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The International Comparative Legal Guide to: Public Procurement 2011

A practical cross-border insight
into public procurement

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The national legislation in the field of public procurement dates back to 1997, when the Act on the Award of State and Municipality Public Contracts was adopted. In 1999, this act was repealed by the Public Procurement Act.

Currently, the relevant act is the Public Procurement Act (PPA), which entered into force on 1 October 2004, and it transposes the provisions of current European Directives. This Act adoption was followed by the adoption of several secondary legislation acts, which set out the legislative framework in public procurement. These acts have been amended several times, the largest part of the amendments took place in 2006 and 2010, in order to ensure full compliance with European legislation in this field and, in particular, with the provisions of the valid European Regulations and Directives.

Under the Treaty establishing the European Community, regulations have direct effect and set out rights and obligations for all subjects of European Law. They require no additional implementing legislation in the Member States. Directives, in turn, have no direct effect on the Member States, but need to be transposed by domestic legislative acts, taking into consideration national particularities.

The legislation in the field of public procurement aims to ensure effectiveness in spending of budgetary and non-budgetary funds, as well as resources related to undertaking tasks of public concern.

The regulation of the concession contracts is set out in a separate act - the Concessions Act, published in State Gazette No. 36, dated 2 May 2006 (the "CA"). Many secondary acts are issued for the implementation of the PPA and the CA, such as the Ordinance on assignment of small public procurement, published in State Gazette No. 84, dated 27 September 2004 ("Ordinance on small PP") and Ordinance on assignment of special public procurement, published in State Gazette No. 80, dated 14 September 2004, as amended ("Ordinance on special PP").

1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

As a Member State of European Union (EU), Bulgaria implemented the provisions of the Directives in the national PPA and the CA. The national legislation corresponds to the EU rules.

1.3 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

In accordance to the EU legislation the principles described below and present in the national legislation should be applied to public procurement procedures. The principles are: publicity and transparency; free and fair competition; and, equality and non-discrimination. These underlying principles are fundamental for the interpretation of the procurement legislation. Any ambiguity or gap in any procurement procedure must be construed and applied in line with these principles. However, the final assessment, whether a particular principle has been properly applied, is within the competence of the Competition Protection Commission and the Supreme Administrative Court.

1.4 Are there special rules in relation to military equipment or any other area?

Several national laws regulate the public procurement procedures related to military equipment, armaments and military installations. The primary one is the Ordinance on Special Public Procurement.

The Ordinance can be applied to a limited number of cases – related to national defence and security especially supply of arms, munitions and war equipment. Under regulation of this Ordinance are PP related to classified information and where the performance under the procurement contract shall be accompanied by special security measures in accordance with the Bulgarian legislation.

Bulgaria applies the rules adopted by the European Defence Agency and the Code of Conduct on Defence Procurement, the Code of Conduct of Offsets and the Code on Best Practice in the Supply Chain.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law (as purchasers)?

The entities defined by the national legislation as purchasers are fully aligned with the applicable framework and EU directives. The public entities which may be classified as the purchaser under public procurement contracts are indicated in Art. 7 of the PPA:

1. The bodies of state authorities. Generally the "state authorities" are all legislative, administrative and judicial bodies.

2. The President, the Bulgarian National Bank, as well as any other state institution established by virtue of a statutory act.
3. The diplomatic and consular representations of the Republic of Bulgaria abroad, as well as the permanent representations of the Republic of Bulgaria to the international organisations.
4. Public organisations, which are commercial or production corporations established for the purpose of satisfying public interests which meet certain statutory requirements.
5. Associations of the entities under items 1, 2 and 4 above which may be corporations or partnerships.
6. The public enterprises and their associations, where they carry out one or several of the activities under Art. 7a – 7e of the PPA (production, distribution and transfer, supply of gas and energy, activities related to drinking water, transportation services, postal services, and activities related to the exploitation of certain geographical region, searching and extraction of oil, gas, coal; use of airports, ports, etc.).

2.2 Which private entities are covered by the law (as purchasers)?

In case a private entity meets the abovementioned requirements under Art. 7a – 7e then the application of the Act should be ensured.

2.3 Which types of contracts are covered?

The PPA covers a few groups of contracts which concern the following:

1. the delivery of goods, which are being carried out by virtue of purchase, leasing, renting, with or without a right of purchase or instalment plan, as well as all necessary preliminary activities related to the use of the goods, such as set up, testing of machines and equipment;
2. provision of services; and
3. construction, including:
 - a) Building or engineering (designing and building) of a construction.
 - b) Fulfilment or designing and fulfilment with any resources of one or several building and mounting works according to Appendix No 1 of the PPA related to the construction, reconstruction, restructuring, maintenance, restoration or rehabilitation of buildings or construction facilities.
 - c) Engineering and fulfilment with any resources of one or more activities related to a construction of a building in compliance with the requirements of the contracting authority, such as feasibility study, designing, organisation of the construction, delivery and mounting of machines, facilities and technological equipment, preparation and commissioning of the site.

Certain activities are explicitly excluded including, *inter alia*, acquisition and leasing of land, existing buildings and other immovable property, as well as establishment of property rights except for the financial services related to such activities, financial services related to emission and transfer of securities and other financial instruments, services rendered by the Bulgarian National Bank; choice of arbitration, employment contracts, etc.

In addition to the foregoing, there are special rules regarding granting of concession rights.

2.4 Are there threshold values for determining individual contract coverage?

There are certain threshold values for determining contract

coverage:

1. For construction – over 2,150,000 BGN, and where the procurement has a place of fulfilment outside the country – over 6,000,000 BGN.
2. For deliveries – over 180,000 BGN, and where the procurement has a place of fulfilment outside the country – over 250,000 BGN.
3. For services – over 110,000 BGN, and where the procurement has a place of fulfilment outside the country – over 250,000 BGN.

Public procurements contracts which fall below the above thresholds are regulated by Ordinance on small PP, where the regime is more simplified.

2.5 Are there aggregation and/or anti-avoidance rules?

In accordance with the Directives, the PPA provides for particular aggregation and anti-avoidance rules. For example, the selection of certain methods for contract value calculation may not be used with the intention of avoidance of the application of the PPA, and splitting up a public procurement with the intention of avoiding the application process is also explicitly forbidden by the Bulgarian procurement rules.

2.6 Are there special rules for concession contracts and, if so, how are such contracts defined?

The applicable legislation regarding the concession contracts is the CA. The concessionaires are granted rights to exploit certain exhaustively listed objects and services for a certain period of time (up to 35 years) against consideration (royalty) and the obligation of management and preservation of the object of the concession at their own risk. In certain cases the concessionaires do not owe a concession payment for the granted rights. Concession contracts are concluded after conduction of an open concession tender, whereby the only criteria for assessing the submitted tenders is “economically the most favourable offer”.

3 Procedures

3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

We could infer that there are various applicable procedures according to the legislation in force. The public procurement shall be assigned by way of holding: an open procedure; a limited procedure; competitive dialogue; and procedures of negotiation.

1. Open procedure is the procedure whereupon all interested persons may file offers.
2. Limited procedure is the procedure whereupon offers may be filed only by candidates having received invitation from the contracting authority.
3. Competitive dialogue is a procedure, where every interested person can submit application for participation and the contracting authority conducts a dialogue with the candidates, with the purpose of definition of one or more proposals, which meet his/her requirements and after that he/she invites the candidates with suitable proposals to submit offers.
4. The procedures of negotiation are: a) procedure of negotiation with announcement, whereupon the contracting authority holds negotiations for determining the clauses of the contract with one or more participants chosen by him/her upon a preliminary selection; and b) procedure of negotiation without

announcement, whereupon the contracting authority holds negotiations for determining the clauses of the contract with one or more concretely chosen persons.

- Project competition is the procedure whereupon the contracting authority acquires a plan or a project, chosen by an independent jury on the grounds of a competition with or without adjudgment of awards.

3.2 What are the rules on specifications?

In the documentation for participation in public procurement procedure the contracting authority shall determine the technical specifications by indicating:

- Bulgarian standards introducing European, international standards, European technical approvals or general technical specifications, or other technical standards of European standardisation authorities, adding the words “or equivalent”.
- Bulgarian standards, technical approvals or specifications, as regards to the designing, the method of calculation and performance of the construction, as well as to the materials used, adding the words “or equivalent” where there are no standards under item 1.
- Operative characteristics or functional requirements, allowing exact definition of the procurement’s object; the functional requirements may include requirements for protection of the environment.
- Operative characteristics or functional requirements under item 3 by reference to specifications under item 1 or 2, the compliance with which is considered compliance with the operative characteristics or the functional requirements.
- The specifications under item 1 or 2 – for certain characteristics, and for others – by reference to operative characteristics or functional requirements under item 3.

The technical specifications shall provide equal access of the candidates or the participants for participation in the procedure and shall not create obstacles to the competition without grounds.

3.3 What are the rules on excluding tenderers?

The Bulgarian PPA contains specific rules regarding cases when the purchaser may or shall eliminate a bidder from the procedure. There are two types of exclusion: mandatory; and discretionary exclusion.

In the discretionary exclusion, the purchaser may exclude a bidder but only under the condition that the grounds for exclusion are specified in the announcement for opening the procurement procedure (for example existence of monetary obligations to the state). The general rule is that if a bidder does not meet the preliminary announced requirements of the purchaser, the latter has to be excluded from the conducted procedure. Otherwise, the rights of other bidders may be harmed. The principle for equal treatment may be breached, which may question the lawfulness of the tender.

In the event of mandatory exclusion the purchaser is obliged to eliminate the bidders (for example in the event of insolvency of the latter or in the event of lack of participation guarantee).

3.4 What are the rules on short-listing tenderers?

The short-listing should only take place when the legislative requirements are met. It is unacceptable for the purchaser to define ill-grounded terms and conditions and requirements that could put limitations to the fair competition. The practice of the Commission for Protection of Competition (CPC) shows that such ill-founded and restrictive procurement related short-listings are suspended.

3.5 What are the rules on awarding the contract?

The contracting authority shall determine the contractor of the public procurement on the grounds of an assessment of the offers by one of the following criteria, indicated in the announcement: a) lowest price; or b) economically the most favourable offer.

If the chosen criterion is economically the most favourable offer, the contracting authority shall be obliged to determine the indices, their relative weight and methodology for determining the assessment by each index, including digital admissible values and its evaluation within limits set in advance. Where, due to objective reasons, it is impossible for the relative weight to be indicated, the contracting authority shall arrange them by importance in descending order. If the selected criterion is economically the most favourable offer, the purchaser may allow the bidders to present variations of their offers. This option cannot apply to the criterion lowest price.

3.6 What methods are available for joint procurements?

The form of joint procurement is the frame agreement. This is the agreement, concluded between one or more contracting authorities and one or more potential contractors of public procurement, whose purpose shall be to determine in advance the terms of the contracts, which the parties intend to conclude for certain period of time, not longer than 4 years, including with regard to the prices, and if possible – the amounts provided. As an exception the term of the frame agreement may be longer than 4 years, provided that the contracting authority shall point out the motives for that in the announcement.

When the contracting authority concludes the frame agreement with several persons, there may not be less than three, on the condition that there is a sufficient number of potential contractors, who meet the preliminary announced conditions of the contracting authority.

3.7 What are the rules on alternative bids?

According to the PPA the main rule is that each bidder may submit only one offer. However, within the term announced by the purchaser for submitting offers, bidders may change or supplement their offers.

Variations of the offers are allowed only under the condition that the purchaser has declared his consent to accept such variations. This should be done with the announcement for opening the procurement procedure.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

The PPA also provides for some special rules which apply to procurement contracts which relate to utility activities such as electricity, water supply, transport and postal services. The special rules supplement or replace the general procurement rules. In Bulgaria amendments and supplements to acts of the rank of the PPA are within the competence of the Parliament. This means that the activities, to which special rules are applied, as well as the content of the said special rules, are determined by virtue of a Parliament’s act.

4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The legislation does not cover the contracts awarded/procured to a partner in a joint venture. An additional condition for excluding such contract is that the said joint venture should be formed in order to carry out the activity concerned over a period of at least three years and the instrument setting up the said joint venture must stipulate that the contracting authorities and parties to the joint venture will be parties thereof for the same period.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

According to the legislation in force and in particular to the Act on Protection of Competition there are many rules allowing and ensuring the protection of the interests of an entity participating in a specific procedure. The protection depends upon the administrative and court procedures envisaged by the legislation along with the deadlines for their commencement/application.

Any interested party is allowed to file a complaint before the CPC – a specialised state body entitled to (among other priority functions) examine arguments in the field of public procurement.

The appeals related to the choice of public procurement contractors have the so-called “impeding” effect which means that the purchaser is not allowed to take further action until the final decision of CPC or the court of appeal is issued.

We should add that the purchaser could request the CPC to apply the so-called Preliminary Execution of the Decision related to the choice of public procurement contractors which means that the contract could be signed right after the CPC or the court of appeal give permission – this is a new option introduced to the public procurement legislation in the middle of 2010.

The CPC resolutions are subject to court control and, in particular, subject to appeal before the Supreme Administrative Court of Bulgaria (the “SAC”). The decision of the SAC is final and binding to the parties.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

Public procurement contracts cannot be appealed before courts of arbitration or other bodies besides the ones stated in the legislation. The rules of appeal are imperative and they cannot be bypassed. After a contract is signed the purchaser and the contractor have the right to negotiate terms and conditions of arbitration but they should only cover the execution of the contract at stake.

5.3 Before which body or bodies can remedies/enforcement be sought?

The competent body is the CPC – a specialised administrative state body entitled to examine the legislative grounds of public procurement procedures. The decisions made by the CPC can be appealed before the SAC.

5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

It is not possible to define any time limits with regard to the case examination because they are heavily dependent upon the particular issues raised. The practice, however, shows that the case examination in the CPC takes between 2 and 10 months and even longer in the court of appeal.

5.5 What remedies are available after contract signature?

After a contract is signed all appeals and arguments should be addressed as defined in the general civil law in Bulgaria, i.e. the CPC and the SAC cannot examine such cases.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

It is not possible to define any timescale because it depends on the applicable legal procedure and the court/administrative body entitled to examine the details. The case examination could take between a few months to a few years.

5.7 Is there a culture of enforcement either by public or private bodies?

Based on the analysis of the practices we could infer that in most cases the choice of the contractor is being appealed but there are also cases where the terms and conditions outlined in the tendering documentation are appealed as unfair or not providing equal rights of the competitors.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

The CPC has a balanced practice – both decisions confirming the lawful nature of public procurement procedures and suspending them. As an example we could offer the decision related to “Toploficazia Sofia” (central heating supplier) where the CPC found a restrictive requirement acting as a prerequisite to choose a specific tenderer as a contractor. The tendering procedure was related to the choice of a telecommunications provider and the CPC suspended the choice made.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

Both open and limited types of procedures do not allow any changes or annexes to be introduced to the contracts. The rest of the procedures allow very limited options for changes.

6.2 In practice, how do purchasers and providers deal with these issues?

Any changes introduced to the contracts are highly risky – for both

the purchaser and the provider. Changes introduced by the purchaser could lead to the suspension of the whole procedure and allow any interested parties to appeal it. Alongside, the providers themselves are not willing to accept changes to the contracts signed.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

There is a Privatisation and Post-privatisation Control Act in force in Bulgaria which covers all privatisation transactions in the country. It is very important to state that the privatisation process in Bulgaria was very impetuous during the last 15 years but at present it is practically over.

The Act envisages several procedures that are different from those in the PPA which is why we would like to list them:

1. public offering;
2. public auction;
3. competitive bidding with public invitation to tender;
4. centralised public auction;
5. acceptance of a tender offer under the terms of the Public Offering of Securities Act; and
6. negotiations with the buyer of the majority stake.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The legislation does not envisage special rules regarding PPP and these cases are not covered by a special law. It is allowed for the separate municipalities to have their own rules and regulations regarding PPP but the centralised standardisation is not a fact yet.

8 Other Relevant Rules of Law

8.1 Are there any related bodies of law of relevance to procurement by public and other bodies, such as freedom of information or general contract law?

It is a significant advantage that the PPA consolidates the public procurement matters. The Act and the regulations deriving from it form a legislative framework corresponding to the requirements of the EU directives. The Obligations and Contracts Act and the Commercial Act could also impact the contracts and their execution indirectly. Other laws could also be applicable especially in the field of defence and security, telecommunications, electricity supply, etc.

9 The Future

9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Unofficial information says that a new PPA is being drafted but the adoption process could take an extremely long time since the draft is in a very early stage. It is highly uncertain if such a draft will ever be passed by the National Assembly.



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Alexander Pachamanov graduated from the Sofia University faculty of law in 1997. He was a junior judge at the Sofia City Court in 1997. He joined Georgiev, Todorov & Co. in 2001 having previously been a senior legal adviser for Prosoft JSC (2001) - one of the major Bulgarian hardware and software retailers - and a lawyer with the State Telecommunications Commission (state regulator in the field of telecommunications) 1998-2001.

He specialises in the fields of telecommunications, commercial law, M&A, concessions, administrative procedures. His experience includes active participation in the privatisation process of Bulgarian Telecommunications Company, Bulgartabak Holding (tobacco processing and cigarettes manufacturing company) and Devin (one of the biggest mineral water and soft drinks bottling companies). He has also provided legal consulting to MSF Portugal with regards to the concession of Trakia highway and Fraport AG Frankfurt Airport Services Worldwide regarding the concession for running the airports of the coastal cities Bourgas and Varna.

Alexander has represented top international and local clients in various public procurements, including: Bulgarian Telecommunication Company, Bulgarian Maritime Shipping, Sofia Municipality and many others.

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Georgiev, Todorov & Co. has worked on the major privatization deals in Bulgaria including the privatisation of the Bulgarian Telecommunication Company, Boyana Film, DSK Bank, Bulgarian Maritime Fleet, Bulgaria Air - the National Air Carrier, Burgartabac Holding etc. The firm worked also on the European Bank for Reconstruction and Development's very first investments in Bulgaria. Georgiev, Todorov & Co. has also provided consultancy to Fraport AG, the owner and operator of Frankfurt Airport. The firm is a preferred choice by Microsoft.

The firm has worked for about 10 years on complex international projects and, as a result, has developed considerable expertise. Lawyers of Georgiev, Todorov & Co. have been involved in various assignments in the field of energy, telecoms, M&A and banking acting for clients such as: the consortium of Mitsui & Co. Ltd., Toshiba Corp. and the Japanese Bank of International Cooperation with respect to the rehabilitation of six units of Maritza Iztok 2 thermal power plant, Bulgarian Telecommunication Company, Raiffeisen Zentralbank Osterreich AG, Alpha Airport Services and others. Recently the firm has been involved in the sale of the division of the Bulgarian Telecommunication Company, for broadcasting of radio and TV signals - "Radio and TV systems".

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