Public Procurement World - France

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# 1. The Laws

## a. What is the applicable legislation?

French procurement law is governed by the following acts:

Ordinance no. 2015-899 dated 23 July 2015 that sets the general framework for public work, service and supply contracts, as well as defence and security contracts covered by Directive 2009/81/EC;

Order no. 2016-360 dated 25 March 2016, that applies to all contracts falling within the scope of Ordinance n° 2015-899 except defence and security contracts;

Order no. 2016-361 dated 25 March 2016, that sets specific rules relating to defence and security contracts.

These texts implement EU Directives; they also edict rules that are specific to the French jurisdiction (the former public procurement code has been replaced by these new texts).

## 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 acts listed above are strongly influenced by the European Union procurement rules since they implement the Directives 2014/24/EU of 26 February 2014 on public procurement. Directives 2014/24/EU and 2014/25/EU are in turn influenced by the WTO Agreement on Government Procurement (Directive 2009/89/EC is not, since the contracts it covers are excluded from the scope of the GPA or exempted from its application).

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

The main principles applicable to public procurement procedures are:

free access to public procurement contracts;

equal treatment of bids and offers submitted by companies;

transparency of procedures;

effectiveness of public procurement; and

best value for public money.

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

As regards aerospace procurement, there are no specific rules applicable to such contracts.

With respect to defence procurement (and, as such, defence aerospace), pursuant to article 16 of Ordinance no. 2016-360, some defence and security contracts are not subject to any competition rules, notably order:

procurement contracts concerning weapons, ammunition and materiel when the essential interests of the French State's security require such an exclusion (according to article 346 of the TFEU);

procurement contracts regarding which applying Ordinance no. 2016-360 would imply to disclose information contrary to the essential interests of the French State's security;

procurement contracts relating to intelligence activities.

The other defence procurement contracts that do not meet these specifications are not subject to the general rules defined in Order no. 2016-360 but are subject to the specific rules laid down in Order no. 2016-361.

# 2. Application of the Statutory Procurement Laws

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

Under article 10 of Ordinance n° 2016-360, all legal entities governed by public law are subject to public procurement rules. The State, its public bodies other than those of an industrial and commercial nature (such as SNCF, RATP, Société du Grand Paris…), local authorities and their public bodies fall within this category.

Pursuant to article 2 of Order no. 2016-360, other public entities such as the Banque de France, the *Caisse des dépôts et consignations* and *Pôle Emploi* (the governmental agency registering unemployed workers) are also covered by procurement rules.

The "UGAP" (Central Public Purchasing Office – *Union des groupements d'achats publics*) is also subject to public procurement rules, since it is a central purchasing body under article 26 of Ordinance no. 2015-899.

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

The following private entities are subject to procurement rules, as laid down in articles 10 and 11 of Order no. 2016-360:

private entities created for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character and either (i) mainly financed by public entities, (ii) subject to management supervision by those bodies, or (iii) having an administrative, managerial or supervisory board, more than half of whose members are appointed by those bodies;

private entities created for the specific purpose of executing joint activities by contracting authorities covered by article 10 of Ordinance no. 2016-360 (namely, legal entities governed by public law or above-mentioned private entities);

contracting authorities listed in article 10 of Ordinance no. 2016-360 or public companies as defined in article 11 of this Ordinance executing network activities listed in article 12 of this Ordinance, related to gas, heat, electricity, water, transport services, postal services, exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports; and

private entities operating on the basis of special or exclusive rights for the activities listed above.

For example, Electricité de France (EDF), Société Nationale des Chemins de Fer (SNCF), Aéroports de Paris (ADP) and La Poste may be subject to Ordinance no. 2016-360.

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

Article 17 of Order no. 2016-360, which implements article 12 of Directive 2014/24/EU, states that co-operations between public entities are exempted from public procurement rules if certain criteria are met.

Notably, procurement rules do not apply where public contracts are awarded by contracting authorities to "in-house" entities, i.e. entities (i) predominantly controlled by the contracting authority; (ii) who carry out part of their activities for the controlling contracting authority; (iii) who are free from any direct private capital participation.

In addition, procurement rules do not apply to co-operation contracts concluded by contracting authorities and concerning the provision of public services governed solely by considerations relating to the public interest.

## d. Which types of contracts are covered?

All contracts and framework agreements for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities listed above and having as their object the execution of works, the supply of products or the provision of services are covered by procurement rules. So are design contests.

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

Article 139 of Ordinance no. 2016-360, which implements article 72 of Directive 2014/24/EU, lists six cases in which contracts and framework agreements may be modified without a new procurement procedure:

where the initial procurement documents provide for precise and unequivocal review clauses that enable modifications (irrespective of their monetary value) and set the conditions under which these modifications may take place;

where unexpected additional works, services or supplies have become necessary, provided that: (i) a change of contractor is impossible for economic or technical reasons (ii) and would either cause significant inconvenience for the contracting authority or lead to significant increase in its costs. In this case, the modification shall not exceed 50% of the value of the original contract;

where the modification becomes necessary due to circumstances that a diligent contracting authority could not foresee. In this case, the modification shall not exceed 50% of the value of the original contract;

where a new contractor replaces the initial one, as a consequence of: (i) a review clause or option, (ii) succession into the position of the initial contractor of another operator following corporate restructuring, provided that this transaction does not lead to substantial modifications to the contract and is not aimed at circumventing procurement rules;

Where modifications are not substantial. Article 139 lists a range of cases in which modifications are substantial: the modification changes the economic balance of the contract in a way that was not provided for in its initial version, it introduces conditions which, had they been part of the initial procurement procedure, would have enabled the admission of other candidates, the acceptance of another tender, or attracted additional participants, etc.;

where the amount of the modification is lower than the threshold values laid down in article 72 of Directive 2014/24/EU (see question 3. a.). In this case, it does not matter whether or not the modification is considered as substantial under article 139.

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

Article 4 of Ordinance no. 2015-899 and articles 78-80 of Order no. 2016-360, that implement article 33 of Directive 2014/24/EU, set the applicable legal regime for framework agreements.

Framework agreements are concluded between one or more contracting authorities and one or more economic operators. They set the terms governing contracts to be awarded during the duration of the framework agreement. Framework agreements may (or may not) set a minimum and/or maximum value or quantity of works, supplies or services to be provided or performed by economic operators. The duration of framework agreements cannot exceed four years when awarded to contracting authorities listed by article 10 of Ordinance n° 2015-899, or eight years when awarded to contracting authorities listed by article 11 of Ordinance n° 2015-899, save in exceptional cases duly justified.

Where framework agreements set all the contractual terms governing the provision of works, supplies and services concerned, contracts are awarded without reopening competition (article 80 of Order no. 2016-360).

Where framework agreements do no set all the contractual terms, contracts are awarded through reopening competition amongst economic operators parties to the framework agreement, under the conditions laid down in article 79 of Order no. 2016-360. However, contracts may be awarded without reopening competition where only one economic operator is able to perform or provide the works, supplies or services concerned for technical reasons. Where framework agreements that do not set all the contractual terms have been awarded to a single economic operator, contracts are awarded to this operator following the conditions set by the framework agreement. In this case, the economic operator may be asked to supplement its tender if necessary.

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

The applicable regime for public-private partnerships (PPPs) is laid down in articles 67 and seq. of Ordinance no. 2015-899 and articles 143 and seq. of Order no. 2016-360. Under French law, PPPs are now considered as a special type of procurement contracts.

The object of a PPP is to entrust one or more economic operators with a global mission consisting of the construction, adaptation, renovation or demolition of buildings, equipments or immaterial goods that are necessary to public services or the exercise of a mission in the general interest, as well as part or all of their financing (article 67 of Ordinance no. 2015-899).

The conditions for entering into PPPs are strict.

First, although all contracting authorities are entitled to enter into PPPs, some of them cannot do it on their own and are considered as non-authorised contracting authorities (article 71 of Ordinance no. 2015-899). This is the case for health public bodies and sanitary cooperative structures having the status of legal entities governed by public law, as well as central public administrations listed by Order dated 27 July 2016 (notably, regional health agencies, universities and other higher education public bodies, some museums and independent administrative authorities). However, the State can enter into PPPs on behalf of non-authorised contracting authorities (article 72 of Ordinance no. 2015-899).

Second, the value of the contract must exceed the following thresholds (article 151 of Order no. 2016-360):

2 million euros (excluding tax) where the object of the contract is about immaterial goods, information systems or equipment other than construction works/buildings, as well as for contracts providing for energy performance quantified goals and making the economic operator's payment subject to the achievement of these goals;

5 million euros (excluding tax) where the main object of the contract is about (i) network infrastructures (notably in the field of energy, transports, urban planning and sanitation) or (ii) construction works/buildings, provided that the scope of the mission entrusted to the economic operator does not include the fitting out, maintenance, renovation, management and operation of construction works, as well as the management of a public service mission or the provision of services contributing to the execution of a public service mission entrusted to a public entity;

10 million euros (excluding tax) where the main object of the contract is about construction works or the provision of services other than those mentioned above.

Third, the contracting authority must demonstrate that resorting to a PPP is more profitable (notably, financially attractive) than other ways to carry out the project in light of the characteristics of the latter, public services requirements, the mission in the general interest that is entrusted to the contracting authority, and deficiencies or difficulties that were brought about by the execution of similar projects (article 75 of Ordinance no. 2015-899). The contracting authority has to perform an evaluation comparing the different possibilities to carry out the project and analysing their respective cost, as well as an assessment of budgetary sustainability. The evaluation and the assessment are submitted to the administration for opinion (article 74 of Ordinance no. 2015-899).

PPPs can be awarded following the procedures applicable to procurement contracts, provided that the thresholds set by Directive 2014/24/EU are complied with.

The launching of the procedure is subject to prior approval of specific authorities (article 77 of Ordinance no. 2015-899 and article 155 of Order no. 2016-360):

if the contracting authority is the State (either for itself or on behalf of a non-authorised contracting authority), the launching of the procedure must be approved by the Ministers for Budget and Economics;

if the contracting authority is a State's public body, a local authority or one of its public bodies, the launching must be approved by the deliberative assembly or body;

for every other contracting authorities, the launching of the procedure must be approved by the decision-making body.

The signature of PPPs is also subject to prior approval of specific authorities (article 78 of Ordinance no. 2015-899 and article 156 of Order no. 2016-360):

if the contracting authority is the State (for itself or on behalf of a non-authorised contracting authority), the signature of the PPP must be approved by the Ministers for Budget and Economics;

if the contracting authority is a State's public body, the signature of the PPP must be approved by the Ministers for Budget and Economics, as well as the Minister responsible for the State's public body;

if the contracting authority is a local authority or one of its public bodies, the signature must be approved by the deliberative assembly or body;

for every other contracting authorities, the signature must be approved by the decision-making body.

PPPs entered into by the State on behalf of non-authorised contracting authorities are signed by the Minister responsible for these non-authorised contracting authorities. Following the signature, they take on all the rights and duties arising from the PPP (article 157 of Order no. 2016-360).

According to procurement rules, PPP contracts must include some mandatory clauses, such as that determining how risks are shared between the contracting authority and the economic operator (article 70 of Ordinance no. 2015-899).

## h. How are concessions dealt with?

Directive 2014/23/EU of 26 February 2014 sets up a new legal framework applicable to the award of concession contracts. Ordinance no. 2016-65 dated 29 January 2016 and Order no. 2016-86 dated 1st February 2016 implement the Directive into French law.

Some provisions of the legal framework applicable to concessions are identical to general procurement provisions. This is the case for the provisions defining contracting authorities (see questions 2. a. and b.), those regarding co-operation between public bodies (see question 2. c.), as well as those concerning changes to an existing contract (see question 2. e.).

Other provisions differ significantly from the general procurement framework.

The duration of concession contracts is limited and depends on the nature and amount of works, services and investments requested from the concessionaire. For concession contracts lasting more than five years, the duration of the agreement must not exceed the time that the concessionaire could reasonably be expected to take to recoup its investments together with a return on invested capital, taking into account the investments required to achieve the specific contractual objectives (articles 34 of Ordinance no. 2016-65 and 6 of Order no. 2016-86).

Although all awarding procedures must comply with the principles of freedom of access to procurement, equal treatment of all economic operators and procedural transparency, the regime applicable to concession contracts depends on the estimated contract value as well as their object (articles 9 and 10 of Order no. 2016-86):

Contracts the value of which is equal to or greater than the threshold set by Directive 2014/23/EU (ie. 5 225 000 euros) are subject to the formalised awarding procedure laid down in the Directive and implemented into French law;

Contracts the value of which is lower than the above-mentioned threshold are subject to a simplified awarding procedure. This is also the case for contracts the object of which is about drinking water, waste water draining out and treatment, irrigation and draining out engineering, exploiting public transport services, social services and other specific services listed in a Notice dated 27 March 2016, regardless of their value.

The simplified procedure gives more leeway to contracting authorities as regards some procedural steps than the formalised procedure. For example, there are no compulsory time limits for receipt of applications and tenders in the context of the simplified procedure. When fixing such time limits, contracting authorities must take into account the nature, value and characteristics of works or services that are requested from the concessionaire (article 18 of Order no. 2016-86).

Additionally, some procedural requirements are more flexible in the context of the simplified procedure. Award criteria do not have to be listed in descending order of importance: they only have to be mentioned in the concession notice (article 27 of Order no. 2016-86). Further, procedural requirements regarding concession award notices are more flexible: only candidates and bidders who request it are told about the grounds for any decision to reject their application or tender and the name of the successful tenderer, within 15 days from receipt of the written request (article 31 of Order no. 2016-86). Finally, procedural requirements as regards publication of concession notices and concession award notices are less burdensome, since publication in the Official Journal of the European Union is not automatic (articles 15, 16 and 32 of Order 2016-86).

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

Contracting authorities or their representatives may be convicted for criminal offences in the event of a breach of procurement rules.

The French Criminal Code provides for several offences against the government committed by civil servants such as passive corruption and trafficking of influence by a person holding public office, unlawful taking of interest or offences against equal access in respect of public tenders.

The management of the companies, as well as the companies themselves, benefiting from such favourable treatment, could also be exposed to sanctions on the ground of complicity or of the concealment of such offences.

Besides, the contract must not place the contractor in a situation of breach of competition law. Otherwise, the decision awarding the contract could be annulled by administrative courts.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

The Order no. 2016-360 provides for four main procedures to award public contracts:

open/restricted procedure (articles 66 to 70), which can be used to choose the economically most advantageous tender, without negotiation, on the basis of objective criteria brought to the prospective bidders' attention beforehand;

competitive procedure with negotiation (articles 71 to 73 - for all authorities but those executing network activities) and negotiated procedure with prior call for competition (article 74 - for contracting authorities and public entities executing network activities, as well as private entities operating on the basis of special or exclusive rights for network activities), whereby contracting authorities may negotiate contract terms with one or several economic operators authorised to take part to negotiations;

competitive dialogue (articles 75 and 76), which can be used when the contracting entity is unable to determine the technical means to meet its requirements, or, when it is unable to establish a project's legal or financial particulars; and

adapted procedure (article 27) which can be mainly used when the estimated amount of the contract is below the thresholds laid down in Directive 2014/24/EU, i.e. €135,000 (VAT excluded) for services and supplies contracts for the State and its public bodies; €209,000 (VAT excluded) for services and supplies contracts for local authorities, health public bodies; €5,225,000 (VAT excluded) for works.

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

Order no. 2016-360 implements article 22 and 53 of Directive 2024/24/EU and provides for some mandatory rules concerning electronic means and procedures.

Pursuant to article 36, contract notices to be published in the Official Journal of the European Union (ie. for contracts the value of which exceeds the thresholds laid down in Directive 2024/24/EU) are transmitted by electronic means to the Publications Office of the European Union. They are in turn published electronically.

According to article 39, tender documents relating to procurement contracts the value of which exceeds the thresholds set by Directive 2024/24/EU are made available by electronic means to economic operators. So are tender documents relating to contracts entered into by the State, its public bodies other than those of an industrial and commercial nature, local authorities, their public bodies and groups, the value of which equals or exceeds 90 000 euros (excluding tax).

Pursuant to article 40, the State, its public bodies other than those of an industrial and commercial nature, local authorities, their public bodies and groups cannot refuse to receive applications and tenders by electronic means. Further, applications and tenders regarding procurements contracts for the supply of computers or computer services entered into by the State, its public bodies other than those of an industrial and commercial nature, local authorities, their public bodies and groups are transmitted by electronic means.

Other than the cases mentioned above, the use of electronic means and procedures is currently optional. Article 40 enables contracting authorities to impose the electronic transmission of applications and tenders on economic operators.

However, tender documents relating to all procurement contracts the contract notice of which will be published after 1st October 2018 will have to be made available by electronic means to economic operators (article 39). In addition, article 41 states that communications and information exchanges regarding contracts, the contract notice of which will be published after 1st October 2018, will have to be performed electronically, save some exceptions (for example, contracting authorities will not be enabled to impose the use of electronic means of information and communication in the case of negotiated procedures without prior publication).

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

Contract notices and contract award notices relating to procurement contracts the value of which exceeds the thresholds laid down in Directive 2024/24/EU are published on the website Tenders Electronic Daily (TED): <http://ted.europa.eu/TED/main/HomePage.do>

Pursuant to article 33, 34 and 104 of Order no. 2016-360, contract notices and contract award notices relating to procurement contracts entered into by the State, its public bodies other than those of an industrial and commercial nature, local authorities, their public bodies and groups and the value of which exceeds the thresholds set in Directive 2024/24/EU are published on the website "*Bulletin officiel des annonces des marchés publics*" (BOAMP): <http://www.boamp.fr/>Contract notices relating to procurement contracts entered into by the contracting authorities mentioned above the value of which ranges from 90 000 euros (excluding tax) to the thresholds laid down in Directive 2024/24/EU may also be published on the BOAMP website (article 34 of Order no. 2016-360).

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

The following prospective bidders are barred from bidding for public contracts:

bidders which have been convicted for specific criminal offences;

bidders convicted for specific offences listed in the French Labour Code;

bidders which have not submitted the tax and social-security returns for which they were responsible,

bidders which have not paid the taxes and contributions due by that date; and

bidders in distress.

# 4. Bidder Selection

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

Article 51 of Ordinance 2015-899, that implements article 58 of Directive 2014/24/EU, states that selection criteria may relate to suitability to pursue the professional activity, economic and financial standing and technical and professional ability. The criteria set by contracting authorities are related and proportioned to the contract performance conditions and object.

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

Pursuant to article 46 of Order no. 2016-360, prequalification is an option for contracts entered into by contracting authorities listed in article 11 of Ordinance no. 2015-899 (ie. contracting authorities and public companies executing network activities, as well as private entities operating on the basis of special or exclusive rights for network activities).

Prequalification enables these contracting authorities to preselect candidates deemed to be qualified for performing certain types of works, supplies or services.

Article 46 sets up the procedural requirements for the creation and functioning of prequalification systems.

Contracting authorities mentioned above publish a prequalification system notice, mentioning its existence, object, duration and access requirements.

Contracting authorities set objective rules and criteria of exclusion or selection of economic operators who seek to be prequalified. They also set objectives rules and criteria of functioning regarding registration to the prequalification system, periodic update of qualifications and duration of the system.

The prequalification system may consist of different rounds of prequalification.

Contracting authorities ensure that economic operators are able to apply for prequalification whenever they want. The rules and criteria for prequalification are communicated to economic operators who request them.

Pursuant to article 100 of Order no. 2016-360, applicants are told about the decision of the contracting authority within four months following the reception of their application. Unsuccessful applicants are told about the reasons behind the refusal within 15 days following the date of the decision.

Contracting authorities draw up a list of prequalified operators.

They can strike off prequalified economic operators only on the basis of the rules and criteria for prequalification mentioned above.

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

Articles 45 and seq. of Ordinance no. 2015-899 implement article 57 of Directive 2024/24/EU and list exclusion grounds from procurement procedures.

Economic operators are excluded when they have been convicted by final judgement for one of the criminal offences listed in article 45(1). The same holds true when the person who has been convicted is a member of the administrative, management or supervisory body of the economic operator. Article 45 also refers to breaches of the economic operator's obligations relating to the payment of taxes or social security contributions, bankruptcy, insolvency or winding-up proceedings, and breaches of labour regulations.

Article 45 also lists the conditions whereby economic operators may unlist. Economic operators must prove the following:

as regards breaches of their obligations relating to the payment of taxes or social security regulations, they must prove they fulfilled their obligations by paying or entering into a binding arrangement with the tax administration, or provided sufficient guarantees;

as regards other exclusionary grounds (except criminal offences listed in article 45(1), bankruptcy, insolvency and winding-up proceedings), they must prove that they were not sentenced to exclusion from procurement procedures, they paid or undertook to pay compensation in respect of any damage caused, collaborated with the investigating authorities and took concrete measures that are appropriate to prevent further criminal offence or misconduct.

## 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?

According to article 48 of Ordinance no. 2015-899, the involvement of a company in the set-up of a procurement procedure is an optional ground for exclusion.

It may be the case where the company had access to information likely to distort competition among candidates and it is impossible to solve the situation by other means (such as providing all the candidates with the same information).

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

Pursuant to article 46 of Order no. 2016-360 that implements article 19 2. of Directive 2014/24/EU, companies may submit their application or bid as a several group or a joint group. Groups cannot be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate to the procurement procedure. However, contracting authorities may require groups to assume a specific legal form once they have been awarded the contract, provided that such a change is necessary for the satisfactory performance of the contract. Groups are represented by a lead company who acts as a proxy and coordinates the works, supplies or services of its members. Applications and tenders are submitted either by all group members or the lead company.

Groups of competitors on the same market may qualify as an anticompetitive agreement within the meaning of article 101 of the TFEU in certain circumstances. This may be the case where the very creation of the group has the object or effect to restrict competition. Competition authorities assess the intention of group members in light of different criteria:

whether creating a group was needed to satisfy the contracting authority's needs;

the wish of the contracting authority to award the contract to a group;

the need for technical complementarity.

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

Pursuant to article 45 of Order no. 2016-360, members of a group of economic operators cannot change between the date the application was sent and that of the signature of the procurement contract.

However, article 45 provides for some exceptions. The group can request the change of a member in the following circumstances:

One of the members cannot perform its task for reasons outside of its control;

in case of corporate restructuring (merger or acquisition).

The group submits one or several potential alternative members, subcontractors or related bidders, for the contracting authority approval, who will assess the capacities of the whole transformed group as well as that of the alternative member, subcontractor or related bidder on an individual basis.

In addition, article 50 of Ordinance no. 2015-899 provides that the contracting authority asks for the replacement of the member affected by a ground for exclusion of the procurement procedure within ten days.

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

Procurement rules do not limit participation of related bidders in the same procurement procedure.

However, competition law may limit such a simultaneous participation. The coordination of the related bidders' tenders may amount to an anticompetitive agreement within the meaning of article 101 of the TFEU. Related bidders must prove that they did not exchange information and bring evidence of their respective decision-making autonomy.

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

A foreign company may be required to translate the following documents on request of the contracting authority:

the declaration that the operator is not affected by a ground for exclusion of procurement procedures, documents requested by the contracting authority in order to prove the operator's suitability to pursue the professional activity, economic and financial standing and technical and professional ability, documents relating to the several responsibility of other entities whose capacities are relied on by the economic operator (article 48 of Order no. 2016-360)the European single procurement document (article 49 of Order no. 2016-360)

documents justifying that the foreign company satisfies the participation requirements relating to the procedure. When the company intends to rely on the capacities of other entities, it may have to provide the translation of documents justifying these entities' capacities as well as those proving that the foreign company will have theses capacities at its disposal (article 50 of Order no. 2016-360)

Documents listed in article 51 of Order no. 2016-360: an extract from the candidate's police records, certificates proving that the foreign company is not affected by a ground for exclusion of procurement procedures, documents justifying that the company is not in breach of its obligations concerning the payment of taxes or social security contributions, documents proving that the foreign company does not face bankruptcy, insolvency or winding-up proceedings and complies with labour regulations.

documents relating to the company's tender (article 57 of Order no. 2016-360).

# 5. Specifications

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

The documents must mention, in the public tender notice or the tender regulations, the documents that must be disclosed in support of applications to facilitate evaluation of the prospective bidder's experience, and its professional, technical and financial capabilities.

Article 6 of Order no. 2016-360 provides for the ways the technical specifications shall be formulated:

by reference to standards or other equivalent documents accessible to candidates, i.e. by order of priority: national standards implementing European standards, European technical assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or, when any of those do not exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies. Each reference must be accompanied by the words "or equivalent";

in terms of performance or functional requirements, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

by combination of standards and performance or functional requirements.

Article 7 of Order no. 2016-360 states that where a contracting authority uses the option of referring to standards or other equivalent documents accessible to candidates, it cannot reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender, by any appropriate means, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications. In addition, where a contracting authority uses the option to formulate technical specifications in terms of performance or functional requirements, it must not reject a tender which complies with a standard or another equivalent document accessible to candidates, where those specifications address the performance or functional requirements which it has laid down.

Article 8 of Order no. 2016-360 provides that technical specifications must not refer to a mode, fabrication process, specific origin or reference with the effect of favouring or eliminating certain undertakings or certain products. However, such a reference is permitted on an exceptional basis where it is justified by the object of the contract or where a sufficiently precise and intelligible description of the object of the contract is not possible, provided that this reference is accompanied by the words "or equivalent".

Article 9 of Order no. 2016-360 highlights that the technical specifications, except in duly justified cases, are drawn up so as to take into account accessibility criteria for persons with disability or design for all users.

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

Bidders are not allowed to change the specifications or submit their own standard terms of business.

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

Promoting small and medium enterprises' access to public procurement is one of the main objectives of Directive 2014/24/EU. As a consequence, this objective is also laid down in national law. Pursuant to article 12 of Order no. 2016-360, contracting authorities divide their public contracts into lots, thus enabling SMEs to access to procurement. Where contracting authorities decide to depart from this principle, they must motivate their choice (in tender documents save exceptions).

Further, article 44 of Order no. 2016-360 implements article 58 of Directive 2014/24/EU and caps the minimum yearly turnover that contracting authorities may request from economic operators as a suitability criterion. It must not exceed two times the estimated contract value, except in duly justified cases relating to the object of the contract or its performance conditions.

# 6. Contract Award

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

The contract must be awarded to the most economically advantageous bid.

The award of the contract can be based, given the object of the contract, on a single criterion, which must be the price.

The award of the contract can also be based on various non-discriminatory criteria which vary in accordance with the object of the contract, such as the operating costs, the bid's technical merit, its innovative nature, its environmental friendliness, its performance in terms of occupational integration of populations in difficulty, the time for completion, its aesthetic and functional features, after-sales service and technical support, the delivery time and date, and the price.

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

Article 60 of Order no. 2016-360, which implements article 58 of Directive 2014/24/EU, states that contracting authorities require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

Contracting authorities may reject the tender where:

evidence supplied by economic operators does not satisfactorily account for the low level of price or costs proposed;

it is abnormally low because it violates French, European or international environmental or labour regulations.

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

Article 58 of Order no. 2016-360 implements article 45 of Directive 2014/24/EU and sets the conditions under which the submission of variants (a.k.a. alternative bids) is authorised or required from tenderers.

Contracting authorities may authorise the submission of variants. For contracts the value of which exceeds the thresholds laid down in Directive 2014/24/EU and that are entered into by contracting authorities listed in article 10 of Ordinance no. 2015-899, variants are prohibited by default save otherwise provided in the contract notice or the invitation to confirm interest. For contracts the value of which exceeds the above-mentioned thresholds and that are entered into by contracting authorities listed in article 11 of Ordinance no. 2015-899 (ie. contracting authorities and public companies executing network activities, as well as private entities operating on the basis of special or exclusive rights for network activities), variants are authorised by default save otherwise provided in the contract notice or the invitation to confirm interest. For contracts the value of which is lower than the above-mentioned thresholds, variants are authorised by default save otherwise provided in tender documents.

In addition, contracting authorities may require the submission of variants, provided that it is indicated in the contract notice, the invitation to confirm interest or the tender documents.

Where variants are authorised or required, contracting authorities state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

Further, in procedures for awarding public supply or service contracts, contracting authorities that have authorised or required variants must not reject a variant on the only ground that it would, where successful, lead to either a service contract rather than a supply contract or a supply contract rather than a service contract.

# 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?

Article 42 of Ordinance no. 2015-899 implements article 32 of Directive 2014/24/EU and provides that public contracts may be awarded pursuant to a negotiated procedure without prior publication in some circumstances.

Article 30 of Order no. 2016-360 lists a range of cases in which a contracting authority is enabled to do so. Notably, contracting authorities may resort to this procedure:

for contracts the value of which is lower than 25 000 euros (excluding tax);

for contracts the value of which is lower than the thresholds laid down in Directive 2024/24/EU, where calling for competition is impossible or plainly useless because of the object of the contract or the low degree of competition in a given sector; for reasons of extreme urgency brought about by events unforeseeable and not attributable to the contracting authority, where the time limits for procurement procedures cannot be complied with.

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

If the contracting authority resorts to the negotiated procedure without prior publication in violation of article 30 of Order no. 2016-360, the awarding procedure may be challenged before the Administrative Court in order to obtain its cancellation, through the appeals mentioned below (see questions 8 e. and seq.).

In addition, criminal sanctions are also incurred in case of illegal direct award. The contract holder as well as the contracting authority may be sued before the Criminal Court for the offences of unlawful taking of interest (pursuant to article 432-12 of the French Criminal Code) or granting of undue advantages (under article 432-14 of the French Criminal Code).

# 8. Remedies and Enforcement

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

The Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and the Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors has been implemented in France respectively by law n°92-10 of 4 January 1992, as subsequently amended, and by law n°93-1416 of 29 December 1993.

The Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts with EEA relevance has been implemented by Ordinance n°2009-515 of 7 May 2009.

Most of these provisions are codified under the relevant sections of French Administrative Justice Code.

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

Contractors may resort to settlement, conciliation, and arbitration under the specific conditions set below.

As regard conciliation, for contracts subject to the Ordinance no. 2015-899 and the Order no. 2016-360, contractors may submit any dispute to an advisory board (*Comité consultatif de règlement amiable des différends ou des litiges*). Such advisory board investigates elements of law or fact with a view to finding an amicable and equitable solution.

Besides, these contracts may refer to one of the Administrative General Terms and Conditions pursuant to which an amicable conciliation procedure before bringing an action before Administrative Courts is compulsory.

As regards arbitration, and as an exception to the principle set forth in Article 2060 of French Civil Code, local public authorities, local public bodies, some public bodies of industrial and commercial nature and the State (subject to prior authorisation by a specific decree in this case) may resort to arbitration for works and supply contracts.

Civil damage claims are available as regards private contracts, i.e. procurement contracts that are entered into by contracting authorities which are private entities.

The French « *Comité consultatif de règlement amiable des différends ou des litiges* » is made up of two judges from the Council of State (*Conseil d'Etat*) and the *Cour des comptes* (the supreme body for auditing the use of public funds in France), two representatives of the administration and two representatives of companies. In addition, a representative of the General Directorate for public finance has an advisory capacity.

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

Disputes relating to public procurement contracts are judged by the local competent Administrative Courts.

Disputes relating to private contracts are judged by the local competent District Courts (*Tribunal de Grande Instance*).

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

"*Référé précontractuel*" (articles L. 551-1 and seq. of the French Administrative Justice Code), which is a summary proceeding that allows the complainant to seek, notably, the suspension of any decision relating to the tendering procedure in case of a failure by the contracting authority to fulfil its obligations of advertising and putting out to tender: it is possible to initiate this summary proceeding until the procurement contract is signed.

"*Référé contractuel*" (articles L. 551-13 and seq. of the Administrative Justice Code), which is also a summary proceeding whereby the judge rules on the validity of the contract: it is admissible where the claimant has an interest to enter into the contract and is likely to be harmed by the contracting authority's failure to fulfil its obligations of advertising and putting out to tender: this summary proceeding can be initiated within a 31-day delay following the publication of a contract award notice in the Official Journal of the European Union or the notification of the conclusion of the contract if the latter is based on a framework agreement or a dynamic purchasing system. If no contract award notice has been published or the notification did not occur (while it is required under French law), the summary proceeding can be initiated within a six-month delay following the day after the conclusion of the contract.

Regarding the "*Tarn et Garonne*" appeal, which is a proceeding on the merits allowing a competitor to question the validity of the contract: this proceeding on the merits can be initiated within a 2-month delay after the contracting authority carried out the appropriate publication requirements, notably the publication of a contract award notice.

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

The three appeals that can be brought before Administrative Courts have similar admissibility requirements.

When it comes to the "*référé précontractuel*" (article L. 551-1 and seq. of the French Administrative Justice Code), it is admissible where the claimant has an interest to enter into the contract and is likely to be harmed by the contracting authority's failure.

The same holds true as regards the "*référé contractuel*" (article L. 551-13 and seq. of the Administrative Justice Code)..

As regards the "*Tarn et Garonne*" appeal ("*recours Tarn et Garonne*" - CE Ass, 4 April 2014, *"Département de Tarn-et-Garonne*", no. 358994), it is admissible where the conclusion of the contract harms the claimant's interests in a sufficiently direct and certain way.

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

The admissible ground for starting the "*référé précontractuel*" and "*référé contractuel*" appeals is the contracting authority's failure to fulfil its obligations of advertising and putting out to tender or treating equally all candidates.

Admissible grounds for starting a "*Tarn et Garonne*" appeal differ according to who brings the claim. For example, an unsuccessful competitor who starts such an appeal must rely on the breaches of procurement procedure directly related to its eviction.

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

The "*référé précontractuel*" affects on-going tender procedures, whereas the "*référé contractuel*" and "*Tarn et Garonne*" appeals affect awarded contracts.

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

The "*référé précontractuel*" may have the following consequences on the tender procedure:

The judge may order the contracting authority to comply with its obligations under procurement law;

The judge may defer the execution of any decision relating to the tender procedure;

the judge may cancel the decisions relating to the tender procedure or annul contractual clauses violating procurement law. The "*référé contractuel*" may have the following consequences on the awarded contract:

the judge may defer the performance of the contract;

It may cancel the contract, pronounce its termination, shorten its duration or impose a penalty on the contracting authority (which cannot exceed 20% of the contract value) if:

the contracting authority failed to fulfil its obligations of advertising;

the contracting authority signed the contract during the standstill delay,

the contracting authority signed the contract between the referral to the Administrative Court and the date the judgement was passed, provided that two conditions are met: the signature prevented the claimant from bringing a claim, and the contracting authority's failure to fulfil its obligations of advertising and putting out to tender jeopardized the economic operator's chances to obtain the contract.

The "*Tarn et Garonne*" appeal may have the following consequences on the awarded contract:

in light of the nature of defects affecting the validity of the contract, the judge may either decide that contract performance must keep going, or ask the parties to regularise these defects;

If the contract is affected by defects that cannot be regularised and prevent contract performance, the judge may pronounce its termination;

The judge may even cancel part or all of the contract if the defects affecting it are particularly serious or relate to the consent of parties;

The judge may award damages in case the claimant's interests are harmed.

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

In case of a "*référé précontractuel*" appeal, judicial proceedings do not take longer than 20 days following the date the appeal was brought.

In case of a "*référé contractuel*" appeal, judicial proceedings do not take longer than a month following the date the appeal was brought.

In case of a "*Tarn et Garonne*" appeal, the duration of judicial proceedings may vary depending on the competent jurisdiction and the complexity of the case. However, it should last 18 months on average.

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

Pursuant to article 99 of Order no. 2016-360, unsuccessful bidders must be notified the rejection of their tender. In case the procedure relates to a contract the value of which exceeds the thresholds laid down in Directive 2014/24/EU, the contracting authority tells the unsuccessful bidder about the reasons why its tender has been rejected.

This notification may occur as soon as the contracting authority decided to reject the tender, but it may as well take place after the contract has been awarded. In this case, the contracting authority provides the unsuccessful bidder with additional information (i.e. the name of the operator who was awarded the contract and the reasons behind this choice), and the notification must take place at least eleven days before the contract is signed (or sixteen days if the notification was not sent by electronic means), as laid down in article 101 of Order no. 2016-360.

## k. Are review proceedings common?

Review proceedings are rare: around 10% of procedures and contracts were challenged before Administrative Courts in 2013 (data: Council of State report for 2013; Public procurement economic observatory, census for 2013).

In addition, less "*référé précontractuel*" and "*référé contractuel*" appeals have been brought since 2008, given that admissibility requirements have been significantly toughened. Further, "*Tarn et Garonne*" appeals may not be really common in the future, since admissibility requirements are also quite strict.

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

Damage claims are only admissible within the framework of the "*Tarn et Garonne*" appeal. Since it has been created recently, there is no available data on damage claims yet.

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

There have been many court decisions involving procurement disputes in France, including those by the Supreme Administrative Court (*Conseil d'Etat*), which are followed by the lower Administrative Courts.

The following decisions can be pointed out: Conseil d'Etat, 3 October 2008, *SMIRGEOMES* (relating to summary proceedings before the signing of the procurement contract and considering that the only persons who show that they have sustained or are likely to sustain harm owing to breaches to publicity and opening to competition can lodge an application) and Conseil d'Etat, 16 July 2007, *Société Tropic Travaux Signalisation* (allowing the ousted competitors to dispute the validity of the contract or some of its clauses once it is signed).

# 9. Other Relevant Rules of Law

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

Competition law and criminal law are relevant to procurement by public agencies (see above).

Further, rules of access to administrative documents laid down in Book III of the French Code on relations between the public and the administration are relevant to procurement by such agencies.

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

Law no. 75-1334 dated 31 December 1975 on subcontracting covers subcontracting in the context of public contracts.

Other than this, there are no specific rules applying to public contracts other than those mentioned 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 public procurement law applies to all procurement contracts, regardless of the industry sector.

However, the contract may refer to one of the Administrative General Terms and Conditions applicable to specific contracts (such as intellectual performances contracts, industrial contracts or information and communication techniques contracts).

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

Order no. 2016-361 dated 25 March 2016 on defence and security procurement contracts sets specific rules applying to the defence and security sectors.

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

There are not any specific laws or practices applying to the healthcare sector.

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

No.

# 11. Looking Ahead

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

There is no proposal to change the law in the near future. However, a new Public Procurement Code gathering all the provisions regarding public procurement and concession contracts should be adopted by end-2018.

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