified by the government agency, to submit a proposal, or to directly negotiate a price matter that has a small budget.

This method can be used if there are special circumstances or conditions – for example, if there is only one qualified entity, or an article is to be purchased due to a disaster or epidemic, and the other two methods would lead to a delay and severe damage.

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

The transitory provision of the Procurement Act allows the Regulation of the Office of the Prime Minister on Procurement Via Electronic Means, B.E. 2549 (2006) (the "**Electronic Procurement Regulation**"), issued under the Procurement Regulations, to be applied to the extent that it is consistent with the Procurement Act, until ministerial regulations, regulations, or announcements concerning matters under the Procurement Act become effective.

The Electronic Procurement Regulation requires that the procurement of supplies and services at a value exceeding Baht 2 million must be carried out in accordance with this regulation, unless approval from the Committee on Electronic Procurement is obtained for procuring supplies or services by other methods.

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

Subject to the procurement method, the procurement information must be published openly at the premises of the government agency that requires the supplies or services. In addition, the agency may publish the announcement and invitation documents by other means contemporaneously.

Furthermore, the Procurement Act gives the Comptroller General's Department the duty to maintain and develop a system for procurement via electronic means, and to publish information related to procurement – for example, invitation documents, and calls for tenders – in the information network system of the Comptroller General's Department, and of the responsible government agency, in accordance with the procedures specified by the Comptroller General's Department

The link to the website of the Comptroller General's Department is: <http://www.cgd.go.th/cs/internet/internet/Home.html?page_locale=en_US>

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

Prospective bidders can be excluded from competition for a number of reasons, such as being blacklisted by government agencies. It is also possible to exclude a prospective bidder from competition through a pre-qualification process in which, for instance, prospective bidders must meet qualifications set out in the terms of reference ("**TOR**") or a request for a proposal ("**RFP**"), such as experience and registered capital of the entity.

# 4. Bidder Selection

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

Government agencies shall mainly take into consideration the interest of the agency, the criteria concerning pricing, and other criteria in making a determination. These include:

costs of supplies and the life of supplies;

standards of products or services;

after-sales service;

supplies that the government intends to promote or support;

evaluation of performance of entities;

technical or other offers if there is a requirement to submit technical or other offers; and

other criteria as specified in ministerial regulations.

The minister will issue regulations specifying criteria concerning review and selection in a tender. The government agency must choose one particular criterion or more coupled with criteria concerning pricing, and shall allocate weight to each criterion clearly. However, if the agency is unable to select other criteria to be used, and it is necessary to use a single criterion to review and make a selection, the criteria on pricing must be used, together with a score – with reasons for the score for each criterion.

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

Pre-qualification is a requirement for participating in a government tender under the Procurement Act. A person submitting a tender in public procurement must have the following qualifications:

being legally competent;

not being declared bankrupt;

not being in the process of dissolution;

not being subject to a suspension on making a tender offer or entering into an agreement with a government agency under the Procurement Act;

not being a person whose name has been circulated as a person abandoning the work of government agency; and

having other qualifications, or not having disqualifications, as specified and published in the *Government Gazette* by the Policy Committee.

The responsible government agency must also specify conditions in the announcement and invitation documents, requiring persons making a tender offer to provide proof of the extent of competence and readiness so possessed, on the date of submission of the offer.

Certain types of entities – for example, construction business operators and consultants – must be registered so that they are qualified to submit bids to government agencies.

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

Yes, the Procurement Act provides the criteria for blacklisting and the "abandonment of work" condition, if it appears that a bidder or contracting party to a government agency has been selected but failed to execute a contract or written agreement with the government agency within the time specified, or the contracting party breached the contract or written agreement, acted in a manner that obstructed fair competition, or acted in bad faith.

Government agencies are prohibited from engaging persons or entities that appear on a circulated list of those who have abandoned work, including juristic persons and partners, managers, managing directors, executives, or authorized signatories of juristic persons, unless the person or entity has been de-listed.

A person or entity listed as having abandoned work may request de-listing if, at the very least, it has:

financial stability;

paid all taxes as required by law; and

the period of time to circulate the list of names of persons abandoning work has lapsed.

The criteria and procedures for an application to de-list, and the consideration and revocation order, must be in accordance with regulations specified by the ministry.

## 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?

Under the Procurement Act, the Government agency may organize a hearing of opinion on the draft scope of work or details of supplies to be procured and the draft TOR from business operators in accordance with regulation specified by the minister of finance. As such, there should not be any conflict of interest if the regulation is fully complied with.

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

Bidders may combine to submit the bid in a form of joint venture or consortium when the TOR allows it.

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

The membership of a bidder consortium cannot be changed during a procurement procedure.

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

The government agency may cancel the procurement if they find that the bidders had joint benefit in the procurement. The Procurement Regulations generally defines "a bidder with joint benefits" means an individual or juristic person who offers to sell in a government procurement of supplies or who offers a price to be hired to make supplies, or who offers work to be hired as a consultant, or to be hired to design and supervise work for any government agency, and has a direct or indirect interest in the business of another individual or juristic person who offers to sell or offers work to such government agency at the same time.

The Procurement Act provides that, before the execution of an agreement, a government agency may announce the cancellation of procurement previously agreed if the successful bidder or the selected bidder having joint benefit with, or has an interest with, another bidder; or obstructs fair competition; or engages in bid rigging with other bidders or officials; or there is any indication of any other fraudulent conduct in placing a bid, subject to the regulations specified by the ministry.

The cancellation of procurement is the privilege of the government agency. Persons submitting bids in a cancelled procurement procedure may not claim any damages from the government agency.

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

There are no specific requirements for foreign companies participating in a procurement procedure.

# 5. Specifications

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

Government agencies are prohibited from prescribing specific features of supplies to be similar to those of a particular brand or those of the particular seller unless there is only one brand of supplies available per the objectives, or spare parts of a particular brand are required.

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

A bidder cannot submit a change to the specifications or submit its own standard terms of business in a government procurement procedure.

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

The Procurement Act does not specify any protection or privilege for small and medium-sized enterprises.

# 6. Contract Award

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

The main rule is that contracts must be awarded in accordance with the rules set out in the TOR or RFP, and in the Procurement Act and related regulations (including the government agency's policies and procedures).

Government agencies shall mainly take into consideration the interest of the agency, the criteria concerning pricing, and other criteria in making a determination. Please see the details under item 4.(a) above.

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

It is an offense under the Bid Rigging Act if any person makes a price proposal in bad faith to a state agency knowing that the price proposed is much lower than is normal, to the extent that it can be clearly seen to not to be in accordance with the description of goods or services, with the objective of obstructing fair price competition, and this act results in the contract not being correctly fulfilled.

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

There are no rules on alternative bids.

# 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?

The Procurement Act provides that one bidder can be selected if there is only one entity that possesses the necessary qualifications, or the entity is legally the sole distributing agent or service agent in Thailand, and no other supplies or service may be used as a substitute. In this case, the specific method must be applied.

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

A procurement official who wrongfully exercises, or omits to exercise, any of his or her duties, causing injury to any person, or dishonestly exercises, or omits to exercise, any of his or her duties shall be liable to a term of imprisonment of between one to 10 years, a fine of Baht 20,000 to Baht 200,000, or both, and the instigator or supporter of the offense shall be subject to the same penalties.

# 8. Remedies and Enforcement

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

The Procurement Act provides that if a contract or written agreement is terminated, and the government agency is not the terminating party, or the government agency does not demand a fine for the termination, if a contracting party believes that the government agency should be liable for damages, the contracting party may submit an application to the government agency to consider paying damages.

The government agency must issue a receipt of the application as evidence, and must consider the application promptly. If the contracting party is not satisfied with the result of the agency's consideration process, it is entitled to commence a lawsuit to demand damages under the contract.

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

The remedies are available under contract law and administrative law.

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

Disputes concerning a tender process are generally within the jurisdiction of the Administrative Court.

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

The Procurement Act sets out the timeframe when an action can be brought before the competent court.

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

An appeal can be made to the relevant government agency if the government agency is deemed to not comply with the criteria and procedures under the Procurement Act, or the ministerial regulations, regulations, or announcements thereunder. If the government agency disagrees with the appeal, they have to report their opinion to the Committee of Appeal for further consideration.

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

Please see item 8.(e).

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

If the Committee of Appeal considers the appeal to be plausible, and that there is a significant effect on procurement, it can issue an order to the government agency to arrange for a new procurement or to begin from certain step as it may deem appropriate.

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

Please see item 8.(g).

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

Under the Procurement Act, the appeal can be made within seven business days from the date of the announcement of the result of the procurement. The review process by the government agency and the Committee of Appeal takes approximately 75 days.

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

No. However, a government agency shall publish the results of successful bidder and supporting reasons on the information network system of the Comptroller General Department.

## k. Are review proceedings common?

Yes.

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

Yes.

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

There have been many court decisions on procurement disputes and tender processes – for instance: Noppawong Construction Co., Ltd. v. Chiang Mai Municipality; the Metropolitan Transit Information Service v. the Director of the Traffic and Transport Department, Bangkok Metropolitan Administration and Bangkok Governor; Thong Inthanon Co., Ltd. v. the Permanent Secretary of the Ministry of Finance and the Procurement Committee; Asian Marine Services Public Company Limited v. the Prime Minister's Office, and the Office of the Permanent Secretary for Defense; and Behlman Electronics, Inc. v. the Royal Thai Navy.

# 9. Other Relevant Rules of Law

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

See item 2.(d).

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

The general principle under the contract law would be applied for public contracts. However, the Procurement Act provides certain rights and privileges for government agencies – for example, amendment of a contract. See details in item 2.(e) above.

# 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?

The Procurement Act generally applies to public procurement, regardless of the specific industry sector.

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

Please see our responses under item 1.(d) above.

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

Please see our responses under item 10.(a) above.

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

Please see our responses under item 2.(g) above.

# 11. Looking Ahead

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

Please refer to item 1.(a) above.

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