THE GOVERNMENT PROCUREMENT REVIEW

Eleventh Edition

Editor
Jonathan Davey

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PREFACE

Welcome to the 11th edition of *The Government Procurement Review*!

This year we have contributions from a diverse range of jurisdictions, ranging from the Dominican Republic to Australia and from the United States to a number of European jurisdictions along with a separate chapter on EU law.

I feel self-conscious, as an English lawyer, focusing year on year in this preface on the UK position, but the UK procurement bill continues its progress through the legislative process and is likely to become law in the autumn of 2023, with implementation in the spring of 2024. Although it represents an evolution rather than a revolution compared to the EU law position, and underpinned as it is by the WTO Agreement on Government Procurement (GPA), a large amount of concentrated effort from contracting authorities and their advisers, and indeed within private sector bidding organisations, will be required to assimilate the changes. There will also be the inevitable, but confusing, period of dual running as the old rules continue to apply to processes in flight.

Swiss law has also seen major changes aimed at the implementation of the GPA and harmonisation of national and cantonal procurement rules. Interestingly, bidding rounds aimed solely at price reduction are prohibited.

Portugal has legislated for digital signatures in bidding documents, after the submission of a bid on an electronic platform.

The Dominican Republic is also proposing a broad range of other modernisations to its procurement laws from anti-corruption measures to the introduction of e-procurement and frameworks, to new sanctions for breach of procurement law.

Geopolitical issues are affecting procurement law and policy across the globe. This goes well beyond the continuing sanctions against Russia and Russian businesses in consequence of the invasion of Ukraine, most notable in the recent significant German legislative measures on defence procurement, and Maltese provisions allowing contractors, who are affected by price increases concerning works and supply contracts, to seek a price increase.

Broader-ranging developments in the United States include:

a an increased focus on domestic preferences with recent legislation expanding Buy America requirements that apply to federally funded infrastructure projects, and regulations amending the Buy American Act applicable to federal procurement creating a framework to impose 'super price preferences' for critical products and components; and

b the National Defense Authorization Act, which prohibits the procurement of electronic parts, products and services that include covered semiconductor parts or services from certain Chinese entities.

Developments in Canada include:

a the adoption of the Contract Security Program, which focuses on security screening activities for participants in the procurement process, including bid solicitation. In response to espionage concerns, these updates mandate that a foreign ownership, control or influence evaluation must be completed in all situations in which a third-party individual, firm or government is assumed to possess dominance of, or authority over, a Canadian facility to such a degree that it may gain unauthorised access to extremely sensitive assets or information; and

b mandates have been introduced for public bodies to ensure that provincial businesses are favoured where the province's goods and services are the subject of a procurement process.

The European Union has now adopted the following:

a the long-threatened International Procurement Instrument, which is intended to open access to public procurement markets around the world, and to address the imbalance between EU procurement markets and restrictions or discriminatory treatment applied by some countries on EU businesses bidding for contracts in their territories;

b the Foreign Subsidies Regulation, which introduces a new set of rules for addressing distortions caused by foreign subsidies in the single market. It involves mandatory notification of foreign subsidies, and the possibility either of exclusion of non-EU tenders or (oddly) the possibility for mandatory scoring adjustments to tenders from affected bidders. It also includes a right for the European Commission to start investigations on its own initiative if it suspects that distortive foreign subsidies may be involved; and

c raising the spectre of retaliatory action in the context of EU Procurement against non-EU states (including, now, the United Kingdom), which do not grant access for EU supplies or where state subsidies create distortions.

These issues are nuanced and concern is understandable where defence or security issues are in play; however, it feels counter-intuitive for states that are GPA signatories to be encouraging national preference or establishing such barriers to trade rather than using the mechanisms offered by the WTO to resolve matters such as distortive state subsidies.

The fallout from covid-19 is also apparent, with a series of high-profile court cases embarrassing to government in the United Kingdom, and new cases reported in the United States involving allegations of fraud related to the Paycheck Protection Program.

There are echoes of the issues in play in the EU decision in *Wall* in the US decision regarding availability of key personnel in *Golden IT, LLC v. United States*.

It is also interesting to note that EU case law has included the bringing in to play of the Charter of Fundamental Rights for review procedures under public procurement law (the *EPIC* case).

In Australia, there have been amendments to the Commonwealth Procurement Rules, including measures aimed at ensuring that small and medium enterprises (SMEs) get more opportunities to participate in covered procurements and even a right to effect direct awards of smaller contracts to SMEs. New anti-corruption legislation has also been adopted, including the ability to investigate serious or systemic corrupt conduct relating to procurement or contract management processes.

Similar rules favouring local family businesses in the context of agricultural produce have been introduced in the Dominican Republic.

Environmental, social and governance issues will become an increasingly more significant facet of procurement law in the next few years, and clearly emission reductions are unlikely to be achieved unless public procurement, accounting as it does for such a significant share of global procurement, is greened.

A good example is Canada, where procurement processes are being modernised to focus more on indigenous procurement, social procurement and green procurement, including:

a mandatory targets for contract awards to indigenous businesses;

b requirement that, before the tendering process for a contract, public bodies in Quebec must conduct an evaluation of their procurement requirements to further the pursuit of sustainable development;

c green procurement provisions relating to carbon in construction and disclosure of greenhouse gas emissions and the setting of reduction targets;

d measures to strengthen federal procurement policies to integrate human rights, environment, social and corporate governance principles and supply chain transparency principles; and

e an innovative coaching service, which aims to support bidders from diverse socio-economic backgrounds who have had difficulties in successfully bidding on federal procurement opportunities and to address the bidding challenges that they have previously encountered.

The Dominican Republic has introduced new laws regarding ethics and due diligence in procurement procedures, and has proposed the broadening of its procurement laws to add inclusion, sustainability and due process.

In Germany, new supply chain legislation imposes due diligence obligations on larger businesses that bid for public contracts on human rights and environmental protection throughout their supply chains, including establishing risk management procedures and implementing preventive and remedial measures for possible human rights or environmental infringements. Violations of the due diligence obligations may lead to a noncompliant bidder being excluded from public procurement procedures for up to three years.

Finally, in Malta, the case of *Vivian Corporation v. Central Procurement and Supplies Unit* is an interesting analysis of the interaction between competition law (in that case, market dominance) and procurement law.

All in all, 2022 has been a very active year for courts, legislators and procurement practitioners worldwide. The pace of change is unlikely to slow.

Jonathan Davey
Addleshaw Goddard LLP
Manchester
May 2023

Chapter 7

MALTA

Steve Decesare and Katya Gatt[1]

I INTRODUCTION

As a Member State of the European Union, Malta is bound by EU law, including the Treaty on the Functioning of the European Union, and has duly transposed the 2014 Procurement Directives into Maltese law. Given that the European Union is a party to the World Trade Organization Agreement on Government Procurement (GPA), Malta is also bound by the terms thereof.

The domestic public procurement framework consists of the Public Finance Management Act (Chapter 601 of the laws of Malta), together with several regulations promulgated thereunder (collectively, the Regulations), namely:

a the Public Procurement Regulations (SL 601.03) (PPRs);
b the Concession Contracts Regulations (SL 601.09) (CCRs);
c the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations (SL 601.05) (the Utilities Regulations); and
d the Public Procurement of Contracting Authorities or Entities in the fields of Defence and Security Regulations (SL 601.07) (the Defence and Security Regulations).

In addition to the Regulations, the domestic public procurement framework also includes the Procurement of Property Regulations (SL 608.12) (the Property Regulations) and the Emergency Procurement Regulations (SL 601.08) (EPRs).

The Office of the Prime Minister sets the agenda for public procurement policy, working through the Department of Contracts (DOC), which falls within the remit of the Ministry for Finance. The DOC, which is headed by the Director of Contracts (the Director), is the central government authority responsible for the regulation, administration and oversight of public procurement in Malta.

The DOC has developed the General Rules Governing Tenders (GRs), which supplement the Regulations and are customarily incorporated by reference in competitive processes administered by the DOC. The DOC also regularly publishes procurement policy notes.[2]

The Commercial Sanctions Tribunal hears and determines issues relating to the blacklisting of persons. The Public Contracts Review Board (PCRB) is responsible for hearing objections in the first instance, while appeals are heard by the Court of Appeal.

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1 Steve Decesare is a partner and Katya Gatt is an associate at Camilleri Preziosi.

2 Government of Malta, 'Procurement Policy Notes': https://contracts.gov.mt/en/ProcurementPolicyNotes/Pages/ProcurementPolicyNotes.aspx (accessed 28 March 2022).

The Maltese public procurement framework expressly requires contracting authorities and contracting entities to comply with the principles of equal treatment, non-discrimination, transparency and proportionality, as enshrined in EU law.

II YEAR IN REVIEW

In July 2022, the Temporary Suspension of Certain Provisions Relating to Public Procurement Regulations[3] were issued, which allows the rule that a contractor cannot claim an increase in the price of commodities used on a public contract to be suspended 'in view of the current hostilities in Eastern Europe and are applicable solely to the conflict between Russia and Ukraine'.[4] This allows contractors that are party to public contracts with a subject matter covered by a DOC policy note, and subject to the conditions set out in the Regulations and policy note, to apply for additional compensation. The DOC has thus far issued two of these notes with respect to works and supply contracts.

Regarding recent developments in case law, the following two cases are particularly noteworthy.

In *356 Holdings Limited v. the Local Councils' Association et al*,[5] the Civil Court, in an action that challenged a public contract under a civil law provision allowing for the judicial review of administrative actions,[6] confirmed the principle first set out by the Court of Appeal a few months earlier in the *Supreme Travel Limited v. Authority for Transport in Malta et al*[7] appeal from a PCRB decision that the six-month period set out in Maltese law for the filing of an application for the ineffectiveness of a contract starts to run from when the signing of the contract is publicised rather than the date of signature.

In *Vivian Corporation Limited v. Central Procurement and Supplies Unit*,[8] the Court of Appeal upheld the decision of the PCRB not to cancel a tender based on an argument that the fact that only one brand of baby feed was being procured for all births at the national hospital and would result in the supplier becoming a dominant player on the market (as this brand would likely continue to be used by parents after discharge), despite a report of the Office for Competition recommending a change of procedure. The Court of Appeal, noting that it is the abuse of a dominant position that is illegal and that, if it takes place, can be attacked by the competition authorities, concluded that while the requirements were creating an unfavourable situation, it did not have the authority to impinge on the discretion of the contracting authority once the situation created was not illegal (while suggesting that the contracting authority was to rethink its position).

3 Subsidiary Legislation 601.13.

4 Regulation 259 of the PPR.

5 Civil Court (First Hall), 5 July 2022, No. 1018/2019.

6 Article 469A of the Code of Organisation and Civil Procedure, Chapter 12 of the laws of Malta.

7 Court of Appeal (Superior Jurisdiction), 31 August 2021, No. 176/21/1.

8 Court of Appeal (Superior Jurisdiction), 17 March 2021, No. 12/2021/1.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The PPRs and the CCRs apply to contracting authorities, which include state, regional or local authorities, bodies governed by public law, or associations formed by one or more such authorities or one or more such bodies governed by public law, as detailed in the schedules thereto. This also includes certain private companies in which the Maltese government has a shareholding as well as government ministries and departments.

The Utilities Regulations mainly regulate procurement by contracting entities defined as entities that are either contracting authorities or public undertakings and that exercise one of the activities covered therein (including the supply of gas, heat and electricity, among others) or other entities that have as one of their activities any of the said activities, or any combination thereof, and that operate based on special or exclusive rights granted by the competent authority in Malta.

The Defence and Security Regulations refer to both contracting authorities and contracting entities, as defined above. The Property Regulations reproduce the definition of 'contracting authorities' found in the PPRs. The EPRs are only applicable to two government entities: the Central Procurement Supplies Unit (within the Ministry for Health) and the Civil Protection Department.

ii Regulated contracts

A contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities falls within the remit of the PPRs and the CCRs. In the context of the PPRs, this includes public supply contracts, public service contracts and public work contracts. The CCRs, conversely, regulate contracts by virtue of which an economic operator is entrusted with the execution of works (a works concession) or the provision and management of services (a services concession), or both. The consideration for both of these types of concession must come in the form of either solely the right to exploit the applicable works or services, or both, or such a right together with payment.

The contracts that fall within the scope of the Defence and Security Regulations are contracts that relate to the supply of military equipment or sensitive equipment, works and services directly related to such equipment, or works and services for specific military purposes. The Utilities Regulations apply to contracts intended for the performance of an activity covered thereunder.

Depending on the value of a contract, different rules may apply, with less stringent rules being applicable to lower-value contracts in certain specified instances. The value of a contract also determines (in certain cases) who shall be responsible for the administration of the procurement process. A procurement process is managed exclusively by the contracting authority, unless the estimated value of the contract exceeds €140,000 in the case of the PPRs and €431,000 in the case of the Utilities Regulations. In the latter case, it is issued, administered and determined by the Director, on behalf of the respective contracting authority (unless the relevant contracting authority is listed in Schedule 3 to the PPRs, in which case it is always responsible for the management of its own procedures). For contracting authorities listed in Schedule 16 to the PPRs, procurement processes relating to contracts valued between €10,000 and €750,000 fall under the mandate of the Sectoral Procurement Directorate, which acts in the name of the contracting authority. In such a case, there is no need to involve the Director. A simpler procedure is contemplated for 'departmental tenders'

for contracts of an estimated value of less than €10,000. In exceptional cases, contracts valued in excess of €10,000 may be procured through a direct contract, subject to obtaining the prior written approval of the minister responsible for finance.

The Property Regulations regulate the acquisition by any title of immovable property located in Malta by contracting authorities, insofar as this is not covered by any other law (e.g., the law on expropriation). The Director would not need to be involved in the administration of the procurement process if the estimated value is less than €500,000.

The EPRs provide for emergency competitive calls made necessary by an unforeseen demand for medical supplies, or issues of national health, security or strategic importance that have an estimated value of less than €135,000.

The exclusions set out in the 2014 Procurement Directives have been incorporated in the Regulations. Compliance with general EU principles should be ensured even where the Regulations do not apply.[9]

A contract may be modified in certain express circumstances as detailed in the Regulations, which replicate the provisions of the 2014 Procurement Directives. If a modification is substantial and therefore tantamount to a new contract, the modification would necessitate a new procurement procedure in line with applicable law.

A contract awarded under the EPRs may not be varied and, where the proper execution thereof necessitates a modification, the contract must be terminated and a new procedure must be initiated.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements and dynamic purchasing systems are routinely used in Malta. The applicable provisions mirror the 2014 Procurement Directives.

Under the Utilities Regulations, contracts based on a framework agreement must be awarded based on objective rules and criteria set out in the procurement documents. Such contracts may include reopening the competition among economic operators that are party to the framework agreement as concluded.

Under the Defence and Security Regulations, where a framework agreement is concluded with several economic operators, the latter must be at least three in number where there are a sufficient number of economic operators that satisfy the selection criteria or admissible tenders that meet the award criteria, or a combination thereof.

The dynamic purchasing system is operated electronically and may be used for the procurement of commonly used purchases under the rules of the restricted procedure. It is open to any economic operator who meets the selection criteria and remains open for submissions of offers throughout the period of validity of the purchasing system.

The estimated value to be taken into consideration is the maximum estimated value (net of value added tax) of all the contracts envisaged for the total term of the agreement or system. Under the Defence and Security Regulations, this calculation must take account any form of option, any renewals of the contract and prizes or payments. Unless justified

9 According to case law from the Court of Justice of the European Union, this entails a degree of advertising if the resulting contract is of a certain cross-border interest.

in exceptional cases, the maximum duration for a framework agreement is four years under the PPRs, eight years under the Utilities Regulations and seven years under the Defence and Security Regulations.

ii Joint ventures

The Maltese public procurement regime reflects the 2014 Procurement Directives in relation to in-house arrangements and contracts between public bodies.

The Utilities Regulations and the CCRs cater for an exclusion for contracts awarded by a joint venture, formed exclusively by:

a a number of contracting entities for the purpose of carrying out activities in the utilities sector to one of those contracting entities; or

b a contracting entity to such a joint venture of which it forms a part.

With respect to public–private partnerships (PPPs), under Maltese law, PPPs are either public contracts or concession contracts. If they qualify as a public contract under the PPRs or the CCRs, they must be awarded by using one of the procedures set out therein. The structure of a PPP may be contractual or structural. When the PPP structure is in the form of joint venture, a single procurement process can be used both to appoint the private sector partner and to award the contract to the joint venture.

V THE BIDDING PROCESS

i Notice

The PPRs, the Utilities Regulations and the Defence and Security Regulations allow contracting authorities or entities, as applicable, to advertise in advance any planned procurement opportunities using a prior information notice (or a periodic indicative notice under the Utilities Regulations). The CCRs necessitate the advertisement of an opportunity by prior information notice for activities listed in Schedule 6 thereto. Under the Regulations, at the start of a tender process, a contract notice (or a concession notice in the case of the CCRs) must be issued as a means of calling for competition. Once the process is concluded, the results thereof must be notified to economic operators through a contract award notice (or concession award notice, as applicable) within 30 days. For the award of concessions or contracts in the field of defence and security, the notice must be notified within 48 days. The PPRs and the Utilities Regulations specify that these three types of notices are only obligatory for above-threshold contracts. The CCRs set out certain exceptions to the need to publish a concession notice.

A notice must be drawn up in accordance with standard forms and must contain certain minimum information as required in the Regulations. They are first transmitted to the Publications Office of the European Union and made accessible on Tenders Electronic Daily. Publication of notices in terms of the PPRs and the Utilities Regulations will subsequently take place at national level through e-PPS,[10] the government's e-procurement platform. Prior information notices issued in terms of the Defence and Security Regulations are published by the European Commission, or by the contracting authorities or entities on their 'buyer

10 Government of Malta, 'Electronic Tendering - Welcome to e-PPS': https://www.etenders.gov.mt/epps/home.do (accessed 28 March 2022).

profile'. Concession notices and concession award notices are published at national level in the Government Gazette after being sent to the Publications Office of the European Union for publication.

ii Procedures

The Maltese public procurement framework sets out different types of procurement procedures that are subject to different requirements and may be utilised in different circumstances, as set out in the 2014 Procurement Directives. The conduct and corresponding time frames of each procedure are regulated by the Regulations.

The default position under Maltese law is that the procurement of products, services and works must be performed through the award of a public contract preceded by a competitive call for tenders. However, the appropriate procedure will depend on several factors, such as the estimated value, the subject matter of the public contract and market conditions.

The open and restricted procedures are the preferred methods in Malta for the award of public contracts. The open procedure is most commonly applied in simple procurements, whereby all interested economic operators may submit a tender in response to a call for competition. The restricted procedure entails an additional stage prior to the submission and evaluation of bids wherein economic operators are pre-qualified and suitable candidates are subsequently invited to submit a tender.

Under the PPRs, the competitive procedure with negotiation and competitive dialogue, the negotiated procedure without prior publication and the innovation partnership require the approval of the Director. These procedures can be utilised in certain circumstances as expressly set out in law and where the market fails to provide the required product, service or works. A contracting authority or entity is free to organise the procedure leading to the choice of a concessionaire within the parameters of the CCRs and in accordance with general procurement principles.

Design contests are another form of procurement procedure and involve a jury that can offer prizes or payments to participants, or may lead to the award of a related services contract. Contracting authorities may decide to hold an electronic auction where the specifications can be established with precision, after a full evaluation of the tenders.

Contracts in terms of the Utilities Regulations and the Defence and Security Regulations may be awarded through the restricted procedure, the negotiated procedure – with or, where justified, without a prior call for competition – and the competitive dialogue. Under the Utilities Regulations, contracts may also be awarded through the open procedure or design contests.

iii Amending bids

Excluding procedures that necessitate a degree of discussion or negotiation, or a combination thereof, between an economic operator and the public purchaser (as is the case in a negotiated procedure), once the submission deadline for tender offers has expired, no changes may be made to the tender offer unless otherwise provided in the applicable procurement documents. The GRs allow tenderers to amend, replace or withdraw their tender at any time before the closing date for submission.

Contracting authorities may request economic operators to submit, supplement, clarify or correct any incomplete, erroneous or missing information or documentation prior to

selecting the winning tender offer. The financial offer cannot be changed, except to rectify evident arithmetic errors. Such requests must be made in accordance with the procurement documents as well as the principles of equal treatment and transparency.

During the competitive dialogue procedure, tenders may be clarified, specified and optimised at the request of contracting authorities. However, this must not involve changes to the essential aspects of the procurement documents that are likely to distort competition or have a discriminatory effect.

VI ELIGIBILITY

i Qualification to bid

For a tenderer to be eligible to submit a tender, it must not be blacklisted or subject to any exclusion criteria. The exclusion criteria include, among others:

a convictions for corruption, fraud, money laundering or terrorist financing;
b a breach of obligations relating to the payment of taxes or social security contributions (subject to the rules set out by law);
c insolvency; and
d the existence of conflict of interests.

The Director is also empowered to blacklist an economic operator in certain circumstances, such as where he or she has shown significant or persistent deficiencies in the performance of a substantive requirement in a prior public or concession contract. A tenderer must also comply with the selection and award criteria. Selection criteria relate to a tenderer's suitability to pursue the activity in question, economic and financial standing, and technical and professional ability. The selection criteria are geared to ensure that a tenderer is capable and competent to execute the relevant contract. In other words, the criteria assess the tenderer rather than its offer. Award criteria, conversely, form the basis for evaluation of the tender or offer.

ii Conflicts of interest

Under the PPRs, the term 'conflict of interests' is rather broadly defined, covering at least any situation where any person (including staff members of the contracting authority) who is either involved in the conduct of the procurement process or may influence its outcome has a direct or indirect personal interest that is actual or can potentially be perceived to compromise the person's impartiality and independence. The PPRs require contracting authorities to take appropriate measures to prevent and detect conflicts of interest in the context of procurement procedures and remedy them to avoid any distortion of competition and to ensure equal treatment of all economic operators. In the case of a public contract, framework agreement or dynamic purchasing agreement that is valued at €140,000 or more, contracting authorities must draw up a report on the procedure indicating any conflicts of interest detected and subsequent measures taken.

In the context of the CCRs, the Director is duty-bound to take appropriate and proportionate measures to effectively prevent, identify and remedy conflicts of interest arising to avoid any distortion of competition, and to ensure transparency and equal treatment of tenderers. An economic operator that is subject to a conflict of interest will not be awarded a public contract, unless this can be effectively remedied by other, less intrusive measures.

The ethics clauses within the GRs also regulate conflicts of interest. The GRs are not automatically applicable but are generally incorporated by reference in tender documents administered by the DOC.

iii Foreign suppliers

As a rule, Malta must provide suppliers established in the European Union or the European Economic Area with the right to bid in calls for tender issued by public authorities, without discrimination. Given that the European Union is a party to the GPA, participation in certain tenders is also open to third countries that have signed and ratified the GPA.

There is no general requirement that foreign suppliers must set up a local branch or subsidiary, or have local tax residence to do business with public authorities.

VII AWARD

i Evaluating tenders

Contracting authorities must award the contract to the most economically advantageous tender. This is determined based on price or cost by adopting a cost-effectiveness approach, such as life-cycle costing. It may include the best price to quality ratio, to be assessed by reference to criteria linked to the subject matter of the contract. The discretion of contracting authorities is not unrestricted; award criteria must secure effective competition and be accompanied by specifications that allow the information provided by the tenderers to be effectively verified. The procurement documents must set out the award criteria and the weighting given to each (unless it is not possible to do so, in which case they must be listed in order of priority).

The award of concessions must be based on objective criteria that comply with the procurement principles and ensure that tenders are assessed in conditions of effective competition to identify an overall economic advantage for the contracting authority or entity. Where the contracting authority or entity receives tenders with an unpredictable, innovative solution, it may, exceptionally and provided that it would not result in discrimination, modify the ranking order of the award. The modification must be notified to all tenderers and the contracting authority or entity must issue a new invitation to submit tenders or a new concession notice, as applicable.

At evaluation stage, an evaluation committee will typically first consider whether a tender response is in line with the requirements set out in the procurement document (in particular with respect to the documentation submitted) and then evaluate whether the respective tenderer is eligible to participate in the procedure based on the eligibility (including blacklisting and exclusion criteria) and selection criteria. The technical offers of qualifying responses are then evaluated to ensure compliance with the specifications set out in the procurement document, with the financial offer being evaluated last. Qualifying responses are scored in accordance with the award criteria specified. Depending on the circumstances, the process or stages (or both) thereof may vary.

Where tenders appear to be abnormally low, contracting authorities must require economic operators to provide explanations on the price or costs proposed. Such tenders may be rejected in specific limited circumstances.

ii National interest and public policy considerations

Contracting authorities enjoy, in principle and without prejudice to the key principles set out above, wide discretion to formulate the technical specifications and the award criteria. However, these must be clearly set out in the procurement documents and be in conformity with the public procurement principles. The procurement documents must not be designed in a way that deviates from the public procurement regime or in a manner that excludes the applicability of the Regulations. The design of a procurement process that seeks to unduly favour or disadvantage (or both) certain economic operators departs from the principle of competition.

Technical specifications should refer to EU standards and, in the absence of such, national standards that reflect EU law. Where specific standards are mentioned, contracting authorities must expressly permit equivalent standards to avoid restricting competition. A reference to a specific make or to a particular process provided by a specific economic operator in the technical specifications is not permitted unless justified by the subject matter of the contract.

Social and environmental considerations may be applied as award criteria to the extent that they are relevant to the subject matter of the contract. Tenderers may be liable to blacklisting for violation of applicable obligations in the fields of environmental, social and labour law.

VIII INFORMATION FLOW

When conducting procurement procedures, contracting authorities are subject to a general obligation of transparency. The procurement documents must be written in clear and unambiguous terms so that the process can be understood by all interested parties. Any additional information or clarification notes must be made available to all tenderers to ensure a level playing field.

The procurement process would customarily include a period during which interested parties may request clarifications. In addition, depending on the subject matter (including the complexity) of the procurement process, bidders' conferences or meetings may be organised.

Each tenderer must be informed on the award decision, or the decision concerning the conclusion of a framework agreement or admittance to a dynamic purchasing system. A standstill period is applicable. An unsuccessful tenderer may ask for additional information on the reasons for the rejection of its tender or the characteristics and relative advantages of the offer selected. The contracting authority can restrict the release of any information; for example, where this would be contrary to public interest or might prejudice competition among economic operators.

Contracting authorities are also bound to preserve the confidential nature of information forwarded by economic operators, particularly trade secrets. They may impose equivalent requirements on economic operators with regard to information received pursuant to a procurement procedure.

IX CHALLENGING AWARDS

i Procedures

Any appeals by aggrieved bidders or interested parties relating to procurement procedures are heard, in the first instance, by the PCRB as the competent judicial authority. Challenges are quite frequent and the chance of success depends on the individual case.

The Regulations provide for remedies both before and after the closing date. Before the closing date, prospective candidates or tenderers may – within the first two-thirds of the time period allocated in the call for competition for the submission of offers or, in the context of the CCRs, one day prior to the closing date – challenge any combination of, inter alia, any:

a unlawful decision made until this stage;
b discriminatory technical, economic or financial specifications; and
c ambiguities that are found in the procurement documents.

After the closing date, any tenderer or interested party may lodge an objection against a decision of a contracting authority made in respect of a contract. In the context of the PPRs, this is available where the contract has an estimated value in excess of €5,000. The objection must be lodged by no later than 10 days following the date on which the contracting authority communicated its decision.

An interested party or tenderer may also file an application to declare a contract ineffective before the expiry of:

a 30 days from the date on which the contract award notice was published (if any);
b 30 days from the date on which the contracting authority informed tenderers about the signing of the contract (where applicable); or
c in any other case, before the expiry of six months following the conclusion of the contract.

This remedy is only available for contracts of a financial value that meets or exceeds the thresholds established under the applicable regulations.

There is a right to appeal decisions of the PCRB before the Court of Appeal, which must be exercised within 20 days of the publication thereof.

Pursuant to an application for judicial review under Article 469A of the Code of Organisation and Civil Procedure (Chapter 12 of the laws of Malta) (COCP), a civil court may be requested to enquire into the validity of any administrative decision. This action is time-barred by the lapse of six months and cannot be resorted to if the claimant has another effective remedy under applicable law (including under the Regulations).

In the context of the CCRs, there is no charge for any application before closing the date. Costs for filing any other application may vary. However, an objection to a procurement decision entails the payment of a deposit equivalent to 0.5 per cent of the contract's estimated value, subject to a minimum of €400 and maximum of €50,000. In its decision, the PCRB may decide to refund the deposit, in full or in part. No deposit is required for an application requesting the ineffectiveness of a contract.

Proceedings before the PCRB are relatively quick, usually taking a few weeks or months, depending on the complexity and specifics of the case as well as the workload of the PCRB. The PCRB must deliver its decision as soon as possible following the hearing and, in any event, not later than six weeks from such a hearing, unless there are serious and justified

reasons. Appeals to decisions of the PCRB brought before the Court of Appeal must be made within two months and subsequently decided upon within the shortest time possible and not later than four months, save for in exceptional circumstances.

Judicial review proceedings under Article 469A of the COCP are not subject to a specific time limit in terms of the law. Their duration depends on the complexity of the case and the workload of the relevant court, but it is not uncommon for them to exceed one year.

ii Grounds for challenge

Challenges before the PCRB may be based on a breach of public procurement law, as detailed in the applicable Regulations, which extends to a general breach of procurement principles and the terms of the procurement documents.

The ineffectiveness of a contract may only be requested where the contracting authority or entity:

a has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union, save for a few exceptions; or

b concludes the contract either before the expiry of the period for filing an objection to an award decision or, where an objection has been lodged, before a final decision is given by the PCRB.

An administrative decision can be impugned based on Article 469A of the COCP where it is in violation of the Maltese Constitution or deemed to be *ultra vires*.

iii Remedies

Where an objection to a procurement decision has been filed, the PCRB must decide whether to accede or dismiss the objection, or even cancel the call, depending on the circumstances of the case. In the case of an application for a declaration of ineffectiveness, the PCRB may also liquidate and order the contracting authority to compensate the applicant for actual damages suffered. If the PCRB declares the contract ineffective, it must impose penalties, which may comprise either the payment of fines in the amount of 15 per cent of the tender value but not exceeding €50,000 or the shortening of the duration of the contract.

Under Article 469A of the COCP, the mandate of the court is limited to declaring the administrative decision null, invalid or without effect. Damages will not be awarded by the court unless it has been determined that the respective authority has acted in bad faith or unreasonably. It is also possible to seek injunctive relief in accordance with the provisions of the COCP.

X OUTLOOK

The second national action plan for 2022–2027 on green public procurement, published in October 2021, demonstrates Malta's commitment to reducing the environmental impact of the purchases made by the Maltese government. It aims to progressively increase the uptake of green products in 90 per cent of tenders.

On 20 January 2021, Malta's Chamber of Commerce, Enterprise and Industry published a report on how the Maltese public procurement framework could be improved. It is committed to maintaining an open dialogue with all stakeholders, which may lead to the adoption of the proposed reforms in the future.