

§ 1:1.Introduction, International Government Contract Law § 1:1

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Chapter 1. Global Government Contracting: A Comparative Law Overview of Major Government Contracting Economies

I. Development of Global Government Contracting

§ 1:1. Introduction

Government procurement is a key vehicle in stimulating the world's economy and plays a substantial role in the economies of many developed nations. This chapter provides an overview and comparison of the procurement environments in countries with large procurement systems including: the United States; the European Union and its Member States; Asian and South Asian nations of China, Japan, Korea, and India; South American nations of Brazil, Mexico, and Chile; and Mid-Eastern nations of Egypt, Saudi Arabia, and the United Arab Emirates. The comparisons are grouped by region to highlight similarities and differences of these featured regions.

Each nation has a unique way of referring to the components of its procurement system. The nomenclature used throughout this chapter, in an effort to accurately capture and compare the procurement systems in various countries, will occasionally vary between nations. Each section looks at the background behind the procurement systems in each country, as well as providing an overview, looking at applicability and qualifications, publication requirements, competition procedures and evaluation, and challenge and dispute processes.

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§ 1:2.Similarities and differences among procurement..., International...

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§ 1:2. Similarities and differences among procurement frameworks

Procurement systems vary greatly from nation to nation and reflect political and cultural differences. Nevertheless, the various procurement systems have many shared characteristics. Reflecting a general move toward open and transparent forms of procurement, the most common form of procurement across nations is open bidding procurement. Most nations also have some form of limited bidding procurement as well as a single source or direct contracting method. Most systems also make exceptions or have different procedures and rules for military and national security contracts.

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§ 1:3. International agreements on public procurement

In addition, the promulgation of international agreements on government procurement has led to the increasing convergence of procurement systems. Although these agreements vary, they set minimum standards for the conduct of covered public procurement. Of course, not all nations have joined such agreements. The most prominent of these agreements is the World Trade Organization's ("WTO") Agreement on Government Procurement ("GPA"), a legally binding multilateral agreement which emphasizes openness, transparency, and non-discrimination.¹ Several of the procurement systems covered in this text have shared responsibilities as members in the GPA. Current members include the United States, the European Union, Japan, and the Republic of Korea, while China, Chile, and Saudi Arabia have observer status. In addition, China is currently negotiating accession to the GPA.

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Footnotes

- ¹ World Trade Organization, The plurilateral Agreement on Government Procurement (GPA), http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

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§ 1:4. Introduction

The United States Government is one of the largest customers in any global market, including the public and private sectors. Its rules for doing business with sellers, accordingly, are important for any business or individual involved with international government contracts. The common theme that runs through U.S. procurement law, as stated in the Federal Acquisition Regulations (“FAR”), “is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives.”¹

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Footnotes

¹ [FAR § 1.102](#)

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§ 1:5. Overview

Government procurement in the United States is a statutory based system. A collection of laws and administrative regulations promulgated under the authority of those laws outline both the guiding principles of the procurement process and also establish firm rules that must be followed.¹ In addition to the numerous laws dedicated to creating and reforming the process, significant changes to government procurement law are often included as a condition of an appropriations bill.² Combined, these laws and regulations create a robust legal framework that governs how the federal government procures goods and services.

The Competition in Contracting Act of 1984 (“CICA”)³ is one of the most important laws in the U.S. statutory framework. It updated the United States' procurement system from one based on Civil War Era principles and World War II era modifications, where every agency was free to enact their own policies, procedures and regulations for procurement, to a modern, uniform system.⁴ It mandates, with limited exception, that full and open competition be obtained in soliciting offers and awarding government contracts.⁵ CICA authorized the FAR to replace administrative agency regulations with one over-arching federal government set of regulations and encourage increased competition for all types of contracts—sealed bidding, negotiated procurements, and sole source contracts, for example.

The Federal Acquisition Streamlining Act of 1994 (“FASA”)⁶ is another significant piece of the statutory framework that included 225 changes that modified 38% of the FAR.⁷ The principle change was the increased guidance and newly relaxed procedures for the procurement of commercial items.⁸ It eliminated mandatory compliance with certain laws for small contracts, added past performance as an evaluation criteria, and required life cycle cost analysis by agencies.⁹

Within this framework, the bulk of government procurement policy is found in the regulations that implement these laws. These government-wide regulations are compiled in the FAR.¹⁰ In many ways, the FAR has become the “code” for public procurement, as if the United States were a civil law system.¹¹ The FAR is made up of several chapters that promulgate the applicable regulations for definitions, competition and acquisition planning, contracting methods and types, and socioeconomic plans. An important section of the FAR also contains all of the contract clauses that are routinely included and incorporated into government contracts.¹² The FAR does permit deviations from its requirements, if needed to comply with treaty obligations.¹³

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In addition, agencies can promulgate their own additional regulations that impose additional or stricter conditions for procurement.¹⁴ These documents provide additional guidance on what contract clauses to include, definitions of important terms, and types of permissible contracts, making them an essential desktop tool for any practitioner in the field.

Although it is a statute and regulation based system, United States government contract law is also influenced by significant case law doctrines. The Christian Doctrine incorporates so-called “mandatory clauses” into every contract with the government, whether the clause actually appears in the contract or not.¹⁵ This is a well-accepted tenet of the field, at this point, even though it is not codified anywhere.¹⁶ Similarly, the limited authority doctrine is a case law established concept that only permits individuals with actual authority to bind the government, regardless of the perception of the parties.¹⁷




Government procurement in the United States is divided, as are most governmental functions, between the federal government and state and local governments. Each of these governmental entities must procure items and services, but each is responsible for their own rules and regulations surrounding procurement policy.¹⁸ This chapter will focus solely on procurement by the federal government.

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Footnotes

- 1 *See, e.g.*, Competition in Contracting Act,  41 U.S.C.A. §§ 3301 to 3311; Federal Acquisition Streamlining Act, [Pub. L. No. 103-355, 108 Stat. 3243](#) (codified as amended in scattered provision of 10 U.S.C. and 41 U.S.C.); Truthful Cost or Pricing Data, [10 U.S.C.A. § 2306a](#).
- 2 *See, e.g.*, Department of Defense Appropriations Act of 2010, § 8816, [Pub. L. 111-118](#) (“Franken Amendment” prohibits paying contractors who include mandatory arbitration clauses for workplace discrimination).
- 3 Competition in Contracting Act,  41 U.S.C.A §§ 3301 to 3311.
- 4 W. Noel Keyes GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATIONS 34-35 (West 3rd ed 2003). *See also* James F. Nagle, A History of Government Contracting, George Washington University 1992.
- 5 Competition in Contracting Act,  41 U.S.C. §§ 3301 to 3311. Nearly all U.S. government agencies must abide by the FAR with limited exceptions including the Central Intelligence Agency, the Federal Aviation Administration, the U.S. Postal Service, and the Tennessee Valley Authority—all of which promulgate their own agency specific regulations.
- 6 Federal Acquisition Streamlining Act, [Pub. L. No. 103-355, 108 Stat. 3234](#) (codified as amended in scattered provision of 10 U.S.C. and 41 U.S.C.).
- 7 W. Noel Keyes, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATIONS 30 (West 3d ed 2003).
- 8 W. Noel Keyes, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATIONS 30 (West 3d ed 2003).
- 9 W. Noel Keyes, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATIONS 30 (West 3d ed 2003).
- 10 48 C.F.R. Parts 1 to 53.

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- 11 See W. Noel Keyes, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION
REGULATIONS 44–45 (West 3d ed. 2003).
- 12 FAR Part 52.
- 13 FAR § 1.405 (“Deviations pertaining to treaties and executive agreements”). However, deviations
of this type are not permitted for regulations implementing on laws enacted post-treaty execution.
See W. Noel Keyes, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION
REGULATIONS 50–51 (West 3d ed. 2003).
- 14 See, e.g., Defense Federal Acquisition Regulation Supplement, 48 C.F.R. Parts 201 to 253
(Supplement for the Department of Defense, commonly called the DFARS); Agency for International
Development Acquisition Regulations, 48 C.F.R. Pts. 700 to 753. (U.S. Agency for International
Development Supplement, commonly called the AIDAR).
- 15  G.L. Christian & Assocs. v. United States, 312 F.2d 418, 424 (Ct. Cl. 1963). But see, e.g., *Control
Data Corp.*, ASBCA No. 16448, 74–1 BCA ¶ 10,410 (refusing to apply the Christian Doctrine to
incorporate non-mandatory clauses).
- 16 See W. Noel Keyes, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION
REGULATIONS 42–44 (West 3d ed 2003).
- 17 See  *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Harbert/Lummus
Agrifuels Projects. v. United States*, 142 F.3d 1429 (Fed. Cir. 1998);  *Mil-Spec Contractors, Inc. v.
United States*, 835 F.2d 865 (Fed. Cir. 1987).
- 18 See, e.g., Richard Pennington, COLORADO PROCUREMENT HANDBOOK (West 2009).

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§ 1:6.Applicability, qualifications, and restrictions, International Government Contract...

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§ 1:6. Applicability, qualifications, and restrictions

The U.S. Government must comply with applicable regulations for all procurements. However, there are numerous circumstances where competition can be achieved through streamlined or modified procedures. There are also other situations where the regulations recognize other important procurement concerns as outweighing competition.

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§ 1:7.Applicability, qualifications, and restrictions—Applicability, International Government...

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§ 1:7. Applicability, qualifications, and restrictions—Applicability

In some situations, procurement regulations may be relaxed or waived. The most common of these situations allows for simplified acquisition procedures for small dollar value contracts.¹ The current minimum, known as the simplified acquisition threshold, is \$150,000.² The threshold is higher for contracts in support of contingency operations or recovery from an attack by a weapon of mass destruction, \$300,000 for domestic contracts and \$1 million for contracts that are awarded and performed outside the United States.³ Agencies are provided broad discretion to fashion suitable procedures for simplified acquisitions.⁴ In addition to the flexible procedures, contractors are relieved from complying with several restrictions normally imposed on contractors, such as, for example, the anti-kickback provisions, overtime compensation provisions, and the covenant against contingent fees provision.⁵ Even further exemptions from contracting requirements are available for “micro-purchases” of less than \$3,500, which are permitted without solicitation of any competitive quotations.⁶

Commercial items may also be procured by the government without complying with all normally applicable regulations.⁷ Commercial items are items for “purposes other than governmental purposes.”⁸ Commercial items may also be procured through simplified acquisition procedures for purchases up to \$7 million.⁹

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Footnotes

¹ See FAR § 13.000 and FAR § 13.104.

²  FAR § 2.101.

³  FAR § 2.101.

⁴ FAR § 13.106-2(b).

⁵ See FAR § 13.006 (“Inapplicable Provisions and Clauses”).


⁶  FAR § 2.101 (definition of “micro-purchase”).

⁷ See W. Noel Keyes, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATIONS 286–92 (West 3d ed. 2003).

⁸  FAR § 2.101;  FAR § 12.102(a).

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 [FAR § 13.500\(a\)](#). *See also* W. Noel Keyes, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATIONS 301 (West 3d ed. 2003).

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§ 1:8.Applicability, qualifications, and restrictions—Qualifications, International...

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§ 1:8. Applicability, qualifications, and restrictions—Qualifications

The United States Government will not just do business with anyone. It is only permitted to procure goods or services from responsible contractors. Responsibility is determined by the contracting officer and relates both to the ability of the contractor to perform the contract at issue, but also to the ethics and past business practices of the contractor.¹ A contractor must also be free from conflicts of interest relating to the contract.² In addition to the responsibility determination, a contractor is ineligible for award if he or she is currently suspended or disbarred³ or appears on certain lists of excluded persons maintained by the General Services Administration.⁴ Indictment for federal or state criminal offenses can lead to suspension and conviction to debarment. Heightened compliance procedures are often negotiated to deal with these situations.

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Footnotes

¹ See FAR § 9.103(b); FAR § 9.104-3(b).

² See  FAR § 9.505. See also Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25 (2005); FAR § 9.103(a).

³ See FAR § 9.402.

⁴ This list may be accessed electronically at <http://www.sam.gov/>.

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§ 1:9. Applicability, qualifications, and restrictions—Restrictions

The U.S. procurement system also restricts purchases to exclude certain products or contractors to promote other policy objectives. It is used to promote protectionist trade policy by restricting purchases to American-made products. The Buy American Act and Trade Agreement Acts, discussed later in this book, restrict the purchase of goods not manufactured in the United States or other acceptable countries.¹ It is also used to further foreign policy by refusing to do business with corporations from countries viewed as bad actors by the State Department.²

The procurement regulations will also restrict competition to favor certain socio-economic groups. Small businesses are afforded a favored status and agencies are asked to meet a goal of awarding a certain percentage of their contracting dollars to small businesses. Small procurements, less than \$150,000, must be awarded to a small business if possible.³ In addition, other disadvantaged groups are given preferential treatment in the procurement process, including veteran-owned businesses, minority owned businesses, Native Alaskan corporations, and woman owned small businesses.⁴

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Footnotes

- ¹ Buy American Act, 41 U.S.C.A. §§ 8301 to 8305. *See generally* John Cibinic, Ralph Nash, & Christopher Yukins, FORMATION OF GOVERNMENT CONTRACTS 1614–24 (4th ed. 2011).
- ² Complete list of applicable sanctions can be found at <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>
- ³ FAR 13.003(b)(1).
- ⁴ *See generally* John Cibinic, Ralph Nash, & Christopher Yukins, FORMATION OF GOVERNMENT CONTRACTS 1573–1614 (4th ed. 2011).

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§ 1:10. Publication

Contracting opportunities valued in excess of \$25,000 must be publicized, with few exceptions.¹ These opportunities must be posted on the government run Federal Business Opportunities website at FedBizOpps.gov. Smaller procurements, between \$15,000 and \$25,000, must also be posted by contracting officer, but do not have to be disseminated as widely.² The notice must include a synopsis of the contract and notices of any modifications to the contract. Exceptions to the notice requirement are limited to circumstances that would compromise national security, where notice is not in the government's best interest, or the nature of the file is not conducive to publication.³

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- ¹ FAR § 5.101(a)(1).
- ² FAR § 5.101(a)(2).
- ³ See FAR § 5.102(a).

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§ 1:11.Competition, procedures, and evaluation, International Government Contract Law...

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§ 1:11. Competition, procedures, and evaluation

The FAR outlines detailed procedures for conducting procurements to ensure that the government receives the best value for its investment. It recognizes that this can be accomplished through different types of procurements under different circumstances, including sealed bidding, negotiated bidding, and sole source procedures.

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§ 1:12.Competition, procedures, and evaluation—Sealed bidding, International...

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§ 1:12. Competition, procedures, and evaluation—Sealed bidding

The principle method of ensuring full and open competition is through sealed bidding. It is the simplest form of bidding and should be used whenever price and price related factors will be the basis for the award.¹ This procedure involves public opening of bids and awarding the contract to the lowest bidder who is responsible, offers a reasonable price, and who offers a product that meets the specifications.² Bids must be sealed and submitted by the designated time in order to be considered.³ Bids submitted prior to the designated time should remain sealed and be placed in a locked box or safe.⁴

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- ¹  [FAR § 6.401\(a\)](#).
- ² See W. Noel Keyes, *GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATIONS* 305 (West 3d ed. 2003).
- ³ See, e.g., *Chattanooga Office Supply Co.*, B-228062, 87-2 CPD ¶ 221 (Comp. Gen. Sept. 2, 1987) (“The bid opening officer's declaration of bid opening time is determinative of lateness unless it is shown to be unreasonable under the circumstances.”).
- ⁴ [FAR § 14.401\(a\)](#).

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§ 1:13.Competition, procedures, and evaluation—Negotiated..., International...

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§ 1:13. Competition, procedures, and evaluation—Negotiated bidding

Procurements that will take into account factors other than price will generally use negotiated bidding. Negotiated bidding can take several different forms: lowest price technically acceptable source selection process, tradeoff process, or a combination of the two processes.¹ Each of these procedures is used in order to ensure that the government receives the best value—although each accomplishes this goal under slightly different means.²

All forms begin with the government issuing a request for proposals, after identifying the particular needs of the procuring agency.³ The solicitation must state which type of negotiated bidding procedure will be used.

Evaluation of a lowest priced technically acceptable source selection process is based largely on price.⁴ The proposals are reviewed for compliance with the technical specifications and the proposal with the lowest price is selected, if it is attached to a technically acceptable proposal.⁵

Evaluation of a tradeoff process proposal involves a balancing of different evaluation factors.⁶ The solicitation must clearly state all of the factors that are going to be used to evaluate the proposal and the relative importance of each factor in comparison to the others.⁷ Common evaluation factors include price, technical performance, delivery schedule or past performance.⁸ It is not uncommon for the lowest priced proposal not to be selected or for the highest priced proposal to be selected.

Unlike sealed bidding, evaluators conduct discussions with proposals after they have been submitted to ensure better products and better prices are received by the government.⁹ The discussions must be both meaningful and fair.¹⁰ After discussing the strengths and weakness of their proposal with the procuring agency, offerors are permitted to submit a new, modified proposal for consideration.¹¹

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¹ See John Cibinic, Ralph Nash, & Christopher Yukins, FORMATION OF GOVERNMENT CONTRACTS 676–83 (4th ed. 2011).

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- 2 [FAR § 15.302](#) (“The objective of source selection is to select the proposal that represents the best
value.”).
- 3 FAR Part 11.
- 4 *See* John Cibinic, Ralph Nash, & Christopher Yukins, FORMATION OF GOVERNMENT
CONTRACTS 679–81 (4th ed. 2011).
- 5 [FAR 15.101-2](#).
- 6 *See* John Cibinic, Ralph Nash, & Christopher Yukins, FORMATION OF GOVERNMENT
CONTRACTS 677–79 (4th ed. 2011).
- 7 [FAR § 15.101-1\(b\)\(1\)](#).
- 8 *See* John Cibinic, Ralph Nash, & Christopher Yukins, FORMATION OF GOVERNMENT
CONTRACTS 689–716 (4th ed. 2011).
- 9 [FAR § 15.306\(d\)](#); *see* John Cibinic, Ralph Nash, & Christopher Yukins, FORMATION OF
GOVERNMENT CONTRACTS 890–91 (4th ed. 2011).
- 10 *See* John Cibinic, Ralph Nash, & Christopher Yukins, FORMATION OF GOVERNMENT
CONTRACTS 907–25 (4th ed. 2011).
- 11 [FAR 15.307](#).
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§ 1:14.Competition, procedures, and evaluation—Sole source, International Government...

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§ 1:14. Competition, procedures, and evaluation—Sole source

The Government is also permitted to procure goods or services directly for a single supplier when there are no other sources for those goods or sources or when time is of the essence and the delay caused by the competitive procurement process would harm the government's interest.¹ Foreign military sale procurement, where the foreign government ultimately direct award to a particular U.S. contractor is another example of an exception to competition requirements.²

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- ¹ FAR Subpart 6.3.
² See generally The U.S. as a Military Exporter and Financier.

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§ 1:15.Judicial and administrative proceedings, International Government Contract Law...

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§ 1:15. Judicial and administrative proceedings

Procurement disputes in the United States system are adjudicated in a variety of forums and through several different procedures, depending on when the dispute occurs during the process.¹ Disputes over the solicitation and evaluation of awards are called bid protests.² Disputes during the performance of government contracts are adjudicated under the Contract Disputes Act.³ The government also maintains oversight over government contractors and can seek relief for fraud or other contractual irregularities.⁴

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- ¹ See generally McKenna, Long & Aldridge and Ronald A. Kienlen, GOVERNMENT CONTRACT DISPUTES (West 2011). But see Steven L. Schooner, “[Fear of Oversight: The Fundamental Failure of Businesslike Government](#),” 50 AM. U.L. REV. 627 (2001)(criticizing the Government's failure to conduct proper oversight during the 1990s).
- ² FAR Subpart 33.1. See W. Noel Keyes, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATIONS 732–53 (West 3d ed 2003).
- ³ FAR Subpart 33.2. See McKenna, Long & Aldridge and Ronald A. Kienlen, GOVERNMENT CONTRACT DISPUTES, Part I (West 2011).
- ⁴ See, e.g., FAR Subpart 42.1 (Contract Audit Services);  [Daewoo Eng'g & Constr. Co. v. United States](#), 557 F.3d 1332 (Fed. Cir. 2009) (requiring Daewoo to forfeit its claim and pay over \$60 million penalty for filing a claim that it knew was false).

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§ 1:16.Judicial and administrative proceedings—Bid protest, International Government...

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§ 1:16. Judicial and administrative proceedings—Bid protest

A bid protest is filed when a party has a dispute over the solicitation, evaluation, or award of a government contract. A protest can be filed either before the contracting agency,¹ the Government Accountability Office (“GAO”),² or the U.S. Court of Federal Claims.³ Each of these forums has their own unique procedures, rules, and precedents. The protester faces a difficult challenge to succeed in a protest action because agencies are given a significant amount of discretion.⁴

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Footnotes

¹ FAR 33.103.

² FAR 33.104.

³ See Tucker Act, 28 U.S.C. § 1491(a)(1).

⁴ See Moshe Schwartz, Kate M. Manuel, & Lucy Martinez, Cong. Research Serv., R40227, GAO BID PROTESTS: TRENDS ANALYSIS, AND OPTIONS FOR CONGRESS (2013) (finding that in 2012 GAO sustained only 4.5% of all protests filed).

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§ 1:17.Judicial and administrative proceedings—Claims, International Government...

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§ 1:17. Judicial and administrative proceedings—Claims

Disputes can also arise during the course of performance. These disputes could be traditional contract disputes relating to quality of performance, changes to the contract, or breach of contract.¹ The dispute could also relate to the termination of the contract by the government for either convenience or default,² or a determination of a contractor's intellectual property rights under the contract.³ These disputes can also be raised in multiple forums: the Boards of Contract Appeals⁴ or the U.S. Court of Federal Claims.⁵

The Boards and the Court of Federal Claims will only entertain claims made by contractors, but not subcontractors.⁶ This is because subcontractors lack privity with the government and, therefore, lack standing to bring the suit. Subcontractors must seek redress of their claim through their prime contractor.⁷

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Footnotes

- ¹ See, e.g., [Metric Constr. Co., Inc. v. United States](#), 81 Fed. Cl. 804 (2008).
- ² See, e.g.,  [James M. Ellett Constr. Co. v. United States](#), 93 F.3d 1537 (Fed. Cir. 1996).
- ³ See, e.g., [Campbell Plastics Eng'g & Mfg. v. Brownlee](#), 389 F.3d 1243 (Fed. Cir. 2004) (resolving dispute between contractor and the government over which owned the patent rights to an invention made during performance of a government contract).
- ⁴ 41 U.S.C.A. §§ 7101 to 7102.
- ⁵ Tucker Act, 28 U.S.C. § 1491(a)(1). See also McKenna, Long & Aldridge and Ronald A. Kienlen, GOVERNMENT CONTRACT DISPUTES, 120–29 (West 2011) (discussing the forum selection considerations between the boards and the court).
- ⁶ See  [Nat'l Leased Hous. Ass'n v. United States](#), 32 Fed. Cl. 454, 460 (1994).
- ⁷ See  [United States v. Turner Constr. Co.](#), 827 F.2d 1554, 1559–61 (Fed. Cir. 1987) (prime contractor certifies claim on behalf of subcontractor);  [Pan Arctic Corp. v. United States](#), 8 Cl. Ct. 546, 548 (1985) (prime contractor includes the subcontractor's liability in its own claim).

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II. United States

§ 1:18. Judicial and administrative proceedings—Oversight

The U.S. procurement system, at times, feels like a never-ending web of regulations that dictate how almost every aspect of a contract should be performed and administered. In order to ensure compliance with the vast array of regulations, the Government uses several tools: audit provisions, mandatory disclosure requirements, and the False Claims Act.

The Government uses audits to ensure that contractors are in compliance with the terms of the contract. The extent of the government's audit rights depends on what type of contract has been entered into and which audit clauses are contained in the contract. Typically, a cost-reimbursable contract entitled the Government extensive audit rights, while a fixed-price contract permits audits only for waste, fraud, or abuse. Audits can be conducted by special government audit agencies, such as the Defense Contract Audit Agency, or the inspector general of the contracting agency.

The Government also requires contractors to disclose any violation that the contractor becomes aware of, as a part of the mandatory disclosure rule.¹ As part of this rule, contractors must have internal control systems designed to facilitate discovery of potential violations.² Once a contractor is aware a violation, failure to make timely disclosure subjects the contractor to suspension and debarment.³






In addition to oversight through audit and mandatory disclosure, the United States also employs the powerful False Claims Act to prevent waste, fraud, and abuse in its procurement program.⁴ The False Claims Act provides for treble damages for any knowingly false or fraudulent claim for payment submitted to the government for payment.⁵ These cases can range from non-conforming products,⁶ to overbilling healthcare costs,^{6,50} to failure to abide by other regulations required by the contract.⁷

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Footnotes

- ¹ See generally ABA Section of Public Contract Law, Guide to the Mandatory Disclosure Rule (2010).
² FAR §§ 52.203-13.
³ FAR §§ 52.203-13.

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- 4 See, e.g.,  [U.S. ex rel. Steury v. Cardinal Health, Inc.](#), 625 F.3d 262, 267 (5th Cir. 2010) (“The FCA is the Government’s ‘primary litigation tool’ for recovering losses resulting from fraud.”).
- 5  31 U.S.C. §§ 3729 to 3733.
- 6 See, e.g.,  [United States v. Aerodex, Inc.](#), 469 F.2d 1003 (5th Cir. 1972) (ball bearings sold to the government did not meet the contract specifications).
- 6.50 See Letitia Stein and Jodie Tillman, *BayCare hospitals to pay \$10 million to resolve federal billing inquiry*, TAMPA BAY TIMES, Nov. 22, 2012 (healthcare provider faced False Claims Act suit for billing outpatient services as inpatient care), *available at* <http://www.tampabay.com/news/health/medicine/baycare-hospitals-to-pay-10-million-to-resolve-federal-billing-inquiry/2142049> (last visited July 5, 2018). See,  [United States ex rel. Harris v. Bernad](#), 275 F. Supp. 2d 1 (D.D.C. 2003).
- 7 See, e.g.,  [Ab-Tech Constr. v. United States](#), 31 Fed. Cl. 429 (1994).

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§ 1:19. Introduction .⁵⁰

The twenty-eight member states of the European Union (“EU”) together represent a huge public procurement market. Each year, 14% of the EU's Gross Domestic Product (“GDP”) is spent on public procurement.¹ The spending ranges from engineering services to office supplies to the construction of power plants. The EU is featured in this section because of the significant role that public procurement plays in the region's economy and because of the potential far reaching impact on the world economy as procurement becomes more open to foreign entities.

The EU traces back to 1957 when the Treaty of Rome created a common market among Germany, France, Italy, the Netherlands, Belgium and Luxembourg.² Under this common market approach these nations sought to lower the barriers that restricted individuals, goods and services from moving freely between the member states.³

Since this initial treaty, the EU has seen substantial growth, adding 22 member states, with eight additional nations seeking membership.⁴ It has also experienced a unification that goes beyond a common market. In the past 15 years, the EU has adopted the euro as a common currency, engaged in several military operations through the use of its joint European Union Force, and most recently, adopted the Treaty of Lisbon.⁵ The Treaty of Lisbon, which supplanted the unratified European Constitution, strengthened and streamlined the EU as a governing body, providing the European Parliament with new legislative and budgetary powers, simplifying the voting rules for the Council, and centralizing the EU's foreign affairs authority.⁶

As the EU has unified, it has adopted comprehensive public procurement regulations for its member states. Through a series of directives, the EU has sought to create harmonized and transparent procurement procedures.⁷ The goal of such procedures is to ensure that companies from member nations can bid freely and on the same competitive footing as companies from the member nation conducting the procurement.⁸

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Footnotes

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At the time that this insert was published, the European Union (EU) had approved but not published the text of new Directives on public procurement, utilities procurement and concession contracts. *See*

§ 1:19.Introduction, International Government Contract Law § 1:19

Press Release, European Parliament, New EU-procurement rules to ensure better quality and value for money (Jan. 15, 2014). These Directives are intended to modernize the EU procurement system and will implement several important changes to the current system. First, public entities will now be allowed to use the “most economically advantageous tender” evaluation method, whereby lowest price is not the determinative factor. Press Release, European Parliament, New EU-procurement rules to ensure better quality and value for money (Jan. 15, 2014). Second, the possibilities for competitive negotiation have been broadened by allowing for such negotiations when justified by the circumstances of the procurement or the inability to meet the procuring entity's needs through the use of off-the-shelf type solutions. Press Release, European Commission, Revision of Public Procurement Directives—Frequently Asked Question (Jan. 15, 2014). Third, the bidding process will be simplified through the use of a standard “European Single Procurement Document” and by only requiring the winning bidder to provide original supporting documentation. Press Release, European Parliament, New EU-procurement rules to ensure better quality and value for money (Jan. 15, 2014). Fourth, the new rules will toughen ethical standards for contractors, clarifying what constitutes a conflict of interest, allowing for the exclusion of contractors that exert undue influence on the decision process or provide serious misrepresentations, and calling for the compulsory exclusion of contractors who submit abnormally low tenders due to non-compliance with labor and environmental laws. Press Release, European Commission, Revision of Public Procurement Directives—Frequently Asked Question (Jan. 15, 2014). “EU countries had until April 2016 to transpose these new rules into national law (except for e-procurement, which has a deadline of October 2018).”

- 1 European Commission-Public Procurement, https://ec.europa.eu/growth/single-market/public-procurement_en.
- 2 EUROPA—The History of the European Union, http://europa.eu/about-eu/eu-history/index_en.htm.
- 3 EUROPA—The History of the European Union, http://europa.eu/about-eu/eu-history/index_en.htm.
- 4 EUROPA—Countries, http://europa.eu/about-eu/countries/index_en.htm.
- 5 EUROPA—The History of the European Union, http://europa.eu/about-eu/eu-history/index_en.htm.
- 6 EUROPA—The Treaty of Lisbon, http://europa.eu/lisbon_treaty/glance/index_en.htm.
- 7 Laure Baudrihay & Julian Ellison, EU Public Procurement Rules, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 1 (2011).
- 8 Directive 2004/17/EC; Directive 2004/18/EC.

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§ 1:20. Overview

Public procurement policies in the European Union concern the awarding of contracts for public works and the purchase of goods and services by public agencies of the EU as well as by its member states. EU member states are parties to the treaties of the EU and are governed by the binding laws of the EU and have representation in the EU's legislative and judicial institutions. EU member states do retain a great deal of autonomy however. Currently, there are twenty-eight member states: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.¹ Because government procurement represents a substantial portion of the EU gross domestic product ("GDP"),² it has been the subject of increasing European regulation since the 1970s.

The EU has a substantial public policy framework governing public procurement consisting of laws, regulations, and policies. The treaties of the European Union form the basis of EU procurement regulation.³ These foundational treaties prohibit barriers to trade within the EU, provide freedom to provide services, prohibit discrimination on the basis of national origin and regulate public undertakings and public monopolies.⁴ In addition, procurement specific legislation, through a series of specific public procurement directives, has been promulgated.

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Footnotes

- ¹ Note that in 2017, the United Kingdom voted by referendum to leave the EU. The United Kingdom has two years to negotiate its withdrawal.
- ² Public Procurement is estimated to be approximately 14% of EU's GDP. European-Commission-Your Europe Rules & Procedures, http://europa.eu/youreurope/business/public-tenders/rules-procedures/index_en.htm.
- ³ See Laure Baudrihay & Julian Ellison, EU Public Procurement Rules, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 1 (2011).
- ⁴ Europa—The History of the European Union, http://europa.eu/about-eu/eu-history/index_en.htm.

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§ 1:21. Overview—Supply and works directive

The Supply and Works Directive, Directive 77/62, was issued in 1977 to provide procedures for awarding public supply contracts.¹ This directive required that contracts be advertised community-wide, prohibited discriminatory technical specifications, and required tendering and award criteria to be objective.² Directive 71/305 provided for similar rules regarding transparency and non-discrimination for public works. In 1993, the Supplies and Works Directives were consolidated as Directives 93/36, 93/37, and 93/38 to make the legal framework more unified.³

Directive 88/295 amended all previous public supplies directives. With this directive, open tendering procedures are standard and negotiated procedures are allowed only in exceptional circumstances.⁴ Procuring agencies are required to provide public advance notice of annual procurement programs and all award decision.⁵ This was followed by Directive 89/440 which widened the scope of applicable contracts to include concession contracts and certain state-subsidized works.⁶

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Footnotes

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|---|--|
| 1 | Directive 77/62/EEC. |
| 2 | Directive 77/62/EEC. This directive did not apply to public utilities or products originating outside of the EU until its amendment by Directive 80/767 in 1979. |
| 3 | Directive 93/96/EC; Directive 93/97/EC; Directive 93/98/EC. |
| 4 | Directive 88/295/EEC. |
| 5 | Directive 88/295/EEC. |
| 6 | Directive 89/440/EEC. |

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§ 1:22.Overview—Utilities directive, International Government Contract Law § 1:22

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§ 1:22. Overview—Utilities directive

In 1990, the EU adopted the first Utilities Directive, Directive 90/531.¹ This directive covered the procurement of public utilities (energy, telecommunications, transportation, and water) which had previously been regulated country to country, in part because each country had differing legal structures regulating public utilities and because governments resisted ceding control of the public utilities.² This directive was similar to the supply and works directive, in encouraging transparency and non-discrimination, but exempted several sectors, including broadcasting, as well as excluding utilities operating under competitive conditions.³ In 1992, the EU adopted the Services Directive, Directive 92/50, which provided for similar provisions for the service sector.⁴

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Footnotes

- ¹ Directive 90/531/EEC.
- ² See Directive 90/531/EEC.
- ³ See Andrea Adler, *Utilities Directive—A Giant Step Down the Long and Winding Road toward Opening Public Procurement Markets in the EC*, 17 B. C. Int'l & Comp. L. Rev. 111, 115 (1994)
- ⁴ Directive 92/50/EEC.

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§ 1:23.Overview—Further directives, International Government Contract Law § 1:23

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§ 1:23. Overview—Further directives

In 2004, the EU adopted its first set of consolidated procurement directives.¹ Under these directives, utilities were governed by the Utilities Directive, Directive 2004/17, while all other directives were subject to the Public Service Directive 2004/18.² Over the next decade, these two directives provided most of the guidance for EU procurement.

In 2014, the EU updated these directives with a revised Utilities Directive, Directive 2014/25, a revised public procurement directive, Directive 2014/24, and a new directive on concession contracts, Directive 2014/23.³ Though the directives retained many of the existing procedures and requirements, they generally sought to simplify these procedures and add greater flexibility to the procurement system.⁴ In particular, the revised public procurement directive lifts restrictions on the uses of competitive negotiations, encourages the use of electronic procurement procedures, and allows for expedited time frames for the procurement of certain goods and services.⁵

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- ¹ See Directive 2004/17/EC; Directive 2004/18/EC.
- ² See Directive 2004/17/EC; Directive 2004/18/EC.
- ³ See Directive 2014/23/EU; Directive 2014/24/EU; Directive 2014/25/EU.
- ⁴ Press Release, Council of the European Union, Council adopts directive for the reform of public procurement (Feb. 11, 2014).
- ⁵ Crown Commercial Services, A BRIEF GUIDE TO THE EU PUBLIC CONTRACTS DIRECTIVE 4-5 (Feb. 2015).

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§ 1:24.Overview—National security and defense spending, International Government...

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§ 1:24. Overview—National security and defense spending

Historically, defense and security spending was largely done on an individual basis by member states. The European defense market has been highly fragmented with many barriers existing between member states. Member states generally procured defense and security contracts under an exemption from the general public procurement directives.¹ In 2009, a Defense Directive was passed which establishes a common framework for defense and security spending.² The purpose of this directive is to open up the European defense market to competition and work toward the development of an efficient European defense market with improved military capabilities.³ The directive includes special provisions to accommodate classified information.⁴ All but the most sensitive procurements must be conducted under this directive's procurement rules.

Under the Directive, member states must use restricted or negotiated award procedures.⁵ The use of noncompetitive award procedures may be used in limited circumstances, such as contracts that would require disclosure of information that is contrary to national security interest, contracts for intelligence activities, and contracts for certain research and development projects.⁶ Member states have the ability to determine how the Directive is implemented under the Directive facilitation clauses.

The European Court of Justice (“ECJ”) has held and the EC has stressed through enforcement that general principles of equal treatment, prohibition of discrimination on grounds of nationality, transparency, mutual recognition, and proportionality are to be applied in all situations in which a public authority procures works, supplies or services and through all stages of an award procedure.⁷

Member states are required to act as a “market purchaser” without distorting competition by favoring certain undertakings or the production of certain goods.⁸ This means that member states are restricted from providing aid to domestic companies if such financing will provide these companies with a competitive advantage.⁹ While this does not require member states to refrain from all aid programs, it is meant to ensure that member states use nondiscriminatory and competitive procurement procedures to obtain best value and prevent competition distortion.¹⁰ In reality, political pressures often lead countries to prioritize national and regional interests ahead of making a best value purchase by favoring domestic suppliers. Some member states tend to favor national suppliers over foreign companies.¹¹ As a result of these practices, critics have noted that efforts to ensure compliance with existing EU procurement law would save government's billions of euros every year.¹²

§ 1:24.Overview—National security and defense spending, International Government...

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Footnotes

- 1 See The European Defense Procurement Directive: An American Perspective, The Government Contractor Vol. 51, No. 41, Nov. 4, 2009.
- 2 Directive 2009/81/EC
- 3 See Directive 2009/81/EC.
- 4 See The European Defense Procurement Directive: An American Perspective, The Government Contractor Vol. 51, No. 41, Nov. 4, 2009.
- 5 Directive 2009/81/EC.
- 6 Directive 2009/81/EC, Art. 13.
- 7 See United Kingdom, Office of Government Commerce, European Commission Interpretive Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, Information Note 03/06 (July 31, 3006).
- 8 Treaty on the Functioning of the European Union, Art. 107.
- 9 EC, Frequently asked questions concerning the application of public procurement rules to social services of general interest, Nov. 2007, p. 12–13, *available at* http://ec.europa.eu/services_general_interest/docs/sec_2007_1514_en.pdf.
- 10 EC, Frequently asked questions concerning the application of public procurement rules to social services of general interest, Nov. 2007, p. 12–13, *available at* http://ec.europa.eu/services_general_interest/docs/sec_2007_1514_en.pdf.
- 11 See *Saving billions of euros in public procurement*, Johannes Schnitzer, The In-House Lawyer, Feb. 2011 p. 2–3 (stating that this is particularly common in Central, eastern and southeastern Europe).
- 12 See *Saving billions of euros in public procurement*, Johannes Schnitzer, The In-House Lawyer, Feb. 2011 p. 2–3.

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§ 1:25.Applicability, qualifications & restrictions, International Government Contract Law...

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§ 1:25. Applicability, qualifications & restrictions

The EU procurement directives apply only to contracts where the value exceeds certain thresholds. In an effort to avoid expensive and lengthy processes for low-value contracts, contracts where the value is considered to be de minimis are not required to follow the EU's procurement directives. The basic rules of the European Treaties, like non-discrimination, do apply. As of April 2016, the EU changed its rules for spending public procurement money. The change makes it easier and less expensive for smaller enterprises to bid for public contracts. The rule is consistent with EU goals for transparency in competition.^{0.50} The thresholds are:¹

- € 5,225,000 for public work contracts
- € 135,000 for goods and services procured by central government authorities
- € 750,000 for certain social services, as well as other specifically identified services
- € 209,000 for all subsidized services, and for goods and services procured by sub-central entities
- € 418,000 for water, energy, transport and postal services, unless specifically identified as subject to the € 1,000,000 threshold

The directives prohibit purchasing authorities from splitting contracts into separate contracts in order to avoid the procurement procedures, although this prohibition is difficult to monitor and enforce.^{8.10}

For defense and security spending, the defense directive applies to supply and service contracts greater than or equal to either € 135,000 or € 209,000 depending on the specific product, and works contracts greater than or equal to € 5,225,000.⁹ Public-private partnerships, often used to manage, construct or renovate infrastructure or to provide a service, have separate rules.¹⁰

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Footnotes

^{0.50}

European Commission- Legal Rules and Implementation, <http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/#t1>; Directive 2014/24/EU.

§ 1:25.Applicability, qualifications & restrictions, International Government Contract Law...

- 1 European Commission, Growth, Legal Rules and Implementation, http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/index_en.htm#t1.
- 8.10 See Directive 2014/24/EU, Art. 5.
- 9 Directive 2014/24/EU.
- 10 http://ec.europa.eu/youreurope/business/profitting-from-eu-market/benefiting-from-public-contracts/index_en.htm
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§ 1:26. Publication

The EU's public procurement framework, through the directives described above, espouse the principles of transparency. One of the key features of this transparency is the publication of procurement notices in the EU's Official Journal. The Official Journal is published every working day in of the official languages of the EU.¹ Three types of procurement notices are published.² Periodic Indicative Notices ("PIN") indicate the annual estimated procurement volume for every contracting authority.³ Formal invitations to suppliers to tender offers, known as invitations to tender, begin the process of awarding a contract.⁴ Contract Award Notices ("CAN") notify the public about the award of a contract to a successful party, including the price and reason for the selection.⁵ Invitations to tender public contracts for works, supplies and services from all EU member states, utilities contracts, as well as public contracts from EU institutions are all included in the Official Journal.⁶ The procurement notices can be accessed free of charge online in the Tenders Electronic Daily ("TED").⁷

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Footnotes

- ¹ Direct access to the Official Journal of the EU, <http://eur-lex.europa.eu/oj/direct-access.html>.
- ² University of Cambridge, Finance Division Procurement Services, THE EU DIRECTIVES ON PUBLIC PROCUREMENT 4 (2012).
- ³ University of Cambridge, Finance Division Procurement Services, THE EU DIRECTIVES ON PUBLIC PROCUREMENT 4 (2012).
- ⁴ University of Cambridge, Finance Division Procurement Services, THE EU DIRECTIVES ON PUBLIC PROCUREMENT 4 (2012).
- ⁵ European Commission, ANNUAL PUBLIC PROCUREMENT IMPLEMENTATION REVIEW: 2012 10 (2012).
- ⁶ Supplement to the Official Journal of the EU, <http://ted.europa.eu>.
- ⁷ Tenders Electronic Daily, <http://ted.europa.eu>.

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§ 1:27. Competition procedures and evaluation

Under the revised public procurement directive, solicitations continue to take a number of forms: open, restricted, negotiated, competitive dialogue or the new innovation partnership.^{0.30}

- Open: The procurement opportunity is publicly advertised and any bidder can respond and submit a tender.
- Restricted: The contracting entity selects at least five potential bidders to submit tenders and competition is limited to these bidders.
- Competitive Procedure with Negotiation: The contracting agency invites selected participants to issue an initial tender which serves as the basis for subsequent negotiations. This process continues until such time that the contracting entity informs participants that it is seeking final tenders.
- Competitive Dialogue: The contracting entity submits a request for participants that sets out its needs and requirements and award criteria. The entity then engages in discussions with participants to narrow the number of participants and proposed solutions. Once the entity identifies the solution(s) capable of meeting its needs, it then requests final tenders.
- Innovation Partnership: The contracting agency uses a negotiated approach to identify potential partners that can provide goods or services for which there is no existing “product” in the marketplace. Partnerships can then be awarded to one or more participants that can help address this gap.

Though the above procedures are the preferred method of contracting, government entities are allowed to restrict competition and award contracts on a sole-source basis, such as when a company has exclusive rights to a product that prevent competitive solicitations.^{0.60} Additionally, such procedures are not required if the contract falls below the previously discussed procurement thresholds.^{0.90}

After the advertised closing date, bids are evaluated. Either the lowest cost or most economically advantageous bid is chosen.¹ When evaluated on the basis of most economically advantageous tender, the contracting authority examines criteria such as quality, price, aesthetics, cost of upkeep, technical merits, functional characteristics, environmental characteristics and technical assistance.² Prior to evaluation, bidders must be informed of the criteria that will be used when conducting the evaluation.³ Once a selection is made, the contract award must be reported in the Official Journal.

§ 1:27.Competition procedures and evaluation, International Government Contract Law...

Under the procurement directives that were approved in January of 2014, contracting entities will be able to utilize two additional procurement procedures. The first is the competitive procedure with negotiation, which is intended to generally replace the negotiated procedure and provide contracting authorities increased ability to negotiate with bidders.⁴ The second is the innovative partnership, through which contracting agencies may work with contractors that are still in the research and development phase of a product.⁵

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Footnotes

- 0.30 Directive 2014/24/EU, Arts. 27–31.
0.60 Directive 2014/24/EU.
0.90 Directive 2014/24/EU, Art. 4.
1 Ohad Soudry, The European Antitrust Review 2011: A Guide to EU Public Procurement, Global Competition Review, <http://www.globalcompetitionreview.com/reviews/28/sections/98/chapters/1097/public-procurement/>.
2 Ohad Soudry, The European Antitrust Review 2011: A Guide to EU Public Procurement, Global Competition Review, <http://www.globalcompetitionreview.com/reviews/28/sections/98/chapters/1097/public-procurement/>.
3 Ohad Soudry, The European Antitrust Review 2011: A Guide to EU Public Procurement, Global Competition Review, <http://www.globalcompetitionreview.com/reviews/28/sections/98/chapters/1097/public-procurement/>.
4 Laure Baudrihay & Julian Ellison, EU Public Procurement Rules, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2014 (2013).
5 Laure Baudrihay & Julian Ellison, EU Public Procurement Rules, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2014 (2013).

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§ 1:28. Judicial and administrative proceedings

When a contracting official of an EU member state allegedly violates EU procurement laws a contractor can bring suit against the individual purchaser.¹ Under the original Remedies Directives, Directive 89/995 and 92/13, when contractors brought suit member states were required to ensure rapid and effective judicial review of decisions by contracting agencies.² The Remedies Directives were updated by Directive 2007/66 in an effort to improve the effectiveness of the review procedures for public contracts.³ Currently, the Remedies Directive requires public authorities to wait a certain number of days, the “standstill period,” before concluding a public contract. The standstill period is from 10 to 15 days depending on whether the notice is delivered via post or electronically. This waiting period gives disappointed bidders the opportunity to start a review procedure at a time when unfair decisions can still be corrected.

Of special concern to Directive 2007/66 were illegal, direct awards of public contracts, those awards made without prior publication or notice. National courts can now render these contracts ineffective and order a new procurement process.⁴ This allows the courts to reopen competition and ensure that companies illegally deprived of a chance to compete have an opportunity to secure the contract.⁵

In addition to challenges by contractors, the European Commission (“EC”) can bring an enforcement action against member states.⁶ The EC can exercise these powers whenever it believes that a member state has violated EU procurement law.⁷ This includes instances where a member state has created a legal monopoly for a state owned institute,⁸ where a member state has imposed illegal domestic preferences,⁹ and where a member state has improperly divided a project so that it does not meet the EU thresholds for public procurement.¹⁰ When the EC believes an enforcement action is necessary it begins by contacting the member state and requesting an explanation.¹¹ If not satisfied with the answer, the EC can make a formal request to the member state to comply with the law, usually within two months.¹² If the member state does not comply, the EC may take action before the ECJ.¹³ The ECJ may grant an injunction to suspend execution of the a contract pending judgment on the merits. Member states are obligated to comply with ECJ judgments.¹⁴ If they do not comply, the EC has the power to bring a second suit before the ECJ seeking either a lump sum fine or periodic penalty payment for the member state's failed compliance.¹⁵

Footnotes

- 1 Directive 89/665/EEC (Public Supply and Public Works); Directive 92/13/EEC (Utilities).
- 2 *See* Directive 2007/66/EC of the European Parliament and the Council, Dec. 11 2007 at ¶ 2.
- 3 Directive 2007/66/EC of the European Parliament and the Council, Dec. 11 2007.
- 4 Directive 2007/66/EC of the European Parliament and the Council, Dec. 11 2007 at ¶ 14.
- 5 Directive 2007/66/EC of the European Parliament and the Council, Dec. 11 2007 at ¶ 14.
- 6 Treaty on the Functioning of the European Union, Art. 258.
- 7 Treaty on the Functioning of the European Union, Art. 258.
- 8 Press Release, European Commission, Public procurement: the Commission asks France to open to public procurement for the purchase of certain geographical information, (Mar. 14, 2011) http://europa.eu/rapid/press-release_IP-11-289_en.htm?locale=en..
- 9 Press Release, European Commission, Public procurement: Commission calls on Greece to amend procedure for awarding supply contract for submarine battery kits, (Nov. 24, 2010) http://europa.eu/rapid/press-release_IP-10-1558_en.htm?locale=en..
- 10 Press Release, European Commission, Public procurement: Commission refers Germany to Court to ensure fair access to architectural services in Nidernhausen (Sept. 30, 2010) http://europa.eu/rapid/press-release_IP-10-1245_en.htm..
- 11 Treaty on the Functioning of the European Union, Art. 258.
- 12 Treaty on the Functioning of the European Union, Art. 258.
- 13 Treaty on the Functioning of the European Union, Art. 258.
- 14 Treaty on the Functioning of the European Union, Art. 260.
- 15 Treaty on the Functioning of the European Union, Art. 260.

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§ 1:29. Introduction

Asian countries provide significant markets and potential areas of growth for public procurement. This section looks at the procurement systems in China, Japan, Korea and India. These countries represent some of the most developed procurement systems in the region as well as potential growth areas. China spends approximately 35% of its GDP on public procurement, while Japan spends 16%, Korea spends 13%, and estimates for India place procurement between 20 and 30% of the nation's GDP.¹ The procurement systems of these nations share some basic features. At their core, all share the universal policy concept that a governmental procurement should aid, in principle, fair competition by promoting transparency and equal treatment of offerors. With the exception of India, these systems are centralized within the national government and generally favor open competitive bidding. Of these nations, China and India have the newest procurement procedures. China in particular has only made its procurement process more open and uniform in the past decade. Many of China's reforms have apparently been driven by its quest to become a member of the World Trade Organization's Agreement on Government Procurement. In contrast, Japan has an older and robust procurement system.

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Footnotes

- ¹ European Union Chamber of Commerce in China, European Business in China Position Paper: 2015/2016 106 (2015); OECD, Government At a Glance 2015 137 (2015); CUTS International; Government Procurement in India: Domestic Regulations & Trade Prospects 31–33 (2012).

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§ 1:30. China

Prior to the mid 1990s, China did not have a transparent procurement process or a uniform set of procurement regulations.¹ Each Chinese state made procurement decisions based on its own discretion without transparency or open competition.² The lack of regulation often led to allegations of wasteful spending, little or no oversight of funds, lack of transparency, corruption, and strong local protectionism.³

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Footnotes

- ¹ Richard W. Pearse, *China*, in *International Public Procurement: A Guide to Best Practice*, 189, 193 (Roberto Hernandez Garcia ed., 2009).
- ² Xinchao, *Chinese Procurement Law: Current Legal Framework and a Transition to the World Trade Organization's Government Procurement Agreement*, 17 temp Int'l & Comp. L.J. 139, 140 (2003).
- ³ Xinchao, *Chinese Procurement Law: Current Legal Framework and a Transition to the World Trade Organization's Government Procurement Agreement*, 17 temp Int'l & Comp. L.J. 139, 140 (2003).

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§ 1:31. China—Overview

China's path towards a modern procurement system began in the mid-1990s as central and local government officials began issuing directives and regulations to govern public procurement.¹ Procurement law in China was then codified with the enactment of the Bidding Law in 1999 and the Government Procurement Law (GPL) in 2002.² While the GPL serves as the primary source of public procurement law, the Bidding Law and several implementing regulations also shape China's current procurement system.³

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Footnotes

- ¹ Cao Fuguo, China's Government Procurement Policy and Institutional Framework: History, Structure, and Operation, in INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 323, 326 (2009); Robert Rothery, China's Legal Framework for Public Procurement, 3 J. Pub. Procurement 370, 372 (2003).
- ² The Bidding Law of the People's Republic of China, Order of the President No. 21, Aug. 30, 1999; The Government Procurement Law of the People's Republic of China, Order of the President No. 68, June 29, 2002.
- ³ Intergovernmental Group of Experts on Competition Law and Policy, Submission by China to the Roundtable on "Competition Policy and Public Procurement," (July 2012) at p. 3, *available at* http://unctad.org/meetings/en/Contribution/ciclp2012_RT_PP_China_en.pdf.

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§ 1:32. China—Overview—The government procurement law

The stated goals of the GPL are: 1) to promote the market economy and fair competition; 2) to standardize procurement rules and recognize the rule of law; 3) to increase the benefits of using government funds and improve the management of the expenditure of funds; 4) to encourage domestic enterprises; 5) to minimize the scope of corruption; and 6) to legally protect the national interest after China's accession to the World Trade Organization (“WTO”) Agreement on Government Procurement (“GPA”).¹

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Footnotes

- ¹ Chinese Ministry of Finance, China Finance & Economy, July 2, 2002 (replying to the correspondent on the promulgation of GPL).

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§ 1:33. China—Overview—World Trade Organization's government procurement agreement

These purposes reference China's involvement with the WTO. In 2001, at the time of China's accession to the WTO, the government announced its intention to begin negotiations for membership in the GPA.¹ Negotiations continued for many years and are still continuing now.² The negotiations for membership in the GPA and subsequent accession to the GPA may result in some changes to China's procurement system. Throughout China's negotiation for accession to the GPA, the United States and other parties have expressed concerns with China's procurement regulations. In particular, the parties are concerned with domestic preferences built into China's procurement system and continue to push for the conformity of China's procurement legislation with the requirements of the GPA.³

The potential for a trade war between China and the United States involving government procurement has escalated and calmed down periodically over the years.⁴ The disputes between the two nations highlight the need for a unified market and procurement principles; rules to ensure equal market access; and transparency in government procurement decisions to ensure a fair and equal playing field in government procurement.⁵

While China's procurement system is considered to be evolving into a transparent procurement system, many concerns, including concerns about domestic preferences and transparency, continue.⁶

Currently, China has observer status for the GPA.⁷ This allows China to participate in the WTO GPA Committee and imposes several requirements upon the Chinese procurement system: the use of technical specifications, the publication of procurement notices, and assurances that procurement regulations will not normally be altered during the course of a procurement.⁸ Since obtaining GPA observer status, China has taken steps to improve its procurement system. In addition to enacting the GPL, China has engaged in ongoing negotiations regarding concessions it would be willing to take in order to join the GPA. As part of these negotiations, China has agreed to speed up the implementation of GPA requirements and expand the number of agencies that would be covered by the agreement.⁹

In 2011, as part of efforts to comply with the GPA and address criticisms from other nations, China's central government revised its rules providing various preferences for domestic goods and services, known as the indigenous innovation rules.¹⁰ Specifically, the government revoked provisions that granted a five to ten percent price preference for indigenous products and suppliers, that required the transfer of core technology as a condition of entering into government procurement contracts, and that made Chinese ownership of intellectual property and trademarks a criteria

§ 1:33.China—Overview—World Trade Organization's..., International...

for certification as an indigenous innovation product.¹¹ Taking their lead from the central government, several local and municipal governments made corresponding changes to their procurement policies.¹² While foreign business organizations noted that such changes were a good first step towards opening the Chinese procurement market, they also stressed that these measures addressed only a portion of the procurement preferences tied to indigenous innovation status.¹³

Despite the efforts that China has made regarding indigenous innovations and other reforms, ascension to the GPA does not appear imminent.

In December of 2014, China submitted its fifth official offer for accession into the WTO.¹⁴ The revised proposal lowered thresholds for application of the GPA and continued to expand the number of provinces and entities that would be subject to the agreement.¹⁵ Despite this expanded scope, the revised offer still did not cover a majority of state-owned enterprises and maintained several exclusions that WTO members had previously opposed.¹⁶

In December 2014, China provided its fifth offer to join the GPA. This offer lowered the proposed thresholds by more than 50% for central government purchases for the first two years of the agreement. It also opened procurement concerning the infrastructure of China (i.e., drinking water, electricity, energy, transportation, telecommunications or postal services) to foreign bidders. Nevertheless, the offer has been subject to criticism since the overlying GPL still requires the government to prefer local Chinese products.¹⁷

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Footnotes

- 1 Tong Xinchao, [Chinese Procurement Law: Current Legal Framework and A Transition To The World Trade Organization's Government Procurement Agreement](#), 17 Temp. Int'l & Comp. L. J. 139 (2003).
- 2 World Trade Organization, Parties and observers to the GPA, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.
- 3 Report (2010) of the Committee on Government Procurement (GPA/106, dated 9 Dec. 2010)
- 4 Allen Green & Marques Peterson, Government Procurement Becomes a Vital Tool to Stimulate Global Economic Recovery, McKenna Long & Aldridge LLP.
- 5 Allen Green & Marques Peterson, Government Procurement Becomes a Vital Tool to Stimulate Global Economic Recovery, McKenna Long & Aldridge LLP.
- 6 See generally, Richard W. Pearse, *China*, in *International Public Procurement: A Guide to Best Practice*, 189, 197–201 (Roberto Hernandez Garcia ed., 2009).
- 7 Parties and observers to the GPA, World Trade Organization, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#memobs.
- 8 Agreement on Government Procurement, Art. XVII(2) (1994).
- 9 Lucy Hornby, Provinces become battleground in China's WTO offer, Reuters, July 21, 2010, <http://uk.reuters.com/article/2010/07/21/uk-china-trade-idUKTRE66K20V20100721>
- 10 U.S. China Economic and Security Review Commission, 2011 Rep. Congress 70 (Nov. 2011).
- 11 U.S. China Economic and Security Review Commission, 2011 Rep. Congress 77–78 (Nov. 2011).
- 12 U.S. China Economic and Security Review Commission, 2011 Rep. Congress 78–79 (Nov. 2011).
- 13 U.S. China Economic and Security Review Commission, 2011 Rep. Congress 77–78 (Nov. 2011) (quoting the U.S.-China Business Council).

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- 14 *U.S. Sees Gains In New China GPA Offer, But Says Big Gaps Still Remain*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Jan. 9, 2015, available at <http://insidetrade.com/inside-us-trade/us-sees-gains-new-china-gpa-offer-says-big-gaps-still-remain>.
- 15 *U.S. Sees Gains In New China GPA Offer, But Says Big Gaps Still Remain*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Jan. 9, 2015, available at <http://insidetrade.com/inside-us-trade/us-sees-gains-new-china-gpa-offer-says-big-gaps-still-remain>.
- 16 *U.S. Sees Gains In New China GPA Offer, But Says Big Gaps Still Remain*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Jan. 9, 2015, available at <http://insidetrade.com/inside-us-trade/us-sees-gains-new-china-gpa-offer-says-big-gaps-still-remain>.
- 17 European Union Chamber of Commerce in China, *European Business in China Position Paper: 2015/2016* 106 (2015).

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§ 1:34. China—Applicability, qualifications & restrictions

The GPL generally applies to all procurements conducted with fiscal funds by any level of government.¹ However, there are several exemptions and thresholds that limit the GPL's application. First, the procurement of goods and services which are not listed in the centralized procurement catalogue, a list of goods and services that must be procured through a centralized agency, is not subject to the GPL unless it meets certain monetary thresholds.² Specifically, the GPL does not apply to the procurement of goods and services with a value of less than RMB 500,000³ (roughly \$80,000 USD).⁴ Similarly, the GPL does not apply to the procurement of works with a value of less than RMB 600,000.⁵

Second, the GPL does not apply to state-owned enterprises, regardless of whether they are using state funds to conduct the procurement.⁶ Given the amount of Chinese procurement conducted by state-owned enterprises, this creates a substantial exception to the GPL, one that has been a source of contention in China's negotiations to join the WTO GPA.⁷

Third, the GPL does not apply to military procurements or procurements concerning state security, emergencies or disaster relief.⁸ However, the GPL does require the Central Military Commission to issue its own set of regulations governing military procurement.⁹

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Footnotes

- ¹ GPL, Art. 2.
- ² GPL, Art. 2; *see also* Cao Fuguo, China's Government Procurement Policy and Institutional Framework: History, Structure, and Operation, in INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 323, 332–33 (2009).
- ³ RMB is the abbreviation for the Chinese Yuan.
- ⁴ Cao Fuguo, China's Government Procurement Policy and Institutional Framework: History, Structure, and Operation, in INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 323, 33 (2009).

§ 1:34.China—Applicability, qualifications & restrictions, International Government...

- 5 Cao Fuguo, China's Government Procurement Policy and Institutional Framework: History, Structure, and Operation, in INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 323, 33 (2009).
- 6 Cao Fuguo, China's Government Procurement Policy and Institutional Framework: History, Structure, and Operation, in INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 323, 33 (2009).
- 7 Cao Fuguo, China's Government Procurement Policy and Institutional Framework: History, Structure, and Operation, in INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 323, 33 (2009).
- 8 Rothery, China's Legal Framework for Public Procurement, 3 J. Pub. Procurement 370, 378 (2003).
- 9 GPL Art. 86.

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§ 1:35.China—Publication, International Government Contract Law § 1:35

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§ 1:35. China—Publication

China's procurement laws are intended to support the principles of transparency, competition, and impartiality.¹ In accordance with these principles, China requires that both centralized procurements—those procurements conducted under the central budget—and decentralized procurements—those procurements that are paid for using local funds—be published in the centralized procurement catalogue.² Information regarding government procurements must also be published in a timely manner through a media source designated by the department overseeing the procurement.³

For contractors seeking to bid on government contracts, China has an internet based bidding and procurement website. For a modest annual fee, a supplier can gain access to many public procurement solicitations.⁴

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Footnotes

- | | |
|--------------|--|
| ¹ | GPL, Art. 3. |
| ² | GPL, Art. 7. |
| ³ | GPL, Art. 11. |
| ⁴ | www.chinabidding.org |

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§ 1:36. China—Competition procedures and evaluation

Generally, under the GPL, the procurement of goods and services is subject to open tendering.¹ Selective tendering may be used if the goods or services can only be purchased from limited suppliers or if the costs of open tendering would be disproportionately higher than the total amount of the procurement.² When evaluating bids submitted through either open or selective tendering the government looks for the bid providing best value.^{2.30} Most often this means best price, but it may also include consideration of factors such as efficiency and quality.^{2.70}

In limited cases, competitive negotiation is allowed. Competitive negotiation is allowed where there is no bid or no sufficient bid; where the technical complexity or special nature of the procurement requires it; where the need is urgent; or where the total amount of tender cannot be calculated in advance.³ In these cases, the GPL provides guidelines for how the negotiation should be conducted. In particular, the regulations provide that an odd number of members are required for the panel facilitating the negotiation and at least three suppliers must participate.⁴ These guidelines are intended to promote transparency and fairness in this process.

Only in a situation where the government is procuring spot goods is the use of request for offer allowed.⁵ Here, as with competitive negotiation, odd numbers of members are required for the panel facilitating the negotiation and at least three suppliers must participate.⁶

Similarly, China allows for single source procurement only in limited circumstances. Single source procurement can be used only where one source is available; in an unforeseeable emergency; or where there is a necessity for delivery from the original supplier to ensure conformity with the original goods or services, but only if the additional delivery will not exceed ten percent of the amount of the original contract.⁷

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Footnotes

¹ GPL, Art. 27.

² GPL, Art. 29.

^{2.30} Rothery, China's Legal Framework for Public Procurement, 3 J. Pub. Procurement 370, 378 (2003).

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2.70	GPA, Art. 17; Rothery, China's Legal Framework for Public Procurement, 3 J. Pub. Procurement 370, 378 (2003).
3	GPL, Art. 30.
4	GPL, Art. 38.
5	GPL, Art. 32.
6	GPL, Art. 40.
7	GPL, Art. 31.

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§ 1:37. China—Judicial and administrative proceedings

Under the GPL, the government's authority over procurement contracts is limited. Contract law governs government procurement contracts and parties to the contract. As a result, civil remedies are available to parties, including remedies for default, contractual obligations, damages, interest and civil liability.¹

A supplier can make inquiries regarding a procurement to the applicable agency and the agency must respond in a timely matter.² A supplier has the right to challenge a procurement, by submitting a written challenge to the procuring agency within seven days of the actual or constructive knowledge of the grounds of the challenge.³ The procuring agency then shall respond to the challenging party and related suppliers within seven days.⁴ If the challenging supplier is not satisfied with the response, or a response is not given with the applicable time period, the challenger has the right to file a complaint with the applicable government entity within fifteen days after the end of the response period.⁵ The government entity then makes a decision within thirty working days after receipt of the complaint.⁶ The government entity has the ability to suspend the procurement, but must take that action within thirty days.⁷

In response to the challenge, the procurement can be terminated and another supplier awarded the contract.⁸ In the alternative, the supplier can be compensated.⁹

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Footnotes

- 1 Tong Xinchao, [Chinese Procurement Law: Current Legal Framework and a Transition to the World Trade Organization's Government Procurement Agreement](#), 17 Temp. Int'l & Comp. L.J. 139, 161 (2003).
- 2 GPL, Art. 51.
- 3 GPL, Art. 52.
- 4 GPL, Art. 53.
- 5 GPL, Art. 55.
- 6 GPL, Art. 56.
- 7 GPL, Art. 57.

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8 GPL, Art. 73.
9 GPL, Art. 73.

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§ 1:38. Japan

Prior to the 1980s, the Japanese government had little open competitive bidding and most public sector procurement was limited to local suppliers.¹ Ninety percent of the procurement done by Japan's central government used private contracts without public notice.² Japan is party to the GPA, which entered into force in January of 1996, and the GPA principles are the foundation for much of the public procurement in Japan.³

In Japan, the country's legislature passes laws which are then implemented through cabinet orders and ministerial ordinances. Notifications and ordinances provide further details regarding implementation of the laws.

The Accounts Law, which applies to the federal government, and Local Autonomy Law, which applies to local government, allow the central and local governments to use one of three types of procurement procedures: open tendering, selective tendering, or limited (single) tendering.⁴ Generally, open tendering is required.⁵ Notice is required and the contract is generally awarded to the lowest bidder.⁶ Selective tendering and limited tendering can be used only as specifically allowed for under the law.⁷ Under selective tendering, the government designates qualified suppliers that are allowed to participate in a procurement competition. Under limited tendering, procuring entities award contracts without open competition.

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Footnotes

- ¹ Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.L.R. 131 (1998).
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See also, Kusunoki, [Japan's Government Procurement Regimes for Public Works: A Comparative Introduction](#), 32 Brook. J. Int'l L. 523, 525–26 (2006–2007).

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- 5 Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.LR 131, 134 (1998).
- 6 Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.LR 131, 134 (1998).
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§ 1:39. Japan—Applicability and qualifications

Procuring entities make qualification determinations before suppliers are allowed to participate in procurements.¹ Once a supplier is determined to be qualified, it is placed on a list of qualified suppliers by that entity.² Because procurement is generally open to qualified suppliers and then awarded to the lowest price bidder, entities value qualification determinations.

Open tendering is open to all qualified suppliers, but, by law, selective tendering and limited tendering are available to smaller groups of suppliers. Government entities are authorized to use selective tendering procedures where it is deemed unnecessary to use open tendering because only a small number of suppliers are expected to participate or the use of open tendering procedures is deemed to be disadvantageous.³ The procuring agencies are then able to designate qualified suppliers that can participate in the procurement.

Limited tendering is authorized under the Agreement on Government Procurement for procurements that meet specific conditions. These conditions include: extreme urgency, a lack of successful participants in an open or selective procurement; the successful offeror failed to conclude the contract; exclusive goods are protected by exclusive rights (like a patent) so only a particular supplier can provide; entity procures a prototype of a good or service with results from experimental research undertaken by the government and that supplier.⁴

Both selective and limited tender can also be used when the contract does not meet certain monetary thresholds. For national government entities these thresholds are 130 million yen for goods and general services contracts, 6 billion yen for construction services contracts, and 600 million yen for technical services contracts.^{4.30} For local government entities these thresholds are 270 million yen for goods and services contracts, 20.2 billion yen for construction services contracts, and 2 billion yen for technical services contracts.^{4.70}

In addition, suppliers must satisfy specific criteria specified by the procuring agency. Requested criteria often includes production, sales performance, past business performance, number of employees, amount of capitalization, capital structure, financial condition, and general state of affairs.⁵ Suppliers may be asked to submit documentation to show that they are qualified. Documentation requested may include historical records of the company, financial statements, tax certificates, or similar information.⁶

§ 1:39.Japan—Applicability and qualifications, International Government Contract Law...

Suppliers can also be disqualified. Disqualification is made by a single procuring entity which then reports disqualifications to the Ministry of Finance.⁷ The Ministry of Finance maintains a list of disqualified suppliers and circulates the list to all government entities.⁸ Because the information is circulated among government agencies, disqualification by one entity can lead to disqualification by other entities. Suppliers can be disqualified because of incompetence, quasi-incompetence, or bankruptcy.⁹ Disqualification can also occur when a supplier commits a disqualifying act. These include:

- Intentional production of low quality goods or dishonest behavior related to quality of goods
- Obstruction of fair tendering procedures
- Interference with the completion of a contract by a successful tendered
- Impeding a inspection of the performance of the contract by government official
- Failure to perform a contract without a valid reason
- Employment of a person who has engaged in any of these disqualifying acts within two years¹⁰

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Footnotes

- 1 Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.LR 131, 135 (1998).
Reiji Takahashi & Makoto Terazaki, Japan, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 138, 139 (2011).
- 2 Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.LR 131, 134 (1998).
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[Kusunoki, Japan's Government Procurement Regimes for Public Works: A Comparative Introduction](#), 32 Brook. J. Int'l L. 523, 527 (2006–2007).
- 4 World Trade Organization, Agreement on Government Procurement, Art. XV.
See also, Kusunoki, [Japan's Government Procurement Regimes for Public Works: A Comparative Introduction](#), 32 Brook. J. Int'l L. 523, 525–26 (2006–2007) (discussing circumstances for which limited tendering can be used under the Accounts Act).
- 4.30 Ministry of Foreign Affairs of Japan, Suggestions for Accessing the Government Procurement Market of Japan 6 (2014).
- 4.70 Ministry of Foreign Affairs of Japan, Suggestions for Accessing the Government Procurement Market of Japan 6 (2014).
- 5 Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.LR 131, 136 (1998).
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§ 1:39.Japan—Applicability and qualifications, International Government Contract Law...

- 9 Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.LR 131, 135 (1998).
- 10 Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.LR 131, 136 (1998).
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§ 1:40. Japan—Publication, International Government Contract Law § 1:40

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§ 1:40. Japan—Publication

Under open tendering, notice is published in the official government procurement publication, the Kanpo, inviting all qualified suppliers to participate in the competition.¹ Under selective tendering, a notice is published in the Kanpo or its equivalent at the local level, allowing for suppliers who have not been designated for the procurement to offer a tender.² Under limited tendering, publication is required at least 20 days in advance of the planned awarding of the contract.³

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- ¹ Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.L.R. 131, 137 (1998).
- ² Ministry of Foreign Affairs of Japan, Suggestions for Accessing the Government Procurement Market of Japan 12 (2014) <http://www.mofa.go.jp/files/000037391.pdf>.
- ³ Ministry of Foreign Affairs of Japan, Suggestions for Accessing the Government Procurement Market of Japan 13 (2014) <http://www.mofa.go.jp/files/000037391.pdf>.

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§ 1:41. Japan—Competition procedures/evaluation

Procuring government entities publish notice of tender opportunities in the Kanpo.¹ The notice is required to contain information for suppliers on where to find detailed tender documentation as the date and place of any informational meetings. The tender documentation must include a description of the products or services to be procured; qualifications in relation to business and technical capabilities required for suppliers; obligations of suppliers; provision of information to suppliers; criteria for awarding the contract; and basic contract provisions.²

Sealed proposals must then be submitted to the place by the date and time included in the published notification. Generally, the procuring agency must select the supplier proposing the lowest price.³ Under Japan's public procurement system, contracts are awarded to the low price bidder, as long as the bid is below the estimate by the procuring entity.⁴ Once a bidder places its bid, revisions or improvements to the bid are not allowed.⁵ Some observers note that this kind of procurement system can lead to bid-rigging.⁶ To avoid “dumping” or overly low bids, the government uses two types of systems: investigations in the low-price bids and minimum values.⁷ Under the investigation system, a bid under the government agency's estimate triggers an investigation into the price.⁸ Under the minimum value system, used only by the local governments in Japan, any bid falling under a certain fixed price is automatically disqualified.⁹

A procuring agency can award the contract to the second lowest offeror when the supplier offering the lowest price will be unable to perform the contract adequately because the proposed price is extraordinarily low or if it awarding the contract to the lowest price offeror would not be in the interests of fair and orderly trade.¹⁰ For contracts in certain sectors, namely computers, satellites, medical technology, and telecommunications, central government entities are allowed to use a “overall greatest value methodology” to evaluate proposals.¹¹ Under this methodologies, procuring entities consider the technical and functional merits of a proposal as well as the price.

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¹ Ministry of Foreign Affairs of Japan, Suggestions for Accessing the Government Procurement Market of Japan 12 (2014) <http://www.mofa.go.jp/files/000037391.pdf>.

§ 1:41.Japan—Competition procedures/evaluation, International Government Contract...

- 2 Ministry of Foreign Affairs of Japan, Suggestions for Accessing the Government Procurement Market
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- 3 Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.LR 131,
138 (1998).
- 4 Nobuaki Mukai, *Japan*, in *International Public Procurement: A Guide to Best Practice*, 291, 291
(Roberto Hernandez Garcia ed., 2009).
- 5 Nobuaki Mukai, *Japan*, in *International Public Procurement: A Guide to Best Practice*, 291, 291
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- 6 Nobuaki Mukai, *Japan*, in *International Public Procurement: A Guide to Best Practice*, 291, 291
(Roberto Hernandez Garcia ed., 2009).
- 7 Nobuaki Mukai, *Japan*, in *International Public Procurement: A Guide to Best Practice*, 291, 295
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- 8 Nobuaki Mukai, *Japan*, in *International Public Procurement: A Guide to Best Practice*, 291, 295
(Roberto Hernandez Garcia ed., 2009).
- 9 Nobuaki Mukai, *Japan*, in *International Public Procurement: A Guide to Best Practice*, 291, 295
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- 10 Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.LR 131,
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§ 1:42.Japan—Challenges to procurement & procurement oversight, International...

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§ 1:42. Japan—Challenges to procurement & procurement oversight

Japan has a system for bid protests regarding the governmental conduct of procurements applicable to all the central government entities covered by the GPA. This system provides for the review of complaints regarding government procurement of goods and services in an effort to provide transparency and competitiveness in the government procurement system. Two Japanese government entities oversee the procurement process—the Office of Government Procurement Review (OGRE) and the Government Procurement Review Board (GPRB).¹ The process for a complaint is as follows:

- A complaint may be filed with the Board within 10 days after the basis for the complaint is known.
- Board reviews within 7 days and determines whether it will be accepted for review. If accepted for review, the Board issues notice publically and to affected parties.
- The procuring entity is required to give the Board a report. Complainant has an opportunity to disagree with the report, make statements to the GPRB or request a review by the GPRB.
- Generally, a report on findings will be drawn up within 90 days by the GPRB.²

If the GPRB finds that the procurement was inconsistent with the AGP or other applicable provisions, it will make recommendations with its report. As a rule, the procuring entity is required to follow the recommendation of the GPRB, however, the recommendation is not legally binding.³ In the event that the procuring entity chooses not to follow the GPRB's recommendation it must provide the board with reasons for this decision within 10 days of its receipt of the recommendation.⁴

Local governments have their own complaint mechanisms that vary by location.

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Footnotes

- ¹ Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.L.R. 131, 140 (1998).
- ² Jean Heilman Grier, An overview of the Japanese government procurement system, 6 P.P.L.R. 131, 140–41 (1998).

§ 1:42.Japan—Challenges to procurement & procurement..., International...

Reiji Takahashi & Makoto Terazaki, Japan, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 138, 140–41 (2011). A timeline of the complaint review process is available on the website for the Office for Government Procurement Challenge System at <http://www5.cao.go.jp/access/english/fig2-e.html>.

3 Reiji Takahashi & Makoto Terazaki, Japan, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 138, 141 (2011).

4 Reiji Takahashi & Makoto Terazaki, Japan, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 138, 141 (2011).

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§ 1:43.The Republic of Korea (“South Korea”), International Government Contract Law...

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§ 1:43. The Republic of Korea (“South Korea”)

The Korean government procurement system is based on the principles of equal treatment, competition, and transparency.¹ Generally, government procurement is done by competitive bidding. The details of the competitive bidding are publicized and award of a contract is made in accordance with established statutory and regulatory standards. Sole source contracting and designated competitive bidding, where a specific number of contractors are designated to compete for a contract, are permitted in certain circumstances.²

The Public Procurement Service is the central procurement agency in South Korea, handling general government procurement.³ Defense related procurement, including the procurement of weapons and other military items, is handled by the Defense Acquisition Program Administration.⁴ Entities covered by procurement regulations include government agencies, local governments, and other agencies specifically designated. Some private entities, created pursuant to public regulation, are also covered by procurement laws. These include private schools established pursuant to the Private School Act and social welfare organizations created pursuant to the Social Welfare Services Act.⁵

Procurements involving United States contractors are now also governed by the U.S.—South Korea Free Trade Agreement (KORUS). This agreement entered into force in March of 2012 and includes provisions regulating public procurement by the two nations.⁶ While the agreement largely reaffirms the current practices of the two nations, such as adherence to the WTO Agreement on Government Procurement and the use of electronic procurement tools, it also expands the number of contracts on which U.S. contractors have a right to bid.⁷ U.S. contractors may now bid on contracts valued at \$100,000 or more, whereas the WTO had only ensured this right for contracts above \$200,000.⁸ The agreement also provides U.S. contractors with access to contracts from nine additional South Korean central government agencies, such as the South Korean Fair Trade Commission and the South Korean Broadcasting Commission.⁹

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¹ South Korea has enacted several government procurement statutes including the Government Procurement Act, The Act on Contract to Which the State is a Party (Government Contracts Act”), and the Act on Contracts to Which a Local Government is a Party.

§ 1:43.The Republic of Korea (“South Korea”), International Government Contract Law...

- 2 Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global
Legal Group (2011) at p. 127.
- 3 Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global
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- 4 Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global
Legal Group (2010) at p. 127.
- 5 Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global
Legal Group (2011) at p. 128.
- 6 U.S.—South Korea Free Trade Agreement, Chap. 17.
- 7 *See* U.S.—South Korea Free Trade Agreement, Chap. 17; United States Trade Representative,
Government Procurement Benefits in the U.S. South Korea Trade Agreement, <http://www.ustr.gov/uskoreaFTA/procurement>.
- 8 U.S.—South Korea Free Trade Agreement, Chap. 17, Annex 17-A; United States Trade
Representative, Government Procurement Benefits in the U.S. South Korea Trade Agreement, <http://www.ustr.gov/uskoreaFTA/procurement>.
- 9 U.S.—South Korea Free Trade Agreement, Chap. 17, Annex 17-A; United States Trade
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§ 1:44. The Republic of Korea (“South Korea”)—Applicability..., International...

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§ 1:44. The Republic of Korea (“South Korea”)—Applicability & qualifications

The government procurement laws apply to contracts for goods and services including supply contracts, service contracts, and construction contracts. Generally, the PPS handles the procurement for contracts over Korean Won (“KRW”) 100 million.¹ If a contract is less than 100 million, the government agency has the authority to handle the procurement.² For construction contracts, the procuring agency can handle contracts up to KRW 3 billion.³

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- ¹ Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 128.
- ² Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 128.
- ³ Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 128.

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§ 1:45.The Republic of Korea (“South Korea”)—Publication, International Government...

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§ 1:45. The Republic of Korea (“South Korea”)—Publication

For supply and service contracts, the procuring agency sends procurement requests to the PPS through the national integrated electronic procurement system.¹ The PPS then publicizes the bids after evaluating the bid and determining the estimated contract price.²

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Footnotes

- ¹ Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 128.
- ² Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 128.

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§ 1:46.The Republic of Korea (“South Korea”)—Competition..., International...

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§ 1:46. The Republic of Korea (“South Korea”)—Competition on procedures and evaluation

Proposals are sent to the PPS which evaluates bids and selects a successful bidder. Generally, the PPS selects the party that has proposed the most advantageous terms to the government.¹ The most important criteria in the evaluation process is whether the bidder can perform the work within the estimated price.²

“Two stage bidding” can also be used in some circumstances. The first stage of the bidding is a specification or technical stage with the second stage being the price bidding stage.³ This is typically used when it is difficult to prepare an appropriate specification or if a single competition is difficult due to the nature of the contract.⁴

Sole source contracting is only permitted in very limited circumstances, including emergencies and when state secrets are involved.⁵

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Footnotes

- ¹ Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 129.
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- ⁴ Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 129 (citing the Act on Contracts to Which the State is a Party, Art. 18).
- ⁵ Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 130.

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§ 1:47. The Republic of Korea (“South Korea”)—Judicial and..., International...

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§ 1:47. The Republic of Korea (“South Korea”)—Judicial and administrative proceedings

For dispute resolution, many contracts include arbitration and many contract disputes are settled this way.¹ If there is not an arbitration provision in the contract, disputes can be resolved by filing a lawsuit with the relevant court in accordance with the Civil Procedure Act.² Generally, the law treats government contracts the same as contracts between two civilian parties.

The applicable laws allows the government to restrict participation of potential contractors in the procurement process in some circumstances. The government is required to restrict bidding for up to two years if there are concerns that a particular bidder will interfere with fair competition or performance of contracts or if participation is inappropriate for other reasons.³ Participation in procurement by bidders who have engaged in faulty construction, committed unjustifiable acts, caused harm to employees or other parties by committing fraud or a breached duty of care must be restricted.⁴

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- ¹ Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 130.
- ² Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 130.
- ³ Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 129 (citing the Act on Contracts to Which the State is a Party, Art. 27).
- ⁴ Hyeong Gun Lee, International Comparative Legal Guide to Public Procurement 2011: Korea, Global Legal Group (2011) at p. 129 (citing the Article 76 of Act on Contracts to Which the State is a Party, Enforcement Decree).

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§ 1:48.India, International Government Contract Law § 1:48

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§ 1:48. India .50

Twenty-nine states and seven centrally administered regions compose India's quasi-federal structure.¹ The Constitution of India provides for fundamental rights which prohibit the government from unequal, discriminatory, or arbitrary treatment of the people.² These fundamental principles are the foundation of India's procurement policy.³ India's independent judiciary has mandated through case law that the government adopt fair procurement policies.⁴ However, there is no centralized legislation on procurement.⁵

In 2006, the government issued three manuals on the procurement of goods, services, and works.⁶ These manuals include compiled information on the government's policy regarding procurement under the stated goals of promoting transparency, competition and fairness. The following explanation of the procurement process is provided for in these manuals, rather than in a centralized piece of legislation.

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While India does not currently have a centralized procurement law, at the time that this insert was published, the Indian parliament was considering enacting such legislation. Public Procurement Bill, 2012, Bill No. 58 of 2012. If enacted this bill would codify the nation's public procurement regulations in order to promote competition, ensure transparency, and provide fair and equitable treatment of bidders. Public Procurement Bill, 2012, Bill No. 58 of 2012, Art. 5(1). Among its most important provisions, the bill would require notice of procurements, mandate the inclusion of certain information in procurement notices, establish evaluation criteria upon which bids may be assessed, and set out the methods of procurement that the government may use. Public Procurement Bill, 2012, Bill No. 58 of 2012, Arts. 14, 15, 21, 29. In November of 2015, the Modi government reintroduced and revamped the 2012 public procurement bill, to increase transparency in public procurement and promote free trade talks with other nations. The new bill, entitled "Public Procurement Bill, 2015," also proposes a uniform, streamlined procurement process. A draft of the bill is set to be released in 2016.

¹ Sumeet Kachwaha, *India, in International Public Procurement: A Guide to Best Practice*, 267, 267 (Roberto Hernandez Garcia ed., 2009).

² Sumeet Kachwaha, *India, in International Public Procurement: A Guide to Best Practice*, 267, 267 (Roberto Hernandez Garcia ed., 2009).

§ 1:48.India, International Government Contract Law § 1:48

- 3 Sumeet Kachwaha, *India*, in *International Public Procurement: A Guide to Best Practice*, 267, 267 (Roberto Hernandez Garcia ed., 2009).
- 4 *See* Erusian Equip. & Chems Ltd. v. State of West Bengal, 1 S.C.C. 70 (1975) (India).
- 5 Sumeet Kachwaha, *India*, in *International Public Procurement: A Guide to Best Practice*, 267, 272 (Roberto Hernandez Garcia ed., 2009). At least two states have procurement laws.
- 6 Sumeet Kachwaha, *India*, in *International Public Procurement: A Guide to Best Practice*, 267, 268 (Roberto Hernandez Garcia ed., 2009).

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§ 1:49. India—Applicability, qualifications & restrictions, International Government...

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§ 1:49. India—Applicability, qualifications & restrictions

Under the guidance provided by the three 2006 procurement manuals, each type of procurement has its own thresholds and requirements. For the procurement of work up to 10 lakh,¹ a Ministry or Department may directly execute repair work or assign the work to any Public Works Organization.² For the purchase of goods, a Ministry or Department may issue a purchase order for the procurement of goods costing less than one lakh and may purchase goods of less than 10 lakh if it uses a letter of acceptance which includes the scope of the work and general and special conditions.³ For the hiring of any consultant that costs less than 10 lakh, the selection can be done by direct negotiation, a form of single source selection,⁴

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Footnotes

- ¹ Lakh is the term used for 100,000 rupees and is roughly equivalent to \$2,200 U.S.
- ² Government of India, Ministry of Finance, Manual on Policies and Procedure for Procurement of Work, at p. 5, available at http://www.finmin.nic.in/the_ministry/dept_expenditure/GFRS/Structure%20CP%20WG.pdf.
- ³ Government of India, Ministry of Finance, Manual on Policies and Procedure for Procurement of Goods, at p. 23, available at http://finmin.nic.in/the_ministry/dept_expenditure/acts_codes/MPProc4ProGod.pdf.
- ⁴ Government of India, Ministry of Finance, Manual of Policies and Procedures of Employment of Consultants, at p. 3, available at http://finmin.nic.in/the_ministry/dept_expenditure/GFRS/MPProc4ProCons.pdf.

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§ 1:50. India—Publication

Any invitation to tender above a value of Indian Rupees (“Rs”) 2.5 million must be published in the *Indian Trade Journal* and in a national newspaper with wide circulation as well as on the website of the procuring agency.¹ Foreign tenders are to be publicized by sending notice of tender to the relevant embassies and posting the notice on the embassy websites.²

The requirement for publication can be excepted for urgent needs, if the procuring authority can show why it is not in the public interest to procure goods or services through publication, or if the sources of the goods or services are known and there is little chance of finding new sources.³ If a situation meets one of these exceptions to the publication requirement, a limited tender enquiry can be sent simultaneously to all firms registered with the organization.⁴

In 2011, India's Ministry of Finance updated the nation's regulations regarding publication of procurement notices by requiring e-publication.⁵ Specifically, all tender enquiries or requests for proposals must now be published on the Central Public Procurement Portal.⁶

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- ¹ Sumeet Kachwaha, *India*, in *International Public Procurement: A Guide to Best Practice*, 267, 269 (Roberto Hernandez Garcia ed., 2009).
- ² Sumeet Kachwaha, *India*, in *International Public Procurement: A Guide to Best Practice*, 267, 269 (Roberto Hernandez Garcia ed., 2009).
- ³ Sumeet Kachwaha, *India*, in *International Public Procurement: A Guide to Best Practice*, 267, 269 (Roberto Hernandez Garcia ed., 2009).
- ⁴ Sumeet Kachwaha, *India*, in *International Public Procurement: A Guide to Best Practice*, 267, 269 (Roberto Hernandez Garcia ed., 2009).
- ⁵ Ministry of Finance Order, Mandatory publication of Tender Enquiries on the Central Public Procurement Portal, Nov. 30, 2011.
- ⁶ Ministry of Finance Order, Mandatory publication of Tender Enquiries on the Central Public Procurement Portal, Nov. 30, 2011. This portal may be accessed at <http://www.eprocure.gov.in/>.

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§ 1:51. India—Competition procedures and evaluation, International Government Contract...

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§ 1:51. India—Competition procedures and evaluation

Tenders must be received in a transparent manner, either through a tender drop box or through hand delivery.¹ All tenders received on time are to be opened at a designated time, date and place in the presence of authorized personnel.² Bids are to be made in two separate sections—technical bids and financial bids.³ The financial bids are only examined for those bids that are technically acceptable.⁴

Generally, the lowest price bid that is responsive and technically acceptable is accepted, after a price reasonableness evaluation is done.⁵ The price reasonableness evaluation looks at:

- the last purchase price of the same or similar goods;
- the current market price of same or similar goods;
- costs analysis; and
- quantity, terms of delivery, and period of delivery.⁶

If the evaluation finds the price to be unreasonable, the government can attempt to negotiate with bidder.⁷ If the negotiation is unsuccessful, the contract may be rebid.⁸

In some situations, price is not the only factor considered in the evaluation.⁹ If the procurement is for sophisticated or expensive equipment, the purchasing authority can consider other factors like past performance or maintenance and operations costs.¹⁰ Additional evaluation factors must be clearly expressed in the tender enquiry.¹¹

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- ¹ Sumeet Kachwaha, *India*, in *International Public Procurement: A Guide to Best Practice*, 267, 269 (Roberto Hernandez Garcia ed., 2009).
- ² Sumeet Kachwaha, *India*, in *International Public Procurement: A Guide to Best Practice*, 267, 269 (Roberto Hernandez Garcia ed., 2009).

§ 1:51.India—Competition procedures and evaluation, International Government Contract...

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(Roberto Hernandez Garcia ed., 2009).
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(Roberto Hernandez Garcia ed., 2009).
- 5 Sumeet Kachwaha, *India, in International Public Procurement: A Guide to Best Practice*, 267, 272
(Roberto Hernandez Garcia ed., 2009).
- 6 Sumeet Kachwaha, *India, in International Public Procurement: A Guide to Best Practice*, 267, 272
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- 9 Sumeet Kachwaha, *India, in International Public Procurement: A Guide to Best Practice*, 267, 272
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- 10 Sumeet Kachwaha, *India, in International Public Procurement: A Guide to Best Practice*, 267, 272
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- 11 Sumeet Kachwaha, *India, in International Public Procurement: A Guide to Best Practice*, 267, 272
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§ 1:52. India—Judicial and administrative proceedings, International Government...

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IV. China, Japan, Korea, and India

§ 1:52. India—Judicial and administrative proceedings

When disputes arise in the various types of procurements there are differing approaches to resolution, For the procurement of work, disputes regarding performance are referred to the Dispute Resolution Board, while disputes over the interpretation or arising from specifications, designs, drawings and instructions are settled by a government arbitrator.¹ For the procurement of goods, disputes are to be settled first by discussions between the parties and then by arbitration.² For the hiring of consultants, contracts simply must include provisions informing the contractor of the law that will be applied and the forum where any dispute will be heard.³

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Footnotes

- ¹ *Ministry of Finance, Manual on Policies and Procedure for Procurement of Works*, Government of India, 11 (2006), available at <https://www.finmin.nic.in/sites/default/files/Structure%20CP%20WG.pdf> (last visited July 5, 2018).
- ² *Ministry of Finance, Manual on Policies and Procedure for Procurement of Works*, Government of India, 100–01 (2006), available at <https://www.finmin.nic.in/sites/default/files/MPProc4ProGod.pdf> (last visited July 5, 2018).
- ³ *Ministry of Finance, Manual on Policies and Procedure for Procurement of Works*, Government of India, 25 (2006), available at <https://www.finmin.nic.in/sites/default/files/MPProc4ProCons.pdf> (last visited July 5, 2018).

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§ 1:53. Introduction

With several of the world's largest economies, South and Central America provide substantial procurement markets. Led by Brazil, with a GDP of \$3.135 trillion in 2015 and expanding presence in the international economy,¹ much of the Latin American region has experienced a significant recovery from the international economic downturn that occurred in the latter half of the past decade.² Going forward, the region is expected to see continued economic growth, as well as increased public sector spending.³

This section looks at the procurement systems in Brazil, Mexico, and Chile. The procurement systems of these three nations share some basic features. The three systems are centralized within the national government and generally favor open bidding based on the principles of fair competition and transparency. The three systems also include similar exemptions from open bidding procedures in the case of emergency or military use procurements. The procurement systems also have differences. While Chile's system is open to foreign and domestic bidders, Brazil's system places some restrictions on foreign bidders and gives a preference to domestic suppliers. Brazil's system also offers some less common forms of procurement, namely a contest bid procedure where parties are called upon to present technical, scientific or artistic works and the winners are awarded prizes or cash, and an auction procedure which the government can use to sell moveable assets, seized products and real estate. Additionally, while Mexico and Chile tend to take a best value approach to evaluation, looking at the overall conditions and merits of the proposed bid, Brazil favors lowest price evaluations.

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- ¹ CIA World Fact Book, <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/br.html>.
- ² Latin America Hurls Towards Recovery, but Must Improve Productivity, World Bank, Sept. 14, 2010, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:22702313~pagePK:146736~piPK:146830~theSitePK:258554,00.html>.
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§ 1:54. Brazil

Public procurement in Brazil is provided for in the Federal Constitution which generally requires public bid proceedings that ensure equal conditions to all bidders.¹ Federal Law 8666 of June 21, 1993 is the primary law governing public procurement. States and localities may supplement federal laws, as long as the state and local laws do not violate the principles and provisions of Law 8666.² The principles governing public procurement in Brazil include free competition, equality among competitors, publicity, and public interest.³

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Footnotes

- ¹ The World Bank, Brazil Overview, <http://www.worldbank.org/en/country/brazil/overview>.
² Ricardo Pagliari Levy, The law on government procurement in Brazil, 1 P.P.L.R. 15 (2001).
The World Bank, Assessment of the Procurement Systems of the Brazilian Federal Government and the Brazilian State of São Paulo 34-35 (2010) (discussing procurement law in São Paulo).
³ Julio Cesar Bueno & Ricardo Pagliari Levy, *Brazil, in International Public Procurement: A Guide to Best Practice*, 131, 132 (Roberto Hernandez Garcia ed., 2009).

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§ 1:55. Brazil—Overview

Brazil has two procurement laws that generally govern the nation's procurement system. The first is Federal Law 8666 of 1993, which governs traditional procurement. This law provides the framework for when certain methods of procurement may or may not be used, establishes requirements for drafting and executing contracts, and lays out procedures for challenging administrative decision in the procurement process.¹ The second law is Federal Law 10520 of 2002, which regulates the use of reverse auctions for the purchase of off-the-shelf goods and non-consulting services.² This alternative method to traditional competitive bidding was enacted as part of an effort to improve the efficiency of the nation's procurement system.³

Additionally, Brazil has established a special procurement regime through Federal Law 12462 of 2011, which was intended to speed up procurements related to the 2013 FIFA Confederations Cup, the 2014 World Cup, and the 2016 Olympic and Paralympic Games.⁴ Under this regime there are numerous differences from the nation's normal procurement procedures, but several deserve special attention. First, the law reduces the minimum time for advertising invitations to bid.⁵ Second, invitations for bids related to these events will not include the government's general budget as a reference price for the project.⁶ Third, the law creates a new evaluation criteria based on “highest discount” provided by the bidder as compared to the government's budget.⁷ Fourth, the regime imposes harsher administrative penalties for defective performance and wrongful conduct, such as fraud.⁸

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- ¹ The World Bank, Assessment of the Procurement Systems of the Brazilian Federal Government and the Brazilian State of São Paulo 29 (2010).
- ² The World Bank, Assessment of the Procurement Systems of the Brazilian Federal Government and the Brazilian State of São Paulo 33 (2010).
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- ⁴ Claudia Elena Bonelli & Celia Maria Nicolau Rodrigues, Brazil, in *THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT* 2012 35, 37 (2011).

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§ 1:56. Brazil—Applicability, qualifications & restrictions

The requirement for open bid proceedings can be waived in certain circumstances. One requirement for waiver is monetary thresholds. The thresholds include: R\$15,000 for engineering works and services; R\$8000 for other acquisitions, disposals or services; R\$30,000 for acquisitions, works, and services contracted by mixed capital companies; and R\$16,000 for acquisitions, works, and services contracted by government owned companies, independent agencies and foundations that qualify as executive agencies.¹ Other instances where waiver of this requirement is allowed include:

- Emergencies
- When there are no interested parties in the first bid proceedings and a repeat bid procedure would adversely affect the Administration
- When the government has to intervene in the economy to control prices or normalize supply
- For material intended for the Armed Forces and except for personal items and office supplies²

There are also limited circumstances where bid proceedings are not applicable because no competitive conditions exist. Bid proceedings are inapplicable for the acquisition of materials, equipment, or items that can only be supplied by a single manufacturer or producer, where the government is contracting for certain specialized technical services, or where the government is contracting with a renowned artist.³

Brazil imposes some restrictions on foreign bidders. For example, if a consortia of Brazilian and foreign companies is bidding on a project in Brazil, the Brazilian company must be the consortium leader.⁴ Additionally, in 2010 the nation passed a new law allowing for a 25 percent price preference for goods and services made in Brazil.⁵

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- ¹ Ricardo Pagliari Levy, The law on government procurement in Brazil, 1 P.P.L.R. 15, 16 (2001) (citing Art. 24 of Federal Act 8666/93).
- ² Ricardo Pagliari Levy, The law on government procurement in Brazil, 1 P.P.L.R. 15, 16–17 (2001) (citing Art. 24 of Federal Act 8666/93).

§ 1:56.Brazil—Applicability, qualifications & restrictions, International Government...

For a more extensive list of exemptions to open bidding proceeding *see* The World Bank, Assessment of the Procurement Systems of the Brazilian Federal Government and the Brazilian State of São Paulo 32 (2010).

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§ 1:57. Brazil—Publication

Bids are solicited through use of a bidding prospectus. A bidding prospectus must include general information including the type of bid, the location/date/time for submission of the bid, and the subject of the bid. A working plan, a budget estimate, and a draft agreement must be attached to the bidding prospectus.¹

For all procurements, other than sole-source transactions, the prospectus must be publicly advertised. Most often this requires that the prospectus be placed on ComprasNet, the nation's official website for public procurement opportunities, and in the Federal Official Gazette.² For contracts valued at over \$150,000 the government must also publish the prospectus in a widely circulated newspaper.³ Once published, an interested party may challenge the prospectus up to two days prior to the opening of bids.⁴ However, third parties must challenge the prospectus at least five days prior to bid opening.⁵

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Footnotes

- ¹ Julio Cesar Bueno & Ricardo Pagliari Levy, *Brazil*, in *International Public Procurement: A Guide to Best Practice*, 131, 137 (Roberto Hernandez Garcia ed., 2009).
- ² The World Bank, *Assessment of the Procurement Systems of the Brazilian Federal Government and the Brazilian State of São Paulo* 59 (2010).
- ³ The World Bank, *Assessment of the Procurement Systems of the Brazilian Federal Government and the Brazilian State of São Paulo* 59 (2010).
- ⁴ Julio Cesar Bueno & Ricardo Pagliari Levy, *Brazil*, in *INTERNATIONAL PUBLIC PROCUREMENT: A GUIDE TO BEST PRACTICE* 131, 138 (2009).
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§ 1:58. Brazil—Competition procedures and evaluation

The Brazilian government is required to provide open competition for virtually all contracting.¹ Historically, the government has accomplished this through the use of various forms of competitive bidding. Full and open competitive bidding (*concorrência*) is required for public works and engineering services contracts above R\$1.5 million and for contracts for goods of R\$650,000 or more, but may also be used for smaller contracts at the discretion of the procuring agency.² For the procurement of public works and engineering services between R\$150,000 and R\$1.5 million or for goods up to R\$650,000, the government must use a request for quotation process (*tomada de preços*) that is open to all bidders who have registered in the federal government supplier database.³ For public works and engineering services of R\$150,000 or less or for goods of R\$80,000 or less, the government can use an invitation to bid process (*convite*), where at least three bidders must be invited to participate.⁴ Finally, for the procurement of technical, scientific or artistic work, the government may use contest bidding (*concurso*), through which a grant or prize is awarded to the winning submission.⁵

Evaluation of bids submitted under competitive bidding are generally evaluated under a two-step process. Bids are first evaluated for technical qualification.⁶ Bids that are found technically acceptable are then evaluated for price, with the contract going to the qualified bidder who submits the lowest price.⁷

Despite the multiple levels of competitive bidding, commentators have noted that procurement under the stringent and formulaic Federal Law 8666 tends to be slow and inefficient.⁸ In order to address this problem, Brazil enacted Federal Law 10502 of 2002 to regulate the procurement of common goods and services. Under this law the government may use a reverse auction process to procure goods and services that can be described with usual market specifications.⁹ While the implementation of these reverse auctions has made the procurement of common goods and services more efficient and transparent, procurement of works remains inefficient and corruption remains frequent.¹⁰

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Footnotes

¹ Article 37, item XXI of the 1988 Federal Constitution; Federal Law No. 8666 of June 21, 1993 as amended (“Law 8666/93”).

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- 8 Julio Cesar Bueno & Ricardo Pagliari Levy, Brazil, in INTERNATIONAL PUBLIC PROCUREMENT: A GUIDE TO BEST PRACTICE 131, 150 (2009).
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§ 1:59. Brazil—Judicial and administrative proceedings

Bidders that wish to protest procurement procedures and decisions must first do so with the authority that conducted the procurement.¹ These appeals are subject to strict time requirements for both the bidder and the reviewing agency. For a protest of a decision regarding bidding documents, a bidder must file five days prior to bid opening and the agency must then respond within three days.² For a decision during the bidding process, bidders must file within two to five days, depending on the procurement method, after the decision is publicized and the agency must then decide within five days of filing.³ Bidders who wish to challenge an agency decision may then appeal to the Supreme Audit Institution.⁴ Bidders may also bypass the appeals process and go directly to the Supreme Audit Institution, but such challenges to the procurement process are not subject to statutory time frames and may draw out the procurement in question.⁵

Additionally, bidders and other interested parties can access the general court system at any point in the procurement process to seek instant relief or claim damages.⁶ Such suits are not subject to the expedited time frame of the protest process and subsequently have varying statutes of limitations and no specific time frame for a decision.⁷

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- ¹ The World Bank, Assessment of the Procurement Systems of the Brazilian Federal Government and the Brazilian State of São Paulo 48 (2010).
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- ³ The World Bank, Assessment of the Procurement Systems of the Brazilian Federal Government and the Brazilian State of São Paulo 48 (2010).
- ⁴ The World Bank, Assessment of the Procurement Systems of the Brazilian Federal Government and the Brazilian State of São Paulo 48 (2010).
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§ 1:60. Mexico

Under Mexico's Constitution, any government agency with contracting authority must buy goods or services through public bids to guarantee the best price, quality, financing, efficiency, equal treatment and opportunity.¹ This law serves as the foundation for all public procurement in Mexico and has resulted in public open tendering as the prominent type of procurement procedure. Other methods, like direct award or the issuing of invitations to bid, can be used in cases of emergencies or for national security reasons.²

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Footnotes

¹ Mexican Constitution, Art. 134

² Roberto Hernandez-Garcia, International Comparative Legal Guide Series: Mexico, Global Legal Group (2010) at p. 178.

§ 1:61.Mexico—Overview, International Government Contract Law § 1:61

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§ 1:61. Mexico—Overview

The procurement laws, Public Works and Related Services Law (“PWRS”) and the Buying of Goods, Leasing, and Rendering of Services of the Public Sector Law (“BGLRS”), are enforced by the Ministry of Public Function, the Ministry of Economy, and the Ministry of Finance.¹ Under these provisions, awards decisions are generally based on both conditions and price and not based solely on lowest price.² Bidders must comply with all specifications and can be excluded from any procurement where they do not comply with bid instructions.³

Mexico is also subject to the procurement provisions of the North American Free Trade Agreement (NAFTA).⁴ In general these provisions apply to the procurement of goods, services, and construction services.⁵ They ensure that U.S. and Canadian companies are provided nondiscriminatory rights when bidding for Mexican procurements.⁶ This includes requirements that Mexico provide public notification of procurements, that bids generally be evaluated without regard for the nationality of the bidding company, and that bidders have the opportunity to challenge any aspect of the procurement process.⁷

Many parties are critical of the current procurement system in Mexico including the public officials, contracting agencies, and private parties. Critics point out the system's problems, like excessive legislation, difficulties with the controlling entities, and awards being subject to challenge from politicians.⁸ Critics also note that the system lacks consistency both between federal agencies and between the federal and local levels.⁹ As a result of these inconsistencies and the general confusion that they cause, some allege that contractors with inside information can manipulate the system to their advantage and undermine public faith in the procurement regime.¹⁰

To address concerns regarding corruption in public procurement, Mexico enacted the Anti-Corruption in Public Contracts Law (*Ley Federal Anticorrupción en Contrataciones Públicas*) in June of 2012.¹¹ This law prohibits both foreign and domestic contractors from promising bribes related to public contracts, attempting to participate in federal public contracting while otherwise prohibited from doing so, and engaging in acts or omissions designed to evade public procurement rules and regulations.¹² Violations of the law subject individuals to fines ranging from \$5,000 to \$250,000, while corporations may be fined between \$50,000 and \$10 million.¹³ Additionally, offenders may be excluded from future procurements, with suspensions lasting up to eight years for individuals and 10 years for companies.¹⁴

§ 1:61.Mexico—Overview, International Government Contract Law § 1:61

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- 4 North American Free Trade Agreement, Art. 1001.
- 5 International Trade Administration, North American Free Trade Agreement, http://www.export.gov/FTA/nafta/eg_main_017794.asp.
- 6 International Trade Administration, North American Free Trade Agreement, http://www.export.gov/FTA/nafta/eg_main_017794.asp.
- 7 NAFTA, Chap. 10.
- 8 Roberto Hernandez Garcia, *Mexico, in International Public Procurement: A Guide to Best Practice*, 303, 303 (Roberto Hernandez Garcia ed., 2009).
- 9 APEC Procurement Transparency: Standards in Mexico (2011) at p. 27.
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- 11 Alison Tanchyk, Humberto Padilla Gonzalez and Rodrigo Dominguez Sotomayor, Mexico's Crackdown on Corruption in Gov't Contracting, LAW360, Oct. 12, 2012, *available at* <http://www.law360.com/articles/386369/mexico-s-crackdown-on-corruption-in-gov-t-contracting>.
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§ 1:62. Mexico—Applicability, qualifications & restrictions

The military can award without a bidding process any contract for the construction of public works, services related to public works, purchase of goods, leasing, and provision of services, if they are for military purposes.¹ \$79,507 and \$10,335,931.

NAFTA's procurement provisions also have several exemptions. First, they do not apply if the procurement does not meet certain thresholds, currently \$80,317 for goods and services and \$10,441,216 for construction services.² Second, the provisions do not apply where a public tender would disclose essential security information relating to the procurement of war materials or national defense.³ Third, the provisions do not apply when the procurement:

- is necessary to protect public morals, order or safety;
- is necessary to protect human, animal or plant life or health;
- is necessary to protect intellectual property; or
- relates to goods or services of handicapped persons, of philanthropic institutions or of prison labor.⁴

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Footnotes

- ¹ Roberto Hernandez-Garcia, International Comparative Legal Guide Series: Mexico, Global Legal Group (2010) at p. 177 (citing Public Works and Related Services Law, Art. 41 and 42).
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§ 1:63. Mexico—Publication

Mexican law requires public notice of open tendering.¹ This notice occurs through the publication of invitations to participate, which are advertised in the Official Gazette every Tuesday and Thursday.² Additionally, the Ministry of Public Administration publishes information regarding open tenders on a public website, Compranet.³

Notices that are published in the Official Gazette and on Compranet must include basic information about the contract. This includes notice of how many suppliers will be selected, the range of bids that will be accepted, and the criteria for evaluating submitted bids.⁴

Following publication of the notice, the government must generally provide bidders with 15 days to respond in the case of a national public tender, while international public tenders require a 20-day response window.⁵ Where the government can provide justifiable reasons, this time period can be shortened to 10 days for either national or international public tenders.⁶

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Footnotes

- ¹ OECD, Fighting Bid Rigging in Public Procurement in Mexico: A Secretariat report on IMSS' procurement regulations and practices 42–43 (2011).
- ² Doing Business in Infrastructure, Pro Mexico: Trade and Investment, <http://negocios.promexico.gob.mx/english/03-2011/art02.html>.
- ³ OECD, Fighting Bid Rigging in Public Procurement in Mexico: A Secretariat report on IMSS' procurement regulations and practices 42–43 (2011).
- ⁴ OECD, Fighting Bid Rigging in Public Procurement in Mexico: A Secretariat report on IMSS' procurement regulations and practices 43 (2011).
- ⁵ OECD, Fighting Bid Rigging in Public Procurement in Mexico: A Secretariat report on IMSS' procurement regulations and practices 44 (2011).
- ⁶ OECD, Fighting Bid Rigging in Public Procurement in Mexico: A Secretariat report on IMSS' procurement regulations and practices 44 (2011).

§ 1:63.Mexico—Publication, International Government Contract Law § 1:63

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§ 1:64.Mexico—Competition procedures and evaluation, International Government...

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§ 1:64. Mexico—Competition procedures and evaluation

Under Article 134 of the Mexican constitution, public-open tendering is the preferred type of procurement procedure. Alternative procedures, however, such as direct award or an invitation of at least three parties, can be used when justified by emergency, *force majeure*, acts of God, and the interests of public health or national security.¹

Upon submission, bids are generally not evaluated on a lowest price basis.² Instead, contracting officials make a determination based on the best conditions and best acceptable price.³

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Footnotes

- ¹ Roberto Hernandez-Garcia, International Comparative Legal Guide Series: Mexico, Global Legal Group (2010) at p. 178.
- ² Roberto Hernandez-Garcia, International Comparative Legal Guide Series: Mexico, Global Legal Group (2010) at p. 178.
- ³ Roberto Hernandez-Garcia, International Comparative Legal Guide Series: Mexico, Global Legal Group (2010) at p. 178.

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§ 1:65. Mexico—Judicial and administrative proceedings

Mexico has a sophisticated system for bid protests and challenging award decisions. Disappointed bidders may seek relief either through administrative forums or through the courts. The administrative dispute process is called “non-conformity” and is intended to nullify any action or omission of the contracting agency that breaches the procurement laws.¹ Disappointed bidders may also file suit in federal courts by choosing to litigate, mediate, arbitrate, or ask for an expert determination.²

Under NAFTA, all participating nations are required to designate a reviewing body that can oversee complaints brought against a governing agency.³ Thus, U.S. and Canadian companies have the ability and right to challenge any bidding procedure or contract award before the proper reviewing authority.⁴ This reviewing authority then has the ability to issue recommendations to the procuring agency, including a recommendation to re-compete the contract.⁵ While procuring agencies are instructed to normally follow these recommendations, they are not required to do so.⁶ A bidder who seeks to file such a bid protest can do so only after notice of the procurement has been published or the tender documents have been made publically available.⁷ Once this occurs the protesting party has 10 days to initiate the bid protest.⁸

In the event that a contractor is unhappy with the outcome of a protest under NAFTA it can contact its own government and seek its aid in beginning the international dispute process.⁹ Under Chapter 20 of NAFTA any of the three nations that feels the provisions of NAFTA are being violated may initially request a consultation with the potentially offending nation.¹⁰ If that consultation does not result in a settlement of the dispute either party involved may then request a meeting of the Free Trade Commission for further negotiation.¹¹ If these negotiations do not result in a settlement a NAFTA panel will be convened.¹² This panel then issues a final report by which the parties are bound.¹³ If either party fails to comply with the report the other party can then deny that party equivalent benefits until the dispute is resolved.¹⁴

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Footnotes

¹ Roberto Hernandez-Garcia, International Comparative Legal Guide Series: Mexico, Global Legal Group (2010) at p. 178.

§ 1:65.Mexico—Judicial and administrative proceedings, International Government...

- 2 Roberto Hernandez-Garcia, International Comparative Legal Guide Series: Mexico, Global Legal
Group (2010) at p. 179.
- 3 NAFTA, Art. 1017(1).
- 4 NAFTA, Art. 1017(1).
- 5 NAFTA, Art. 1017(1).
- 6 NAFTA, Art. 1017(1).
- 7 NAFTA, Art. 1017(2).
- 8 NAFTA, Art. 1017(2).
- 9 Trade Compliance Center, Chapter Twenty of the North American Free Trade
Agreement, Department of Commerce, [http://tcc.export.gov/Trade_Agreements/Exporters_Guides/
List_All_Guides/NAFTA_chpater20_guide.asp](http://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/NAFTA_chpater20_guide.asp)
- 10 NAFTA, Art. 2006.
- 11 NAFTA, Art. 2007.
- 12 NAFTA, Art. 2008.
- 13 NAFTA, Arts. 2018 to 2019.
- 14 NAFTA, Art. 2019.

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§ 1:66. Chile

Historically, the procurement of public works and the purchase of goods and services in Chile have been carried out under separate legal and organizational frameworks.

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§ 1:67. Chile—Overview

In 2003, Chile enacted the Procurement Law 19.886 which provides the framework for procurement of goods and services contracts and makes the nation's electronic procurement system, the Chilecompa, the procurement platform for all agencies of the government.¹ Generally, the law provides for public bidding as the primary procurement method for contracts.

In 2004, Chile and the United States entered into the United States-Chile Free Trade Agreement. Like the general procurement laws of Chile, the United States-Chile Free Trade Agreement establishes a preference for open public bidding, with advanced publication of intended procurements.² However, the agreement does provide exceptions for procurements necessary for public safety; the protection of human, animal or plant life or health; the protection of intellectual property; or relating to goods or services for handicapped persons, philanthropic institutions, or prison labor.³

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Footnotes

- ¹ See Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? i (2008); World Bank, Republic of Chile Country Procurement Assessment Report 3 (Aug. 2004).
- ² United States-Chile Free Trade Agreement, Article 9.
- ³ United States-Chile Free Trade Agreement, Article 9.16.

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§ 1:68. Chile—Applicability, qualifications & restrictions

Public bidding is the default procurement method for contracts valued at 1,000 UTM.¹ Contracts may not be broken down into multiple procurements for the sole purpose of avoiding public bidding. Limited bidding and direct contracting are procurement methods allowed only under specific conditions provided for in the law.

The basic requirements for contracting with the government are that the company or individual must have the legal power to sign the contract relating to the provision of goods or services in question and not be run or owned by an individual from the relevant government agency or the relative of an someone at the agency.² Suppliers can be Chilean or foreign.³

Companies or individual who have been convicted of anti-trade union practices or breaching fundamental employee rights within the previous two years, are ineligible.⁴

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Footnotes

- ¹ José Francisco Sánchez & José Manuel Cruz, Chile, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 55, 57 (2011).
- ² Art. 4 of Law on Procurement, Art. 92 of the Procurement Regulation
- ³ Art. 4 of Law on Procurement, Art. 92 of the Procurement Regulation
- ⁴ José Francisco Sánchez & José Manuel Cruz, Chile, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 55, 57 (2011).

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§ 1:69. Chile—Publication

All tender documents are published by the Public Procurement and Contracting Bureau on its Chilecompra website.¹ Under the Regulation on Public Procurement these tender documents must include objective criteria for evaluating received bids, qualifications for bidders, and any other information relevant to the awarding of the contract.²

Additionally, any procurement done through direct contracting must be published within 24 hours on the Chilecompra website.³ The only exception to this requirement is where disclosure of the contract could adversely affect the nation's interests or security.⁴

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Footnotes

- ¹ Catherine Weller, Edmundo Claro & Hernán Blanco, Sustainable Public Procurement: Where do we stand in Chile? 1–2 (2008). The Chilecompra website is *available at* www.chilecompra.cl.
- ² José Francisco Sánchez & José Manuel Cruz, Chile, in *The International Comparative Legal Guide to: Public Procurement* 2012 55, 58 (2011).
- ³ Catherine Weller, Edmundo Claro & Hernán Blanco, Sustainable Public Procurement: Where do we stand in Chile? 7 (2008).
- ⁴ Art. 8 of the Law on Procurement.

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§ 1:70. Chile—Competition procedures and evaluation

The procurement process can take place through three methods: public tender, private tender, or direct contracting. Goods and services are generally procured by public tender.¹ Public tender is a procurement method by which competitive tender is open to the public and is announced on Chilecompra.² Public tender is required if the value is over 1,000 UTM's unless the situation meets specific conditions. Conditions that allow for procurement other than public bidding include emergencies and where no bids were received in a public tender.³ If these conditions are met, private tender or direct contracting may be used depending on the situation. The Chilecompra Express is an online catalogue of products and services with agreements, called *convenios marcos*, between the Directorate of Public Procurement and a supplier that sets the price, terms and specifications.⁴ The items are negotiated by the Directorate rather than individual agencies, generally resulting in better terms for the government.⁵

Private tender is a competitive tender open to only those suppliers selected to participate. The decision to use private tender must first be approved by the public authority and approval must be published on Chilecompra.⁶ Private tender must involve at least three suppliers.⁷

Direct contracting, a non-competitive procurement method, may be used only in limited circumstances. This includes instances where there are no interested parties in a public tender; a contract is terminated as a result of supplier negligence and the remaining portion of the contract can be completed for less than 1,000 UTM (roughly \$77,000); there has been an emergency; there is only one potential provider of the service; there is a national security threat; or the amount of the procurement is below the regulatory threshold.⁸ The decision to use direct contracting must be published, along with the name of the supplier, within 24 hours of the decision.⁹

Under public and private tender, the public authority must set out technical specifications and process details, to allow the public authority to compare bids and choose the most advantageous.¹⁰ Price cannot be the only consideration.¹¹ The procuring agencies are required to consider effectiveness, efficiency, and quality as well as price.¹² Specifications must also ensure that equal treatment of all bidders is maintained.¹³

§ 1:70.Chile—Competition procedures and evaluation, International Government...

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- 1 Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? 5 (2008) (citing Article 9 of the Procurement Regulation).
- 2 Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? 5 (2008).
- 3 Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? 5 (2008).
- 4 Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? 5 (2008).
- 5 Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? 5 (2008).
- 6 Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? 6 (2008).
- 7 José Francisco Sanchez & José Manuel Cruz, International Comparative legal Guide to Public Procurement 2011: Chile, Global Legal Group (2011) at p. 53.
- 8 José Francisco Sánchez & José Manuel Cruz, Chile, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 55, 57 (2011).
- 9 Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? 7 (2008).
- 10 Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? 6 (2008) (citing Art. 20 of the Procurement Regulation).
- 11 Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? 6 (2008).
- 12 Catherine Weller, Edmundo Claro & Hernán Blanco, Institutional Institute for Sustainable Development, Sustainable Public Procurement: Where do we stand in Chile? 6 (2008).
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§ 1:71. Chile—Judicial and administrative proceedings

When a disappointed bidder wishes to challenge the decision of a government agency it may file with the agency itself.¹ Additionally, the Public Procurement Court hears and resolves complaints related to administrative action or omissions in the bidding process and award of all contracts by government agencies covered by the Procurement Law.² However, the court does not have jurisdiction to resolve contractual disputes.³ Any decision by the Public Procurement Court may then be appealed to The Santiago Court of Appeal.⁴

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Footnotes

- ¹ José Francisco Sánchez & José Manuel Cruz, Chile, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 55, 60 (2011).
- ² José Francisco Sánchez & José Manuel Cruz, Chile, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 55, 60 (2011).
- ³ See José Francisco Sánchez & José Manuel Cruz, Chile, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 55, 60 (2011).
- ⁴ José Francisco Sánchez & José Manuel Cruz, Chile, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PUBLIC PROCUREMENT 2012 55, 60 (2011).

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VI. Egypt, The Kingdom of Saudi Arabia, and the United Arab Emirates

§ 1:72. Introduction

With substantial natural resources and generally large public sectors, the Middle East and Northern Africa have proven to be considerable procurement markets.¹ However, protectionist policies and religious law can complicate entry and participation in these markets. Further, some have expressed concern that regional turmoil could lead these nations to divert funding from procurement programs to operational programs, as nations are forced to address conflicts within their borders.² The recent developments of the “Arab Spring” and the revolution in Egypt obviously affect these processes.

This section examines the procurement systems of Egypt, Saudi Arabia, and the United Arab Emirates (UAE), three of the largest economies in the region.³ Overall, the systems in these nations are very similar. Each nation favors open tenders, generally requires public notice of procurements, and has an administrative review process that allows contractors to challenge the procurement decisions of government officials. However, there are also substantial differences between the nations. While Islam is the official religion of each nation, Saudi Arabia is notably stricter in its application of Islamic law than either Egypt or the UAE, which has potential ramifications in the field of government contracts. Further, where Egypt and the UAE require that foreign contractors have a nationalized agent within the country, Saudi Arabia has a stricter requirement that 30% of any contract go to Saudi nationals.⁴

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Footnotes

- ¹ Regional Economic Outlook: Middle East and Central Asia 33 (Oct. 2010) <http://www.imf.org/external/pubs/ft/reo/2010/mcd/eng/10/mreo1024.pdf>; Guy Anderson, Briefing: Turbulence in the Middle East and the implications for the defence trade, IHS Jane's, Mar. 9, 2011, http://www.janes.com/products/janes/defence-security-report.aspx?ID=1065929167&pu=1&rd=janes_com
- ² Guy Anderson, Briefing: Turbulence in the Middle East and the implications for the defence trade, IHS Jane's, Mar. 9, 2011, http://www.janes.com/products/janes/defence-security-report.aspx?ID=1065929167&pu=1&rd=janes_com
- ³ International Monetary Fund, World Economic Outlook Database, <http://www.imf.org/external/pubs/ft/weo/2011/01/weodata/index.aspx>.
- ⁴ See Embassy of the Kingdom of the Netherlands, Economic Affairs and Development Co-operation Department, Doing Business in Egypt: 2011 Guideline for Netherlands Companies 10 (2011) (citing

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Federal Law No. 120 of 1982); World Trade Organization Secretariat, Trade Policy Review: United Arab Emirates 53 (2012); United States Trade Representative, 2012 National Trade Estimate Report on Foreign Trade Barriers, at p. 338, *available at* <http://www.ustr.gov/about-us/press-office/reports-and-publications/2012-1>.

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§ 1:73. Egypt^{0.50}

The government procurement of goods and services and contracts for public works and transportation (i.e. supplies, services, and construction contracts) is to be conducted by way of advertised public tender.¹ The government is also able to contract by public negotiation.² Public tenders must be publically advertised and must ensure equal opportunity and free competition.³ In certain circumstances, other forms of procurement are available including limited tender, local tender, sole source purchasing and direct purchasing.⁴

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At the time this insert was published, Egypt was in the midst of ongoing political change due to a military coup that took place in July of 2013. Following this coup, the interim government has imposed various new laws, ranging from a new anti-corruption law to restrictions on protests. Additionally, in January of 2014, the country voted in favor of a referendum for a new Constitution. Reza Sayah & Mohammed Tawfeeq, *Egypt passes a new Constitution*, CNN, Jan. 18, 2014, available at <http://www.cnn.com/2014/01/18/world/africa/egypt-constitution/>. While it remains to be seen exactly what effect this political change will have on the Egyptian procurement system, there have already been some changes at the periphery. Notably, interim President Adly Mansour issued a Presidential decree in September of 2013 raising the thresholds for when public officials could utilize direct agreements rather than tenders. Ahmed Feteiha, *Egypt expands officials' authority in bypassing public tender process*, AHRAM, Sept. 13, 2013, available at <http://english.ahram.org.eg/NewsContent/3/12/81477/Business/Economy/CORRECTED-Egypt-expands-officials-authority-in-byp.aspx>.

¹ Institute for Public-Private Partnerships, Review and Analysis of the Egyptian Tender Law and Its Executive Regulations 2 (2003) (citing the Tender Law, Law 89 of 1998, Art. 1), available at http://pdf.usaid.gov/pdf_docs/PNACY313.pdf.

² Institute for Public-Private Partnerships, Review and Analysis of the Egyptian Tender Law and Its Executive Regulations 11 (2003).

³ Ali & Partners, Doing Business in the Middle East, http://mideastlaw.com/middle_eastern_laws_egypt.html.

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4 Institute for Public-Private Partnerships, Review and Analysis of the Egyptian Tender Law and Its Executive Regulations (2003).

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§ 1:74. Egypt—Overview

Egypt's government procurement process is governed by Law 89 for the Year 1998, known as the “Tenders Law.”¹ This law generally requires that the purchase of goods or services be conducted through either tender or competitive negotiation and that such procurements adhere to the principles of open announcement, free competition, equal opportunity and equitable evaluation.² However, the law also leaves room for the use of direct agreement in certain emergency circumstances.³ Additionally, in September of 2013, interim President Adly Mansour issued a presidential decree that raised the threshold for when tenders are required.⁴ Under the decree, ministers can purchase goods without tenders for purchases between 100,000 and five million L.E., while the heads of government authorities may make purchases between 50,000 and 500,000 L.E. without tenders.⁵

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- ¹ Institute for Public-Private Partnerships, REVIEW AND ANALYSIS OF THE EGYPTIAN TENDER LAW AND ITS EXECUTIVE REGULATIONS 2 (2003).
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- ³ Institute for Public-Private Partnerships, REVIEW AND ANALYSIS OF THE EGYPTIAN TENDER LAW AND ITS EXECUTIVE REGULATIONS 13 (2003).
- ⁴ Ahmed Feteiha, *Egypt expands officials' authority in bypassing public tender process*, AHRAM, Sept. 13, 2013, <http://english.ahram.org.eg/NewsContent/3/12/81477/Business/Economy/CORRECTED-Egypt-expands-officials-authority-in-byp.aspx>.
- ⁵ Ahmed Feteiha, *Egypt expands officials' authority in bypassing public tender process*, AHRAM, Sept. 13, 2013, <http://english.ahram.org.eg/NewsContent/3/12/81477/Business/Economy/CORRECTED-Egypt-expands-officials-authority-in-byp.aspx>.

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§ 1:75. Egypt—Applicability, qualifications & restrictions

The tenderer must be a resident of Egypt or have an Egyptian agent.¹ Foreign companies wishing to engage in any type of consulting or other services or to bid on a government procurement must do so through a registered local agent.² A commercial agent must be either an Egyptian national or an Egyptian juristic entity whose name has been registered at the Commercial Agents and Intermediaries Register at the Ministry of Economy and Foreign Trade.³ Furthermore, the person/entity must meet specific characteristics as set forth in Article 2 of the Commercial Agencies Law.⁴

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- ¹ Embassy of the Kingdom of the Netherlands, Economic Affairs and Development Co-operation Department, Doing Business in Egypt: 2011 Guideline for Netherlands Companies 10 (2011) (citing Federal Law No. 120 of 1982).
- ² See Embassy of the Kingdom of the Netherlands, Economic Affairs and Development Co-operation Department, Doing Business in Egypt: 2011 Guideline for Netherlands Companies 10 (2011).
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- ⁴ Ali & Partners, Doing Business in the Middle East, http://mideastlaw.com/middle_eastern_laws_egypt.html.

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§ 1:76. Egypt—Publication

Public tenders must be advertised in a daily newspaper locally or abroad, depending on the nature of the contract, for thirty days.¹

This advertisement must provide contact information for submission, a deadline for submitting bids, a description of the goods or services to be supplied, information about the required bond, and other data that the contracting agency considers necessary.²

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- ¹ Institute for Public-Private Partnerships, Review and Analysis of the Egyptian Tender Law and Its Executive Regulations 8 (2003).
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§ 1:77. Egypt—Competition procedures and evaluation

Under the Tenders Law the government can use three methods of procurement: tender, competitive negotiation, or direct agreement. Generally, the use of tenders is the preferred method of procurement and can take one of three forms. The first is public tender, where the procurement opportunity is publicly advertised and bids are sought from all qualified bidders.¹ The second is limited tender, where invitations to bid are sent only to potential bidders working in a specific field.² This type of tender is limited to instances where the nature of the contract requires specific technical or financial qualifications.³ The third is local tender, where invitations to bid are limited to local suppliers and contractors.⁴ Local tender is only permitted when the value of the contract does not exceed LE 200,000 (roughly \$32,000 U.S. dollars).⁵

The Tenders Law requires that bids be evaluated under a two-step process where technical offers are evaluated first and then technically acceptable offers are evaluated for price.⁶ Under this process a Decision Committee initially reviews technical bids to determine which offers are technically acceptable.⁷ The Decision Committee then reviews the financial offers provided by these bidders for the least-cost offer and recommends that bidder to the contracting agency.⁸

The other form of competitive procurement is competitive negotiation. Under this method the government must publicize its procurement needs in almost the same way as it would a public tender, but the government may then negotiate with bidders who have submitted technically acceptable offers in order to ensure it receives the best services at an optimal cost.⁹ Competitive negotiations can be either public, where the opportunity is advertised like a public tender, or limited, where the opportunity is advertised like a limited tender.¹⁰ The use of limited competitive negotiations is restricted to instances where the goods or services are only available from specific entities or individuals, their special nature requires they be manufactured in a specific location, their technical nature requires specific expertise, or disclosure of the need for the good or service would affect national security.¹¹

Under the Tenders Law competitive negotiations are evaluated in a similar manner to bids. Here a Competitive Negotiation Committee reviews initial bids to determine technical acceptability.¹² Those bidders the committee finds technically acceptable are then informed and meet with the committee to engage in further negotiations and arrive at a final offer that is intended to provide the best technical conditions at the lowest cost.¹³ The committee then reports this offer to the contracting agency, which then makes a determination as to which offer to accept.¹⁴

§ 1:77.Egypt—Competition procedures and evaluation, International Government...

For both of the above methods the government generally bases its award decisions on price and best value.¹⁵ However, a domestic preference is provided to Egyptian contractors, as long as their bid is within 15% of a lower foreign bid.¹⁶ The only exception to this preference is for Ministry of Defense tenders, which are treated differently in accordance with a Reciprocal Defense Procurement Memorandum of Understanding with the United States.¹⁷ This memorandum of understanding ensures that in Ministry of Defense tenders United States contractors are treated the same as domestic contractors in the evaluation process.¹⁸

While the use of tenders or public negotiation is preferred, the government may use direct agreement in the case of emergency. Depending upon the type and value of the contract the use of direct agreement must be authorized by different officials. A presidential decree issued in September of 2013 expanded the potential use of such direct agreements.¹⁹ Under the decree, ministers may enter direct agreements for the purchase of goods or services between 100,000 and five million L.E., while the heads of government authorities may acquire goods and services worth between 50,000 and 500,000 L.E. through direct agreements.²⁰

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§ 1:78. Egypt—Judicial and administrative proceedings

Challenges can be resolved in the administrative judicial system, the civil judicial system, or through arbitration.¹ The administrative courts are empowered to hear challenges to the validity of decisions issued by administrative entities as well as disputes involving contracts with the government. Arbitration of disputes is permitted if the necessary government approval has been obtained.²

As a practical matter, arbitration is often the preferred method of resolving contract disputes. However, the government can challenge arbitral decisions, whether domestic or foreign, in Egyptian courts.³ Additionally, arbitral decisions have limited application, as they cannot be used to settle claims with other government entities, such as Customs of the Egyptian Tax Authority.⁴

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Footnotes

- ¹ See Institute for Public-Private Partnerships, Review and Analysis of the Egyptian Tender Law and Its Executive Regulations 15 (2003) (citing the Tender Law, Law 89 of 1998, Arts. 23, 42), available at http://pdf.usaid.gov/pdf_docs/PNACY313.pdf.
- ² Institute for Public-Private Partnerships, Review and Analysis of the Egyptian Tender Law and Its Executive Regulations 15 (2003) (citing Tenders Law 89/1998, Article 42).
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§ 1:79. The Kingdom of Saudi Arabia

The Kingdom of Saudi Arabia has one of the most traditionalist legal systems in the Middle East.¹ Under this system, many areas of law are governed by royal decrees and implementing regulations that form “statutory” law.² However, this statutory law is subject to sharia, or Islamic law, which is based on the life of the Prophet Mohammad and the teachings of the Quran.³ This means that any statutory law must adhere to applicable sharia law and cannot remove the requirements that sharia imposes.⁴ Subsequently, sharia law has substantial influence over many areas of life, even where royal decrees and regulations exist.

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- ¹ Frank E. Vogel, Islamic Law and the Legal System: Studies of Saudi Arabia, 2000. p. xiv.
- ² See Frank E. Vogel, Islamic Law and the Legal System: Studies of Saudi Arabia, 2000. p. 169-78; Frank E. Vogel “The Islamic Legal System of Saudi Arabia: A Primer for U.S. Business,” Middle East Insight, xi/ 6 (1995), 95.
- ³ Frank E. Vogel, Islamic Law and the Legal System: Studies of Saudi Arabia, 2000. p. 174–75.
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§ 1:80. The Kingdom of Saudi Arabia—Overview

Government contracts in Saudi Arabia are governed by the comprehensive Royal Decree on Government Bids and Procurement.¹ As with all royal decrees and regulations, these “statutes” are still subject to sharia law. Sharia can subsequently influence government contracts in several ways, such as limiting termination remedies to incurred direct cost and defining what constitutes *force majeure*.²

The government's procurement laws and regulations apply to almost all of Saudi Arabia's government authorities, ministries, departments, public institutions and public bodies.³ One exception is defense contracts, which are generally negotiated individually and are not subject to the procurement laws and regulations.⁴

The objective of the procurement laws and regulations is to ensure integrity, efficiency, competition, fair competitive process, transparency and advancing the public interest.⁵

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Footnotes

- ¹ Government Tendering & Procurement Regulations, Issued by Royal Decree No. M/58, dated 4.9.1427 AH; Ministry of Finance Resolution No. 362 (March 10, 2007).
- ² See Noor Mohammed, “Principles of Islamic Contract Law”, 6 *J.L. & Religion* 115, 126–27 (1988); Emile Sarker, “Force Majeure and Imprevison—One and the Same?” *Middle East Business Law Review* (Summer 2007), 12.
- ³ See Royal Government Tendering & Procurement Regulations, Issued by Royal Decree No. M/58, dated 4.9.1427 AH, Article 6.
- ⁴ 2012 *National Trade Estimate Report on Foreign Trade Barriers*, United States Trade Representative, 338 (Mar. 2012), available at <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2012-1>.
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§ 1:81.The Kingdom of Saudi Arabia—Applicability,.... International...

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§ 1:81. The Kingdom of Saudi Arabia—Applicability, qualifications & restrictions

All government works and procurements must be available for public tender, unless exempted by the procurement law.¹ Exempted procurements include weapons and military equipment; consultancy; spare parts; goods and services available only through one supplier; and urgent medical supplies.² Decisions on bids may be delegated to a lower authority where the amount involved does not exceed 3,000,000 Riyals.³ Contracts valued at less than this amount may be documented by correspondence rather than formal agreement.⁴ For major projects, where the value exceeds 5,000,000 Riyals and is for longer than one year, government authorities must submit contracts to the Ministry of Finance for approval.⁵ Procurement where the value of the purchase does not exceed 1,000,000 Riyals may be carried out by direct purchase.⁶

Foreign contractors must subcontract 30% of the value of any government contract to firms owned by a majority of Saudi nationals, unless there is not a Saudi owned company that can satisfy the requirements of the procurement.⁷ Saudi Arabia gives priority in government purchasing to all Gulf Cooperation Council (“GCC”) products. These items receive up to a 10% price preference over non-GCC products in all government procurements.⁸

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- ⁶ Government Tendering & Procurement Regulations, Issued by Royal Decree No. M/58, dated 4.9.1427 AH, Art. Art. 44.

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§ 1:82.The Kingdom of Saudi Arabia—Publication, International Government Contract...

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§ 1:82. The Kingdom of Saudi Arabia—Publication

When a governmental authority conducts a public tender it must announce the tender in accordance with the Government Tendering and Procurement Regulations.¹ This announcement must include the name of the governmental authority, a description of the tender, a scope of classification, the price of documents, and the time and place for bid submission and opening.² Additionally, the announcement must be made in the Official Gazette, in at least two local newspapers, on the website of the Umm Al-Qura Gazette and the advertising authority, and in the major newspapers of countries that provide the services sought.³

The Government Tendering and Procurement Regulations also require publication of the results of all public tenders and purchases exceeding 100,000 Riyals.⁴ This publication must identify the successful contractor and provide reasons supporting the contracting agency's decision to select that contractor over other bidders.⁵

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- ¹ Government Tendering & Procurement Regulations, Issued by Royal Decree No. M/58, dated 4.9.1427 AH, Art. 7.
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§ 1:83.The Kingdom of Saudi Arabia—Competition..., International...

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§ 1:83. The Kingdom of Saudi Arabia—Competition procedures and evaluation

Government authorities conduct tender processes in a number of ways: expressions of interest (“EOI”), requests for proposals (“RFP”), requests for tenders (“RFT”), and staged process.¹

EOIs invite interested parties to submit an offer where there is no present intention to be bound.² EOIs usually outline a proposed project and request potential bidders to register with their interest and capability to deliver the project.³ A small number of those who respond will be invited to submit full bids. EOIs are usually used when the scope of the potential market is unknown, the issuing party wants to test the market, or the project is being tested for feasibility.⁴

RFPs are requests for interested parties to submit proposals for a project which has not yet been clearly established.⁵ RFPs are used when documentation has been developed but not finalized, the scope of the market is unknown, and/or the government authority is looking for innovative solutions to its particular project requirements.⁶ An RFP contemplates further negotiation before contract signing.

RFTs are an invitation to potential bidders to submit an offer capable of acceptance in accordance with the issued request for tender document.⁷ The offer is generally made on the basis that a contract will come into force upon acceptance, without further negotiation.⁸ An RFT is appropriate when the scope of the project is clear, price is the most important selection criteria, or final documentation is capable of being finalized.

Staged process is when the procuring entity first calls for an EOI and then issues an RFP.⁹ Responses are short listed and a request is made from those tenders still in the running for the best and final offers.¹⁰ Acceptance of the best and final offer forms a binding contract.¹¹

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Footnotes

¹ Al Tamimi & Co., Government Tenders and Procurements in the Kingdom of Saudi Arabia, Advocates and Legal Consultants Law Update, Issue 214, Jan. 2009, *available at* http://newsweaver.ie/altamimi/e_article001340509.cfm.

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§ 1:84.The Kingdom of Saudi Arabia—Judicial and..., International...

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§ 1:84. The Kingdom of Saudi Arabia—Judicial and administrative proceedings

The regulations concerning government tendering and procurement require that the Minister of Finance form a committee of at least three individuals from the ministry and other concerned government agencies to address procurement disputes.¹ This committee hears and decides contractor compensation claims, claims of fraud, decisions of work withdrawal, and requests received by the Ministry of Finance for the exclusion of contractors for failure to comply with established conditions and specifications.²

If the committee finds for the contractor, it has the authority to issue a decision to pay due compensation, however, this decision is subject to appeal before the Board of Grievances.³ If the committee finds that a contractor did in fact violate national procurement laws it can issue a decision prohibiting the contractor from dealing with the government for up to five years.⁴ This decision can also be appealed to the Board of Grievances.⁵

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Footnotes

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§ 1:85. United Arab Emirates (“UAE”), International Government Contract Law § 1:85

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§ 1:85. United Arab Emirates (“UAE”)

Generally, there is no central procurement entity for the UAE. Instead, individual ministries and Emirate-level departments are responsible for their own procurement of goods and services. However, purchases of non-military equipment by the UAE federal government are governed by the federal “Public Tenders Law” and federal regulations provided by Ministerial Decision No. 20 of 2000.¹

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Footnotes

- ¹ World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 52 (2012).

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§ 1:86. United Arab Emirates (“UAE”)—Overview, International Government Contract...

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§ 1:86. United Arab Emirates (“UAE”)—Overview

The Public Tenders Law provides that only UAE nationals, foreign entities represented by a UAE distributor or agent, or UAE companies where foreign entities have a minority share can bid for public sector tenders for the supply of goods or services.¹ In reality, circumstances often arise where specialized goods or services can only be provided by a foreign contractor and these requirements are waived.²

One exception to this decentralized approach is the UAE Offsets Group (“UOG”) which makes defense purchases on behalf of the federation.³ All purchases made by the UAE armed forces or elements thereof are subject to the offset obligation. The UOG carries out its purchases through direct negotiation with contractors and acts as a conduit between international contractors and the local private sector.⁴ Generally, defense contractors must negotiate directly with the UOG and invest an amount that will generate a profit in the UAE equal to an agreed upon portion of the contract.⁵ Defense contractors that are awarded contracts valued at more than \$10 million must establish a commercially viable joint venture with local business partners that is projected to yield profits equivalent to 60% of the contract value within a specified period.⁶

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§ 1:87. United Arab Emirates (“UAE”)—Applicability, ..., International...

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§ 1:87. United Arab Emirates (“UAE”)—Applicability, qualifications & restrictions

The Public Tenders Law does not apply in several instances. First, it does not apply to contracts with the federal defense forces.¹ Second, the law does not apply to the individual Emirate governments.² Instead, each Emirate has its own provisions regulating public procurement.³ While these provisions generally track the Public Tenders Law, they do differ in formality and flexibility.⁴

Current federal and Emirate-level government procurement regulations favor domestic suppliers over foreign competitors or require that foreign companies contract with local agents to provide equipment and services. Specifically, the UAE grants a 10% price preference for local firms in government procurement.⁵

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§ 1:88. United Arab Emirates (“UAE”)—Publication

Under federal UAE procurement law, procurement notice is usually published electronically for one month by the relevant procuring entity. However, in order to access the electronic notice system, suppliers must register with the Ministry of Finance and Industry and pay a fee for the first year and for renewal.¹ Federal law also usually requires that notice be published twice in two widely read newspapers.² Publication may also be in foreign newspapers or other available media.³

A notice regarding planned procurement is published at the beginning of each fiscal year.⁴ The notice includes a description of goods and services to be procured, the authority receiving tenders, the period of validity of tenders, and the deadline for submission of tenders.⁵ Specifications and condition of the procurement must be in Arabic but can also be translated into one or more foreign languages.

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Footnotes

- ¹ World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 53 (2012).
- ² World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 53 (2012).
- ³ United Arab Emirates, Ministry of Foreign Trade, Trade Policy Review: 2010 47 (2010), *available at* <http://www.moft.gov.ae/images/releasesen/180.pdf>.
- ⁴ United Arab Emirates, Ministry of Foreign Trade, Trade Policy Review: 2010 47 (2010), *available at* <http://www.moft.gov.ae/images/releasesen/180.pdf>.
- ⁵ United Arab Emirates, Ministry of Foreign Trade, Trade Policy Review: 2010 47 (2010), *available at* <http://www.moft.gov.ae/images/releasesen/180.pdf>.

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§ 1:89. United Arab Emirates (“UAE”)—Competition procedures and evaluation

Under Ministerial Decision No. 20 of 2000, public tender is supposed to be the preferred method of procurement for purchases of products, services and construction by the federal government.¹ The procurement method that is used most often though is the “practical participation” method, where a committee requests quotations from selected contractors without engaging in the tendering process.² This process may be used when:

- a product or service is only available from a specific contractor
- it is hard to describe the product in detail
- the work requires a specialist
- there is an urgent need for the procurement
- the procurement requires confidentiality due to public interest
- the procurement is for low-cost products
- the good is produced under monopolistic conditions
- two or more suppliers have provided similar quotations under the general tender process
- the good or service has already been tendered under the general tender process but no quotation was provided or only one was provided and was not accepted
- an existing contract is terminated before completion and the practical participation method is used for completing the remaining work.³

The federal procurement regulations also allow for the use of limited tenders and direct orders, however these are not used as extensively as practical participation.⁴ The limited tender method, where a smaller number of contractors are invited to provide quotations, may be used when only a small number of suppliers exists.⁵ Direct order, where the government buys directly from one supplier, may be used when exceptional circumstances require, such as where a monopoly exists for a certain product.⁶

When evaluating quotations received through the tendering process the government, through a Tenders Committee, is generally required to select the “best and lowest” bid.⁷ However, this evaluation standard is subject to a 10% price

§ 1:89.United Arab Emirates (“UAE”)—Competition..., International...

preference for domestic contractors, which, along with nationality requirements, limits foreign participation in UAE federal procurements.⁸

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Footnotes

- 1 World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 52–53 (2012).
- 2 World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 52–53 (2012) (noting that in 2010 roughly 60% of all federal procurements were conducted through the practical participation process).
- 3 World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 52 (2012).
- 4 In 2010, limited tender and direct order methods were each used in only about 10% of federal procurements. World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 52–53 (2012).
- 5 World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 52 (2012).
- 6 World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 52 (2012).
- 7 World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 53 (2012).
- 8 World Trade Organization Secretariat, TRADE POLICY REVIEW: UNITED ARAB EMIRATES 53 (2012).

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§ 1:90. United Arab Emirates (“UAE”)—Judicial and..., International...

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§ 1:90. United Arab Emirates (“UAE”)—Judicial and administrative proceedings

Under the Federal Regulation of Conditions of Purchases, Tenders and Contracts, Financial Order No. 16 of 1975, unsuccessful offerors are informed that their bids have failed and provided with an outline of the reasons their bid was not accepted.¹ Once they have received notification, unsuccessful bidders can choose to challenge the decision either with the Ministry of Finance's central complaint committee or in the courts.²

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Footnotes

¹ Global Integrity Report 2009, United Arab Emirates: Integrity Indicators Scorecard, available at <http://report.globalintegrity.org/United%20Arab%20Emirates/2009/scorecard/62>.

² Global Integrity Report 2009, United Arab Emirates: Integrity Indicators Scorecard, available at <http://report.globalintegrity.org/United%20Arab%20Emirates/2009/scorecard/62>.

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