

# The International Comparative Legal Guide to: Public Procurement 2010

A practical insight to cross-border 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?

Belgian legislation on public procurement has been codified in the Act of 24 December 1993 and its implementing Royal Decrees. This Act contains the core of both the co-ordination and the codification of all existing public procurement regulations and of the transposition into Belgian law of the European Procurement Directives. The most important Royal Decrees implementing this Act are:

- Royal Decree of 8 January 1996 concerning the award of public procurement contracts for the undertaking of works, supplies and services and for the concessions for public works in the “ordinary sectors”;
- Royal Decree of 10 January 1996 concerning the award of public procurement contracts in the “Utilities Sector”;
- Royal Decree of 18 June 1996 concerning the award of public procurement contracts for the undertaking of works, supplies and services by some private entities; and
- Royal Decree of 26 September 1996 and its annexes containing the General Contracting Conditions for public procurement contracts for the undertaking of works, supplies and services and for concessions of public works.

Recently, various modifications have been made to this legislation in order to make it compatible with the most important stipulations of Directives 2004/17 and 2004/18.

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

The Act of 24 December 1993 serves to transpose the EC Directives on public procurement, which are in their turn influenced by the GPA rules. Insofar as these Directives contain precise and unconditional stipulations, they have direct effect in the Belgian legal order. In cases where Belgian legislation is contrary to European public procurement rules, the latter prevail.

### 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?

Contracting authorities must respect the general principles relating to good administration and the fundamental principles of the EC treaty when they award public procurement contracts. Of these general principles, the most relevant in terms of public procurement

are equal treatment and non-discrimination, free competition, transparency, legal certainty and proportionality. These principles can also be used when interpreting Belgian (and European) public procurement law and also have to be taken into consideration in situations where no explicit regulation exists.

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

The Act of 24 December 1993 places the public procurement contracts relating to military equipment within the scope of the public procurement legislation, although the Act and its Royal Decrees provide some exceptions to the applicable rules for these contracts. Moreover, the Royal Decree of 6 February 1997 also contains some specific additional rules for the award of military equipment contracts.

On the other hand, the public procurement contracts for the undertaking of supplies or services that are used for international cooperation operations in which primarily EU or NATO Members participate are exempted from the application of public procurement legislation.

## 2 Application of the Law to Entities and Contracts

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

Article 4 of the Act of 24 December 1993 gives an enumeration of contracting authorities covered by the public procurement rules in the ordinary sectors. These contracting authorities are principally the “public authorities” (State, Regions, Communities, provinces, municipalities and the associations formed by one or more of these entities), and the “bodies governed by public law”, which are defined according to a set of cumulative criteria:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- having legal personality; and
- financed, for the most part, by the State, regional or local authorities, or other afore-mentioned bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

In accordance with the European Directives, the Belgian legislation has a broader field of application in the utilities sector. In addition to the contracting authorities mentioned in the ordinary sectors, the utilities regulation includes also “public undertakings” (i.e. any undertaking over which the public authorities have a dominant influence) and certain private entities.

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

Some private entities are covered by the public procurement legislation in the utilities sector. This concerns especially the entities operating on the basis of special or exclusive rights. Special or exclusive rights are rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities in the field of water, energy, transport services and postal services to one or more entities, and which substantially impacts the ability of other entities to carry out such activity. Consequently, private entities are not subject to the public procurement rules when they obtained their rights on the basis of objective, proportional and non-discriminating principles.

## 2.3 Which types of contracts are covered?

The public procurement rules cover contracts for pecuniary interest concluded in writing between a contractor, a supplier, or service provider and a public purchaser for the undertaking of works, supplies and/or services. Public works contracts cover the execution of general building and civil engineering works in conformity with the requirements specified by the public purchaser. The design of the works may also be included in the contract. Public supply contracts relate to the delivery of products. Delivery in this context includes purchase, lease, rental or hire purchase, with or without an option to buy. Public service contracts cover all the services mentioned in annex 2 of the Act of 24 December 1993.

## 2.4 Are there threshold values for determining individual contract coverage?

All contracts are subject to Belgian procurement legislation. As a principle, the (Belgian) publication of the announcement of the contract is required, even when the European threshold values are not met.

The threshold values above which European publication of the announcement of the contract is obligatory are (as of December 2009) EUR 5,150,000 for works contracts (ordinary and utility sectors), EUR 206,000 for supply contracts and service contracts (ordinary classic sectors), EUR 133,000 for supply contracts and service contracts in particular sectors and EUR 412,000 for supply contracts and service contracts in the utilities sector.

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

It is forbidden to split up contracts that are to be considered as one works, supply or service contract and that are valued above the threshold values for the purpose of obtaining different contracts that are below those values.

At the same time, it is forbidden to aggregate different contracts in order to avoid the application of the European threshold values.

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

Concessions contracts are contracts which have as their object the execution of works or services in return for which the contractor/service provider has either the exclusive right to exploit the works/services or the right to exploit the works/services with payment.

Concession contracts are given special treatment under the Belgian public procurement regulation. When awarding a public works concession, the contracting authority has total freedom in choosing the procurement procedure and can always choose to use the negotiated procedure. Service concessions do not fall under the Public Procurement Rules.

## 3 Procedures

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

Belgian public procurement legislation distinguishes between three types of procurement procedures referred to as *aanbesteding/adjudication*, *offerteaanvraag/appeel d'offres* and the “negotiated procedure”.

In case of the, *aanbesteding/adjudication* the contract must be granted to the tenderer who has submitted the lowest regular tender. In case of a *offerteaanvraag/appeel d'offres*, the contract must be granted to the regular and most advantageous tender, according to the criteria mentioned in the contracting documents. The contracting authority has the free choice between both procedures.

Both procedures may be awarded by means of an open or restricted procedure. In an open procedure all interested contractors may submit tenders. In a restricted procedure, only those contractors so invited by the contracting authority may submit tenders.

The negotiated procedure allows the contracting authority to consult the economic operators of its choice and to negotiate the terms of the contract with one or more of them. This procedure can only be chosen in limited cases as enumerated in the Act of 24 December 1993.

The competitive dialogue, which is introduced by the Directives of 2004, has not yet been implemented in the Belgian legislation.

### 3.2 What are the rules on specifications?

The Belgian legislation makes a distinction between contracts under and above the European threshold values. For contracts above these values, the Belgian legislation, following the Directives of 2004, allows the contracting authority to draw up the technical specifications in terms of functional performance and requirements and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenderers are allowed to refer to equivalent arrangements, which can be demonstrated by any form of evidence.

For all contracts, the technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover, and have to permit equal access to all competitors.

### 3.3 What are the rules on excluding tenderers?

In accordance with the requirements of the EC public procurement

rules, Chapter II of Title I of the Royal Decree of 8 January 1996 contains rules concerning the situations in which a contracting authority has the obligation to exclude candidates. It concerns candidates who have been convicted of the following offences: participation in a criminal organisation; corruption; bribery; and fraud. Chapter II also contains situations in which a contracting authority has the possibility (not the obligation) to exclude candidates, like for example, in case of a conclusively proved major fault in the professional practice or noncompliance with the obligations concerning the payment of social security contributions.

### 3.4 What are the rules on short-listing tenderers?

The selection of the tenderers must be based exclusively on the selection criteria contained in the tender notice and on the basis of documents enumerated in the tender notice as being required for the selection. The selection criteria may refer to technical and/or professional ability and economic and financial standing. The contracting authority may also restrict the number of tenderers by opting for a restricted procedure, where only the providers which fulfill the required conditions will be invited to submit tenders.

### 3.5 What are the rules on awarding the contract?

The contracting authority must award the contract either to the economically most advantageous tender or to the tender which contains the lowest price offer. Where the contracting authority chooses to award the contract to the most economically advantageous tender, it is left to the contracting authority to determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The criteria for the award of the contract should enable tenders to be compared and assessed objectively. The award criteria which will be applied must be mentioned in the contract documents or in the tender notice.

### 3.6 What methods are available for joint procurements?

Article 19 of the Act of 24 December 1993 provides the possibility of a joint procurement in the event two (or more) contracting authorities want to set up the joint realisation of public works contracts, public supply contracts or public service contracts. The contracting authorities have to designate the contracting authority or the legal personality which will act during the award and execution of the contract as their authorised representative.

Belgian public procurement rules also contain regulations on the possibility to make purchases from a central purchasing body or under a framework agreement.

### 3.7 What are the rules on alternative bids?

In principle, an economic operator has to submit its best and final offer at once.

In the event the specifications allow or oblige the formulation of variants, economic operators are permitted or obliged to state variants in their tender. The contracting authority has to describe in the specifications in detail what is required in order to lead to the desired result.

If the specifications do not make mention of variants and the criterion for award is that of the most advantageous tender, a tenderer may propose on its own initiative free variants, which

contain alternative solutions for one or more aspects of the specifications. Such variants are allowed as long as they meet the minimum specifications required by the contracting authority and respect specific requirements for their presentation.

## 4 Exclusions and Exemptions (including in-house arrangements)

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

The Belgian legislation concerning exclusions/exemptions is in accordance with the European Directives. Therefore, the public procurement rules do not apply to, for example, service contracts awarded on the basis of an exclusive right, contracts awarded pursuant the international rules, the acquisition or rental of land, existing buildings or other immovable property or concerning rights thereon.

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

In principle, the relations between contracting authorities concerning the awarding of public contracts, are subject to the same rules concerning public procurement as the relations between a contracting authority and a private entity. There are however two general exceptions to this principle.

The first exception concerns the award of contracts between two contracting authorities (in-house contracts). If the conditions stipulated in the case law of the Court of Justice (i.a. Teckal case), are complied with, the awarding of the contract will not be subject to the public procurement rules.

The second exception concerns delegation of powers whereby there is a full devolution of tasks, responsibility and power of decision from one contracting authority to another. The contracting authority becomes a substitute and exercises all the competences of the initial contracting authority. If these conditions are fulfilled, the relation between the contracting authorities will not be subject to public procurement rules.

## 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*?

The current Belgian public procurement legislation only contains a standstill obligation (article 21 *bis* of the Act of 24 December 1993) for procedures above the threshold for European publication, on the basis of which within a time frame of 15 days between the notification of the award decision and the contract conclusion with the chosen tenderer, a suspending procedure of extreme urgency before the Council of State or a summary procedure before the civil courts can be introduced. Even though the public procurement legislation does not provide other forms of (judicial) protection, the Belgian judicial system offers unsuccessful tenderers various possibilities to contest an award decision which they consider as illegal (see question 5.2).

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

Due to lack of specific proceedings, general Belgian (procedural) law can be utilised to its full extent to get some form of restitution or compensation. Various measures can be requested, ranging from the suspension or annulment of the different decisions taken by the contracting authority, to the suspension or annulment of the contract and damage claims. These measures can often be combined, even if all of them cannot necessarily be brought before the same judge (the Belgian judicial system is a dual one with administrative and civil jurisdictions).

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

The suspension or annulment of the decisions taken by the contracting authority are brought before the Council of State, except in the case that the contracting authority is not a public authority in the sense of the legislation on the Council of State. In this case, the suspension or annulment actions are brought before the civil courts. The civil courts possess the exclusive competence for damage claims, for the suspension and annulment of the public procurement contracts, and for all disputes concerning the execution of these contracts.

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

The suspending proceedings within the scope of the standstill obligation have, in principle, to be launched within a time frame of 15 days after the notification of the award decision, as the contracting authority has the possibility to conclude the contract after this period of time. The request for annulment of the decisions from the contracting authority must be introduced before the Council of State within a time frame of 60 days.

The proceedings before the civil courts are less stringently regulated: in case of summary proceedings the demanding party has to prove that there is need for urgency; in the other cases it has only to be assured that the prescription does not intervene before the introduction of the procedure.

## 5.5 What remedies are available after contract signature?

The conclusion of the contract generally deprives a third party in principle of the possibility to obtain rehabilitation in natura, i.e. the possibility of being able to still obtain the award of the contract itself.

Third parties can nonetheless still try to obtain the annulment of the award decision before the Council of State, and/or the suspension/annulment of the contract before the civil courts. Furthermore, damage claims can be introduced before the civil courts.

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

This is highly dependent upon the type of procedure, the facts of each case and the availability of the competent court.

Judicial proceedings can indeed take a few weeks (suspending proceedings of extreme urgency before the Council of State and

summary proceedings before the civil courts and tribunals), several months (normal suspending proceedings before the Council of State) or even several years (annulment proceedings before the Council of State/damage claim before the civil courts and tribunals).

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

The Belgian public procurement legislation does not really know the principle of enforcement by public bodies, even if, according to Belgian administrative law, it is always possible to ask the author of a contestable decision, to review its decision. Enforcement can thus especially be achieved by means of a judicial review, by the way of one of the aforementioned proceedings before the Council of State and/or civil courts. It is common practice for unsuccessful tenderers to utilise these procedures and it often happens that several procedures are combined.

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

The Belgian judicial system does not know the principle of 'precedents'.

Nonetheless especially the jurisprudence of the Council of State - the judgments of the civil courts and tribunals are only rarely published - is deemed a relevant source of law with respect to the public procurement legislation.

Especially relevant for questions concerning 'remedies and enforcement' is judgment no. 87.983 from the Council of State (the 'Feyfer-Formanova' case). In this case it was decided by the General Assembly that the conclusion of a contract results in the impossibility to suspend the award decision. Therefore, after the contract closes only some proceedings are left over (see question 5.5).

## 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?

In principle, a contract will be awarded on the same terms as those set out in the specifications.

Before the award of the contract, Belgian legislation does not deal with changes to contract conditions. European and Belgian case-law admit however the possibility of modification under certain conditions. Within the limits set by that case-law, changes to the specifications are possible.

After the award of the contract, Belgian legislation prescribes that regardless the manner in which prices are determined, the contracting authority is entitled to amend the original contract unilaterally, insofar its purpose remains the same and, if necessary, on condition of a lawful compensation. Within the limits set by the General Contracting Conditions changes to contract conditions and additional work are possible.

An extension of an existing contract has to be considered in principle as a new public procurement and has, by consequence, to be awarded in compliance with the public procurement rules.

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

Before the award of the contract, Belgian legislation in principle does not allow contractors to get into contact with contracting authorities, except in the case of a negotiated procedure. Changes to contract conditions (and especially to contract specifications) can nevertheless be proposed by the introduction of variants.

After the award of the contract, the General Contracting Conditions stipulate conditions on the basis of which it is allowed for contractors to apply for an extension of the time-limit or a review or revocation of the contract. Furthermore, the General Contracting Conditions stipulate that the contractors are in principle obliged to execute additional works in so far as the total value of the additional works does not amount more than 50 percent of the initial amount of the public procurement.

## 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?

Belgian legislation does not contain special rules regarding privatisations. Where a privatisation gives rise to a procurement of goods, works and services, it is in principle subject to the procurement rules in the same way as any other contract.

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

There is some law which aims to facilitate the use of PPPs, e.g. by authorising public authorities to participate in joint ventures. This law often is directed to a particular matter (e.g. social housing; housing programme for elderly people) and may provide for subsidies.

## 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?

Along with the rules determined by the EC Treaty, there are various legislative provisions of relevance to contract award procedures in Belgium.

The Belgian legislation prescribes that public authorities have to make information - in principle - available to all who ask for it. As a consequence, every person has the right of access to information about all public contracts and procurement activity undertaken by public authorities, although the access to some information (for example, the tender documents) is subject to conditions or exemptions.

Also the linguistic regime in Belgium which recognises three official languages (Dutch, French and German) should be taken into consideration. According to the linguistic rules set out by the Co-ordinated Acts of 18 July 1966 applicable to most of the contracting authorities, all documents relating to public procurement procedure are available in either one or two of the official languages. Belgian legislation on public procurement does however not contain provisions relating to the language of the tender documents. The specifications and the contract notice usually contain regulations concerning the use of languages by the tenderers.

Considering the principles of general contract law, it can be noted that during the award phase, the rules are unilaterally determined by the contracting authority. During the execution of the contract, general contract law is applicable to the extent that is not has been set aside by the General Contracting Conditions or the contract documents.

## 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?

By means of two Acts, the Act of 15 June 2006 and the Act of 16 June 2006, the Belgian Parliament approved a whole set of new regulations concerning public procurement. Those Acts have however not yet entered into force (except for a few provisions) since the implementing decrees have not yet been approved. The effective date of entry into force of the new legislation is therefore unclear.



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In 2000, Leopold won the prestigious Fettweis Award for his article on the execution of judgements in the light of article 6 of the European Convention on Human Rights. Leopold has written several articles on public procurement law and often act as speaker on seminars.

## Stibbe

Stibbe is a leading full-service law firm with 150 lawyers in its Brussels office, 31 of whom are partners.

Stibbe has acquired leading experience and renown in respect of public procurement regulation.

In its day-to-day work, our team assists governments and businesses in the complex world of public tenders and in examining the applicability of the regulations, the actual award of public tenders and in the context of potential disputes in carrying out tender contracts.

This assistance encompasses inter alia:

- advising on drawing up bids and the conduct of negotiations with the awarding authority;
- screening tenders;
- assessing the propriety of selection procedures;
- verifying assessments and the statement of reasons in award reports;
- screening draft award decisions;
- providing explanations to management;
- assisting in negotiating with the selected contractee in respect of preparing contract documentation; and
- if required, conducting court actions before the Belgian Supreme Administrative Court and the civil courts (in summary proceedings).