

Iceland

Erlendur Gíslason and Hjördís Halldórsdóttir

Logos Legal Services

Legislative framework

1 What is the relevant legislation and who enforces it?

Public Procurement is regulated in Iceland by a statutory instrument enacted by the parliament Act on Public Procurement No. 84/2007 (Lög um opinber innkaup, herein referred to as the Procurement Act), which entered into force on 17 April 2007 and implements the provisions of the EU Procurement Directives.

A specific administrative entity, The Tendering Appeals Committee (Kærunefnd útboðsmála), has a non-exclusive, non-mandatory jurisdiction in enforcing the Procurement Act. Participants in public procurement procedures may, but are not obliged to, submit complaints to the Tendering Appeals Committee, which hands down binding decisions on the subject matter. The Procurement Act is ultimately enforced by the courts, both through judicial review of the Tendering Appeals Committee's decisions as well as by adjudicating on direct applications from the unsuccessful bidder.

2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The Procurement Act supplements the EU procurement directives in that the provisions of the Procurement Act implementing the substantive rules of the EU procurement directives apply to procurement projects below the threshold of the EU procurement directives, while above the specific domestic thresholds.

3 Are there proposals to change the legislation?

The Procurement Act has only been introduced recently. It not only implements Directives 17/2004 and 18/2004 but also introduces a mandatory 10-day standstill period between the award decision and the conclusion of the contract (see question 38). We are not currently aware of any further plans to amend the Icelandic procurement rules.

4 What is the relevant legislation for the procurement of military equipment?

Iceland does not have a military such that there is no specific government department responsible for procuring military equipment in Iceland. If such equipment were to be procured, it would be handled by the State Procurement Agency (Ríkiskaup) or possibly the Icelandic Coast Guard. Article 5 of the Procurement Act provides that its provisions apply to the procurement of military equipment in accordance with article 123 of the Agreement on the European Economic Area (article 296 of the EC Treaty), unless otherwise provided by law, so that such pro-

urement falls within the ambit of the Act. So far, no statutory exceptions have been enacted. Article 9 of the Procurement Act further provides that it does not apply to procurement contracts that are classified as secret or whose performance requires special security measures or where it is in the interest of national security to exempt the procurement. Such classification must be provided for by law. There is no special legislation applicable to procurements benefiting from the exemptions mentioned above.

Applicability of procurement law

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

There have not been any rulings by the Tender Appeals Committee or court judgments ruling any entity or any kind of entities not to constitute contracting authorities.

6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

There is no formal dispute at hand as to whether any certain kind of entities have a status of contracting entity or not. There have, however, been divided opinions as to whether certain construction projects of private parties and local governments with a public non-competitive interest, which have received direct, extraordinary financial support from the central government, while not being on the state budget, would fall within the public tendering obligation because of the state support. It has been criticised that a number of such projects have not been the subject of a public tender, even if all requirements for tendering have been met, such as public financing and public, non-competitive interest of the project.

7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

The Procurement Act enacts the rules for calculating thresholds as provided in the EU directives. Contracts under a certain value are excluded from the scope of the Procurement Act. The threshold values are as follows:

- goods (5 million Icelandic kronur, approximately €42,200);
- works (10 million kronur, €84,400); and
- services (10 million kronur).

The above amounts are subject to an annual escalation on the basis of increases in the Consumer Price Index.

The Procurement Act provides detailed rules for the calcula-

tion of the value of each type of contract, which rules are substantially consistent with similar rules in the EU Directives.

- 8** Does the extension of an existing contract require a new procurement procedure?

Where the contract, as advertised, provides for unilateral extension by the contracting authority, the contracting authority may extend without a new call for competition since the extension was always envisaged and did not require the agreement of the contractor.

Where the advertised contract does not provide for unilateral extension, the general view is that if the value of the extension exceeds the threshold then there should be a new competition.

- 9** Does the amendment of an existing contract require a new procurement procedure?

The Procurement Act does not expressly deal with this matter. If there is a 'material change' to the scope or specification of the existing contract, in principle, a new procurement procedure is required. Whether the change is material depends on factors such as the relative scale and cost of the new works and whether they are different in kind from those originally provided for.

- 10** May an existing contract be transferred to another supplier or provider without a new procurement procedure?

Generally, if the value of the contract that is to be transferred by the contracting authority is above the relevant threshold, there should be competition to avoid concerns about discrimination.

- 11** In which circumstances do privatisations require a procurement procedure?

The provisions of the Procurement Act do not apply to privatisations. The procedure of privatisation follows specific rules in a Code of Conduct set by the Government Committee on Privatisation, issued in May 1996, which provide among other things for public invitations to tenders where public entities are transferred into private ownership.

- 12** In which circumstances do public-private partnerships (PPPs) require a procurement procedure?

Public-private partnerships are not subject to any exemptions from the provisions of the Procurement Act. If the partnership does fulfil the criteria for being considered a service concession, the Procurement Act does not apply to the partnership, except however for article 14, which deals with the principles of equality and transparency. The Procurement Act does apply to work concessions, although in a more limited manner than to works, services and supply procurements.

- 13** What are the rules and requirements for the award of services concessions?

As stated above, only article 14 of the Act on Public Procurement applies to services concessions. Article reads as follows:

Equality and transparency must be maintained during public procurement. Discrimination on grounds of nationality or other similar reasons is prohibited. Stipulating in procurement documents that a supply is to be delivered, service given or work carried out at a specified location is not considered to be discriminatory, provided that such a stipulation is based on legitimate arguments.

- 14** What are the rules and requirements for the award of an in-house contract without a procurement procedure?

For a contract to constitute an in-house contract the work or service to be performed must form a normal part of the activities of the contracting authority and as such fall within the legally prescribed object of the contracting authority. The contracting authority and the service provider must strictly form a part of the same legal entity. Therefore an agreement to supply services between government ministries, or two municipal councils, or between a council and a company owned by the same council, would be caught by the procurement procedure rules and not be authorised under the in-house contract exemption. Where the contracting authority intends to award a contract to an entity legally distinct from it and whose shareholders include private undertakings, or where a contracting authority is awarding a contract to a mixed joint venture in which a private company is participating, the Procurement Act will apply.

The procurement procedures

- 15** Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

The Procurement Act explicitly refers to the principles of equal treatment, non-discrimination, transparency and competition (Procurement Act, articles 1, 14 and 20).

- 16** Does the relevant legislation or case law require the contracting authority to be independent and impartial?

It follows from the principles of the Procurement Act of equal treatment, non-discrimination and transparency as well as from general principles of administrative law that the contracting authority must be independent and impartial.

- 17** How are conflicts of interest dealt with?

There is no express provision in the Procurement Act on conflicts of interest arising from, for example, business relations or family ties. In the context of procurement by local government, there are some legislative provisions to regulate conflicts of interest. For example, the Act on Local Authorities No. 45/1998 (Sveitarstjórnarlög) sets out the conduct to be expected of the members of local authorities. This code requires members of local authorities to disclose any personal interest they might have in a matter and not to take part in discussions where they have a financial or personal interest in the matter in hand, or where it appears that they are at risk of bias or of using their position improperly.

At the central government level, a contracting authority would probably look to the principles underpinning the procurement rules such as equality of treatment and general administrative principles of impartiality in making a decision on the course of action to follow in a conflicts scenario.

- 18** How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The Procurement Act does not contain rules relating to this matter. The general principles of non-discrimination, transparency and equality of treatment will apply to require a level playing field to exist among bidders. Prior involvement will not necessarily prevent further participation in the project unless the prior involvement is considered to grant such bidder an unwarranted advantage over other bidders with an effect to distort or preclude

competition. The Tender Appeals Committee has on at least one occasion prohibited the participation of an engineering firm in a tender procedure for supervisory services where the engineering firm had had an advisory role in drafting the specifications for the tender. The prohibition in such case is absolute.

19 What is the prevailing type of procurement procedure used by contracting authorities?

An open tender procedure is recommended by the central government, thus providing an opportunity to all interested parties to participate, and is by far the most common type of procurement procedure. For larger and more complicated projects a restricted tender procedure with pre-qualification is commonly used.

20 Are there special rules or requirements determining the conduct of a negotiated procedure?

The rules determining the conduct of a negotiated procedure are set forth in articles 32 and 33 of the Procurement Act. Article 31 implements article 30 of Directive 2004/18/EC and article 33 of the Act implements article 31 of the Directive.

21 When and how may the competitive dialogue be used?

The requirements for conducting the competitive dialogue procedure closely follow the requirements set in the EU Directives. Thus, the Procurement Act provides in Article 31 for the competitive dialogue procedure when awarding particularly complex projects. A project is regarded as particularly complex where the authority is unable to define the technical specifications or the legal or financial make-up of the project. With the provisions for competitive dialogue in the Procurement Act having been enacted quite recently, the competitive dialogue procedure has not yet been used in Iceland so there is no administrative precedents or case law available on its use.

22 What are the requirements for the conclusion of a framework agreement?

Framework agreements may be awarded using either the open, restricted, negotiated or competitive dialogue procedure. The maximum duration of a framework agreement is normally four years. A framework agreement may not be used to prevent or restrict competition.

23 May several framework agreements be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

Framework agreements can be concluded with several suppliers for the same goods, works or services. Where a public sector framework agreement is concluded with more than one supplier, the minimum number is three (provided there is a sufficient number of qualified bidders). The authority has a choice as to how call-offs under the framework agreement are awarded. The authority can either award call-offs based on the terms of the bidders' initial applications to join the framework (where these applications are sufficiently detailed) or, where the conditions are not detailed, conduct a mini-competition at call-off stage.

24 Under what conditions may consortium members be changed in the course of a procurement procedure?

The Procurement Act does not address this matter. Individual instructions to tenderers where consortia are specifically recommended, in particular for design projects, a change of consortium members is discouraged and permitted only in case of a cessation of business or similar circumstances subject to the approval of the contracting authority provided a replacement is an equally or better-qualified member.

25 Are unduly burdensome or risky requirements in tender specifications prohibited?

There is no such explicit prohibition stated in the Procurement Act, whereas it may be considered as implied. Moreover, under the Procurement Act, contracting authorities have to ensure that the technical specifications afford equal access to bidders and do not create unjustified obstacles to the opening up of competition. If a contracting authority wishes a provider to meet technical specifications, these must be set out in the contract documents with the aim of defining them in accordance with European standards wherever possible.

26 What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

In assessing the qualification of tenderers, contracting authorities may not require a bidder to be either a physical or a legal person or for a legal entity to have only a particular legal form. Further contracting authorities may only take into account the following criteria which are stated in the Procurement Act:

- tenderers who have been convicted of certain types of offences such as corruption, bribery, fraud (depending on the circumstances) and money laundering must be excluded from the competition;
- the contracting authority may exclude bidders who are bankrupt, have been convicted of other business related offences or have failed to pay their taxes or social security contributions; and
- in addition, the authority can define the minimum requirements in relation to the bidders' financial standing and technical capacity.

There are administrative law requirements that a contracting authority acts fairly and not arbitrarily in the exercise of discretion.

27 What are the requirements for the admissibility of alternative bids?

Should a contracting authority wish to consider variant bids, it must state this in the invitation for tenders. Otherwise, alternative bids are considered as prohibited. Contracting authorities often require bidders to submit a compliant bid in addition to the variant, whereas that is not a legal requirement. Alternative bids may only be permitted by a contracting authority in procedures in which the selection criteria is the most economically advantageous tender. Only alternative bids that satisfy the minimum requirements of the invitation to tenders will be considered.

28 Must a contracting authority take alternative bids into account?

If the contracting authority has indicated it will consider such bids in the invitation for tenders (see question 27), it is obliged to take account of variant bids which satisfy the minimum require-

ments set out in the invitation and are not excluded on any of the limited grounds permitted by the Procurement Act (see question 26). The authority may not consider variant bids submitted in violation of the terms of the invitation to tenders and the specifications.

29 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

In an open or restricted procedure, the contracting authority should not accept changes to the specifications and terms unless it has indicated to all bidders which types of amendments are acceptable. Any bid containing such change or accompanied by such particular terms of business would be rejected. In a negotiated procedure and a competitive dialogue, discussions about the specifications and the terms can be part of the usual award process. The authority has to ensure that all bidders are given equal opportunities to suggest and discuss such amendments.

30 What are the award criteria provided for in the relevant legislation?

The authority can choose between the lowest price or the most economically advantageous tender. In the competitive dialogue procedure, the contract may only be awarded on the basis of the most economically advantageous tender. The premises for the evaluation of the most economically advantageous tender shall be stated in the invitation for tenders and shall relate to the subject matter of the contract, such as quality, price, technical performance, external look, capabilities of use, environmental capabilities, operational cost, operational efficiency, maintenance service levels, time or period of delivery or contract expiry. The premises shall be weighted either by way of a proportional rating system or ranked in terms of importance.

31 What constitutes an 'abnormally low' bid?

There is no definition in the Procurement Act as to what is meant by an 'abnormally low' bid. It is generally considered to be one that appears commercially unviable taking into account the financial and technical premises of the works, goods or services to be provided by the bidder, as well as the bid's compliance with employee's rights and workplace regulations and the bidder's possible entitlement to state aid.

32 What is the required process for dealing with abnormally low tenders?

The purchaser shall, following due consultation with the tenderer, ascertain the premises behind the tender on the basis of documents submitted by the tenderer. If the purchaser finds that the tender is abnormally low because the tenderer enjoys state aid, the tender shall not be rejected unless the tenderer can not verify within a prescribed time period, that the state aid was lawfully granted. If the tender is rejected on these grounds, then the purchaser shall notify the EFTA Surveillance Authority of its decision. The purchaser shall provide reasoning for its decision to reject a tender for being abnormally low.

33 How can a bidder, that would have to be excluded from a tender procedure because of past irregularities, regain the status of a suitable and reliable bidder? Is 'self-cleansing' an established and recognised way of regaining reliability?

The regaining of a status of a suitable and reliable bidder would be evaluated on a case-by-case basis. Certain types of past irregu-

larities, such as judgments with respect to bribery or financial irregularities, may not be wiped out, whereas evidence on the improved financial and technical ability may ensure the status as a suitable and reliable bidder for someone who did not enjoy such status in a previous tender procedure. There is no specific manner of 'self-cleansing' known as an established and recognised way of regaining reliability, whereas the contracting authorities may freely evaluate whatever evidence is proffered by a bidder as to his improved reliability to the extent that past irregularities may be the subject of change.

Review proceedings and judicial proceedings

34 Which authorities may rule on review applications?

Any unsuccessful bidder may file a review application with the Tender Appeals Committee.

Review proceedings can also be commenced by taking direct legal action before the competent District Court without prior application to the Tender Appeals Committee.

35 How long does a review proceeding or judicial proceeding for review take?

A review proceeding before the Tender Appeals Committee may take between four to eight weeks, whereas a judicial proceeding for review may take between six to 12 months, which may be doubled if the District Court judgment is appealed to the Supreme Court.

36 What are the admissibility requirements?

Any undertaking (including physical and legal persons) enjoying rights under the Procurement Act and having a legal interest in the resolution of a determined matter, may file an application for review with the Tender Appeals Committee or commence judicial proceedings for review.

The applicant's claim and the Tender Appeals Committee's decision is limited to the annulment in part or in whole of a purchaser's decision in relation to public procurement, the ordering of a purchaser to open a tender procedure for a determined procurement, the repetition of a tender announcement or cancellation of certain unlawful terms or conditions in the procurement documents. The Committee can express an opinion on the purchaser's obligation to pay damages to the applicant, while it does not make a determination as to the quantum of damages.

37 What are the deadlines for a review application and an appeal?

An application for review must be filed within four weeks from the date of the decision or event which the unsuccessful bidder wishes to have overturned or changed or otherwise from the date when grounds for bringing the action first arose.

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure?

No. In proceedings brought under the Procurement Act, the Tender Appeals Committee may, by interim order, either suspend the procedure leading to the award of the contract or suspend the implementation of any decision or action taken by the contracting authority in the course of following such a procedure. This is not, however, automatic. During the 10-day standstill period described in question 39, unsuccessful bidders have an opportunity to file an application requesting an interim order for a

Update and trends

The recently enacted Procurement Act introduced the competitive dialogue as a new procurement procedure. There is an emerging trend of tendering large-scale building projects, such as universities and schools, on a design-build basis for a fixed price. Tender documents only provide the purchaser's requirements and, with the price being fixed, the selection criteria is effectively the best design without any price competition. This approach was used for the first time in public procurement only a few years back, with success, and time will tell if its use becomes more widespread.

suspensive effect blocking the continuation of the procurement procedure before any irreversible decision or action is taken by the contracting authority.

39 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded?

The recently enacted Procurement Act introduces a requirement to notify bidders of the award decision before the contract is entered into. The contract may not be entered into for a period of 10 days after the despatch of the notice.

40 Is access to the procurement file granted to an applicant?

The Procurement Act does not address the question of an applicant's access to the procurement file. From the time of opening of tenders each applicant has information on the amount of other tenderer's bids. For any other information from the procurement file an applicant would have to apply under the Freedom of Information Act No. 50/1996. The contracting authority, however, may refuse access under the Freedom of Information Act where information in the procurement file was received under an express duty to preserve the confidential nature of that information, such that disclosure of the relevant information would constitute a breach of confidence actionable by the relevant bidder, or the disclosure of the procurement file would be prejudicial to another person's commercial interest.

41 Is it customary for disadvantaged bidders to file review applications?

The number of complaints that the Tender Appeals Committee receives each year oscillates between 25 and 40 cases each year. Based on an informal inquiry with the main contracting authority a review application is filed with respect to one in every 20 procurement procedures (5 per cent). The Tender Appeals Committee is quite accessible, application filing charges are low and the procedure is expeditious. It is up to the reader to judge whether these statistics mean that it is customary for disadvantaged bidders to file review applications. Only a very few Tender Appeals Committee rulings are challenged each year by court action so it can be asserted that it is not customary for disadvantaged bidders to be litigious.

42 May a contract be cancelled or terminated if the procurement procedure that led to its conclusion violated procurement law?

Where the contract has already been entered into, save in the case of fraud or bad faith, the court can only award damages to an interested party for any breach of the Procurement Act by the contracting authority in relation to the award of that contract. The same would probably also apply to the award of a contract in breach by the authority to respect the mandatory 10-day standstill period (see question 38), as the basic principle is that a contract that has been entered into will not be set aside, save in the case of fraud or bad faith. There are, however, no court precedents so far on the question of a breach of the 10-day standstill period.

43 Is legal protection available in cases of a de facto award of a contract, namely, an award without any procurement procedure?

The Procurement Act does not provide any legal protection in cases of a de facto award of a contract. Such contracts can not be cancelled or terminated by having recourse to the Procurement Act and damages do not seem to be claimable. The validity of such contracts is subject to the general principles of the law on contracts, which does not provide grounds for cancellation under normal circumstances.

LOGOS

LEGAL SERVICES
SINCE 1907

Hjördís Halldórsdóttir
Erlendur Gíslason

hjordis@logos.is
erlendur@logos.is

Efstaleiti 5
103 Reykjavík
Iceland

Tel: +354 5400 300
Fax: +354 5400 301
www.logos.is