

Understanding the Standards of Bid Protest Standing:
A Comparative Analysis of Bid Protest Standing Rights and Requirements Across 98
Countries and the European Union
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Abstract

Standing is a fundamental part of any legal challenge, and as such is a fundamental aspect inherent in bid protest and procurement challenge systems around the world. Yet the extent to which standing is conferred often differs from one country to the next, as each confers standing to different kinds of parties and under different kinds of circumstances. This paper observes the standing rights and requirements of 98 countries and the European Union with the objectives of (1) comparing how standing is implemented in bid protest systems across the world, and (2) to recommend an optimal standing requirement for the United States. With the recent decision of the United States Court of Appeals for the Federal Circuit in *Acetris Health v. United States*, it is possible that standing rights and requirements in the United States will be interpreted more broadly in the near future. With *Acetris Health* and the United States as a backdrop, this paper will analyze standing by analyzing the specific elements which, when taken together, affect a country's overall standing. Additionally, this paper will analyze the considerations behind a country's implementation of standing rights and requirements. In performing this analysis, this paper will introduce the standing rights of 97 other countries and the European Union, while identifying various trends and observations on the overarching spectrum that exists for standing rights and requirements. Thereafter, this paper endorses the potential shift in the US bid protest system's interpretation of its standing rights and requirements, based on the observations made on the standing rights contained in the challenge systems of the other 97 countries and the European Union.

Table of Contents

Table of Contents	iii
Introduction.....	1
Part I: Standing, the US Protest System and <i>Acetris</i> : A Potential New Standard for Standing.....	2
A. An Introduction to Standing.....	2
B. A Cursory Overview of the US Bid Protest System and Standing Requirements.....	4
C. A Potential New Standing for Standing.....	5
D. Larger Theme of Tension.....	6
Part II: A Global Look at Bid Challenge Standing Requirements.....	7
A. The List: A Look at 98 Different Bid Challenge Schemes.....	8
1. The European Union	9
2. Afghanistan	10
3. Albania	11
4. Algeria.....	12
5. Angola	12
6. Argentina.....	13
7. Armenia.....	14
8. Australia	15
9. Austria (EU)	15
10. Azerbaijan.....	16
11. Bahamas.....	16
12. Bahrain.....	17
13. Barbados	17
14. Belarus	18
15. Belgium (EU)	18
16. Bermuda.....	19
17. Bhutan.....	19
18. Bolivia	20
19. Brazil	20
20. Burkina Faso.....	21
21. Cambodia.....	22
22. Cameroon.....	23
23. Canada	23

24.	Chile.....	24
25.	China.....	24
26.	Colombia	25
27.	Democratic Republic of the Congo	25
28.	Republic of the Congo.....	26
29.	Cote d'Ivoire	26
30.	Croatia (EU)	27
31.	Czech Republic (EU).....	27
32.	Denmark (EU)	28
33.	Dominica	29
34.	Dominican Republic	29
35.	Estonia (EU)	30
36.	Finland (EU).....	30
37.	France (EU)	31
38.	Georgia	32
39.	Germany (EU)	33
40.	Ghana.....	33
41.	Greece (EU).....	34
42.	Hong Kong	34
43.	Iceland	35
44.	India	36
45.	Indonesia.....	36
46.	Ireland (EU).....	37
47.	Italy (EU).....	38
48.	Japan	38
49.	Jordan.....	39
50.	Kazakhstan.....	39
51.	Kenya.....	40
52.	South Korea	41
53.	Kuwait	41
54.	Kyrgyz Republic.....	42
55.	Laos	42

56.	Latvia (EU)	43
57.	Liberia.....	44
58.	Lithuania (EU).....	45
59.	Luxembourg (EU).....	45
60.	Macau	46
61.	Malawi	46
62.	Malaysia.....	46
63.	Malta (EU).....	47
64.	Mexico	47
65.	Netherlands (EU).....	48
66.	New Zealand.....	48
67.	Nigeria	49
68.	Norway	49
69.	Pakistan.....	49
70.	Panama.....	50
71.	Peru	50
72.	Philippines	51
73.	Poland (EU)	51
74.	Portugal (EU).....	51
75.	Qatar	52
76.	Russia.....	53
77.	Saudi Arabia	53
78.	Senegal.....	54
79.	Serbia	54
80.	Singapore	55
81.	Slovenia (EU)	55
82.	Somalia	56
83.	South Africa.....	56
84.	South Sudan.....	57
85.	Sweden (EU).....	57
86.	Switzerland	58
87.	Taiwan	59

88.	Thailand	59
89.	Tunisia	60
90.	Turkey	60
91.	Uganda.....	61
92.	Ukraine	61
93.	United Kingdom (England, Wales and Northern Ireland).....	62
94.	Uruguay	63
95.	Venezuela	63
96.	Vietnam	63
97.	Yemen.....	64
98.	Zimbabwe	64
	A Note on Other Countries	64
	Part III: Global Trends and Reanalysis of <i>Acetris</i> : What the US system should do.....	65
	A. Trends: A Closer Look at Individual Standing Elements	65
	i. Which Type of Party	66
	ii. Which Circumstances.....	68
	iii. Which Tribunal or Decision-Making Authority.....	71
	iv. Taking into Account All of the Standing Elements as a Whole	72
	B. Weighing Preferences	75
	C. Revisiting <i>Acetris</i> : How the United States Can Improve Its Bid Protest Standing Rights To Achieve a More Optimal Balance	78
	i. Comparing the United States to the World.....	79
	ii. Revisiting <i>Acetris</i>	80
	Conclusion	82

Introduction

The recent decision of the United States Court of Appeals for the Federal Circuit in *Acetris Health*¹ signals a potential shift in the bid protest standing requirements of the United States. In the United States, procurement challenges can be brought before the agency conducting the procurement, the United States Court of Federal Claims, or the United States Government Accountability Office (“GAO”).² For the past two decades, standing in the United States has been conferred only to bidders or prospective bidders who had a substantial chance of winning the award were it not for the adverse actions of the procuring entity.³ When compared to the bid protest standing rights in other countries, the US standard for protest standing rights is narrow. The recent Federal Circuit decision, however, suggests a shift in standing for bid protests.

Part I of this paper starts with analysis on the concept of standing; after which Part I turns to introducing standing thresholds for parties in the United States more thoroughly and addressing the wider themes which shape the US bid protest: providing oversight of government accountability and achieving quick and efficient remedy. Part II focuses on a comparative analysis between different protest standing requirements that exist around the world. The first section of this part consists of country profiles for the European Union and 97 different countries, and covers the various standing requirements utilized by respective bid challenge systems abroad.⁴ The second section of this part identifies trends while comparing and

¹ 949 F.3d 719 (Fed. Cir. 2020).

² Standing is a necessary element when pursuing any legal claim, including for parties pursuing agency review, but this paper will focus on standing before the Court of Federal Claims and the GAO.

³ See *American Federation of Government Employees (AFGE)*, 258 F.3d 1294 (Fed. Cir. 2001).

⁴ The countries and sovereign entities whose challenge systems are under analysis in this paper include the European Union and, listed in alphabetical order: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Barbados, Belarus, Belgium, Bermuda, Bhutan, Bolivia, Brazil, Burkina Faso, Cambodia, Cameroon, Canada, Chile, China, Colombia, Democratic Republic of the Congo, Republic of the

contrasting different standing requirements. Finally, Part III applies the observations on foreign bid challenge systems to the United States and culminates in endorsing the potential change in course undertaken by the Federal Circuit in *Acetris Health*.

Part I: Standing, the US Protest System and *Acetris*: A Potential New Standard for Standing

To understand how the US bid protest system compares to the challenge systems of other countries, it is first important to just what “standing” is, what the US standard for standing is, and why standing plays such an important role in protest proceedings.

A. An Introduction to Standing

“Standing” is a fundamental aspect of litigation, effectively serving as the threshold for determining under what circumstances a party may bring a specific claim before a court or other legal authority. For bid protests, this makes standing an important aspect that has to be covered. Therefore, analysis of standing essentially requires answering three questions: (1) which type of party (2) under which circumstances (3) before which forum can a procurement award challenge be brought?⁵

Congo, Cote d'Ivoire, Croatia, Czech Republic, Denmark, Dominica, Dominican Republic, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Hong Kong, Iceland, Ireland, India, Indonesia, Italy, Japan, Jordan, Kazakhstan, Kenya, South Korea, Kuwait, Kyrgyz Republic, Laos, Latvia, Liberia, Lithuania, Luxembourg, Macau, Malawi, Malaysia, Malta, Mexico, Nigeria, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Qatar, Russia, Saudi Arabia, Senegal, Serbia, Singapore, Slovenia, Somalia, South Africa, South Sudan, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, Uruguay, Venezuela, Vietnam, Yemen and Zimbabwe.

⁵ Nonetheless, defining standing is often a controversial subject, as is demonstrated by the many cases on the matter before the United States Supreme Court throughout its existence. Some argue that standing is distinct from prejudice, meaning harm to a party. See Frederick W. Claybrook Jr., *Standing, Prejudice, and Prejudging in Bid Protest Cases*, 33 PUB. CONTRACTS L.J. (2004). In effect, it can be argued that prejudice goes more to the question of “under what circumstances can a party bring suit” rather than “which party can bring suit.” Regardless of whether the two are distinct from one another, if “standing” rights are broad, but the threshold outlining the circumstances under which a party can bring a suit is too stringent, then in effect, fewer parties can bring suit. In short, both prejudice and standing rights are inherent in answering “which party may bring a claim?” and as such, this paper will not attempt to answer whether a distinction exists.

Complicating “standing” somewhat is the doctrine of sovereign immunity.⁶ In the legal systems of most countries, private parties are precluded from suing the government because of this doctrine, which holds that the actions of the government are non-contestable in legal proceedings unless the immunity has been waived by the government in question.⁷ In practical terms, waivers are created when lawmakers explicitly confer the right to sue the government to certain parties in certain situations. This waiver has been implemented by a substantial number of sovereign states for government actions in connection to procurement proceedings. As such, standing rights for challenging government procurement actions must be conferred by a waiver.

Countries, however, do not confer rights uniformly, which makes comparing the extent of conferring of standing rights among countries a potentially useful endeavor. The extent of standing rights conferred to protestors in fact often differs from sovereign to sovereign (as is demonstrated by this paper). As such, there is a wide amount of variation among states regarding which parties, circumstances and forums are permitted. For example, in some countries, only the parties who submitted bids may challenge procurement decisions; in others, any interested party may challenge a proceeding.

Ultimately, comparing protest standing rights between countries requires answering the question raised at the beginning of this section: (1) by what kinds of parties, (2) under what kinds of circumstances, (3) and before what tribunal options, can a protest be raised? The evaluation of any one system must account for all three factors in order to gain an overall sense for how that

⁶ See *Am. Fed'n of Gov't Employees, AFL-CIO v. United States*, 258 F.3d 1294, 1301 (Fed. Cir. 2001) (“In resolving this issue, we are guided by the principle that waivers of sovereign immunity, such as that set forth in § 1491(b)(1), are to be construed narrowly.”)(citing *McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 96 L.Ed. 26 (1951) (“[S]tatutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign.”)).

⁷ *Id.*

protest system compares to others on the issue of standing, because restrictions in any one area can greatly affect the overall openness of a country's bid protest standing rights.

B. A Cursory Overview of the US Bid Protest System and Standing Requirements

In the United States, challenges to federal US agency procurement decisions can be raised in one of three venues: the Agency conducting the procurement, the United States Court of Federal Claims, and the United States Government Accountability Office ("GAO").⁸ Decisions of the United States Court of Federal Claims can be appealed to the United States Court of Appeals for the Federal Circuit.⁹ The three initial tribunal options are the result of Congressional legislation; the Court of Federal Claims receives its authority to render decisions on bid protest cases from the Administrative Dispute Resolution Act of 1996 ("ADRA"); GAO receives its jurisdiction from the Competition in Contracting Act (CICA). Both ADRA and CICA provide that standing is conferred to "interested parties."¹⁰

CICA, however, defines "interested parties" as meaning "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." In summarizing standing, GAO has stated: "[O]ur Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions[,] it would have had a substantial chance of receiving the award."¹¹

This definition of interested party was not included in the legislation authorizing bid protest jurisdiction for the Court of Federal Claims. Rather, the term was left undefined and as

⁸ See 28 U.S.C. § 1491(b); 31 U.S.C. §§ 3551–56.

⁹ See 28 U.S.C. § 1295.

¹⁰ See also Frederick W. Claybrook Jr., *Standing, Prejudice, and Prejudging in Bid Protest Cases*, 33 PUB. CONTRACTS L.J. (2004).

¹¹ See *IGIT, Inc.*, Comp. Gen. B-275299.2, June 23, 1997, 97–2 CPD ¶ 7.

such, no uniform definition was adopted by the Court of Federal Claims. A majority of judges in the Court of Federal Claims found the Administrative Procedure Act (“APA”) definition of “interested party” to be more appropriate. The APA defines interested party as “adversely affected or aggrieved.” A substantial minority of judges, however, adopted the CICA/GAO definition, meaning bidders or prospective bidders who had a substantial chance at receiving the award of the bid. In resolving the split among the judges of the Court of Federal Claims, the United States Court of Appeals for the Federal Circuit adopted the CICA definition.¹² As such, for the past 20 years challenges to the actions of procuring entities could only be raised by bidders or potential bidders who had a substantial chance of receiving awards. As a consequence, standing to raise a bid protest in the United States is in effect conferred only to parties who can claim they were the next-highest bidder.¹³

C. A Potential New Standing for Standing

Judge Dyk’s decision in *Acetris Health, LLC v. United States*, however, reflects a potential change in the Federal Circuit’s interpretation of “interested party” and may signal acceptance of a broader class of protesters in the near future.¹⁴ Acetris, a pharmaceutical company, argued that its injury-in-fact was an inability to compete on equal footing because of an agency interpretation which excluded Acetris’ products.¹⁵ Acetris was not the next highest

¹² See *American Federation of Government Employees (AFGE)*, 258 F.3d 1294 (Fed. Cir. 2001) (adopting the CICA definition for standing before the Court of Federal Claims).

¹³ See *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009) (“Thus, to come within the Court of Federal Claims’s § 1491(b)(1) bid protest jurisdiction, Weeks is required to establish that it ‘(1) is an actual or prospective bidder and (2) possess[es] the requisite direct economic interest.’ *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1308 (Fed.Cir.2006). We have stated that ‘[t]o prove a direct economic interest as a putative prospective bidder, [the bidder] is required to establish that it had a ‘substantial chance’ of receiving the contract.’ *Id.*; see also *Info. Tech. & Applications v. United States*, 316 F.3d 1312, 1319 (Fed.Cir.2003) (“To establish prejudice, [the protestor] must show that there was a ‘substantial chance’ it would have received the contract award but for the alleged error in the procurement process.”); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1580 (Fed.Cir.1996) (same).”)

¹⁴ See *Acetris Health*, 949 F.3d at 726.

¹⁵ *Id.* at 725.

bidder, and under the conventional interpretation of bid protest rules would not be considered an “interested party,” a fact which the Court squarely acknowledged in stating that Acetris lacked standing to contest the actual award of a specific contract.¹⁶ Nonetheless, the Court found that Acetris still possessed sufficient standing, because the Court found it “virtually certain” that the issues raised by Acetris would reoccur in the future, and that therefore Acetris had pleaded a significant injury in fact. Thus, Acetris was effectively granted standing as an “interested party,” despite it being explicitly denied standing to contest the procurement.¹⁷

This decision potentially signals a remarkable shift in US bid protest standing rights for protestors, and potentially signals acceptance of an interpretation that is closer to the APA interpretation of “interested party” for US bid protests, rather than the CICA definition used by GAO. Nonetheless, by allowing *Acetris* to raise a protest, the courts were able to address and rectify a serious recurring issue affecting government procurement.

D. Larger Theme of Tension

At play behind the scenes of *Acetris* are competing perspectives on the function and objectives of a protest system: providing private remedy vs. whistleblowing. On the one hand, a protest system can provide space for parties to serve as a sort of private attorneys general, providing an accountability check on government action and allowing a quick avenue for blowing the whistle on mismanagement.¹⁸ On the other hand, a protest system also provides a means for granting remedy to injured parties.¹⁹ In effect, there are two compelling purposes for

¹⁶ *Id.* at 726-27.

¹⁷ *Id.* at 727.

¹⁸ See Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 693 (2001) (“protest proponents advocate that, while pursuing their own interests, protestors serve the public as private attorneys general”);

¹⁹ See William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 486 (1995).

having a protest system. In theory, if the purpose of a protest system is only to grant an injured party a remedy, then standing requirements should be more restrictive; if the purpose is to also provide an oversight function, then standing requirements should be made less restrictive.²⁰

Proponents of a remedy focused protest system argue that looser requirements will give rise to frivolous and unsuccessful lawsuits, resulting in more protests, less efficiency and longer waits for resolving protests. Proponents of the private attorneys general function argue that the ability of private parties to serve as a check on government powers is an important aspect, as parties possess an inherent interest in keeping the protest system both transparent and fair. In this sense, parties to protests serve a whistleblower function.

The optimal solution likely lies in between and as alluded to above, a good protest system should accommodate both functions to some extent.²¹ Accepting this, consideration then turns to finding the proper balance between transparency and efficiency.²² In finding this balance, it is helpful to turn to systems from around the world. Examining and comparing the standing rights and requirements found in various procurement challenge systems serves to provide better insight into finding the right balance between accountability and transparency on the one side, and efficiency and remedy on the other.

Part II: A Global Look at Bid Challenge Standing Requirements

When considering the various national-level bid challenge systems in place across the world, it becomes apparent that there is a spectrum of options for implementing bid challenge

²⁰ *Id.*

²¹ See Daniel L. Gordon, *Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make*, 35 Pub. Cont. L. J. (2006)

https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1690&context=faculty_publications.

²² *Id.*

standing requirements.²³ Some states, like France, allow for standing to be held by a wide class of entities, including third parties. A number of other states (including many in the EU) provide standing only to bidders and potential bidders. Further, certain states only provide standing to those vendors who actually submitted bids. Further still, the United States only confers standing to bidders and potential bidders who had a substantial chance of receiving the award. And indeed, some countries still maintain no mechanism for reviewing procurement-related complaints at all. In observing where any particular country falls on this spectrum of standing, it is crucial to identify the parties permitted, the circumstances required and the tribunals available.

A. The List: A Look at 98 Different Bid Challenge Schemes

While by no means inclusive of the 200 plus states around the world, the following list of 98 procurement challenge systems is intended to incorporate a diverse array of countries of different size, wealth, regional location, and cultural ties.²⁴ It incorporates both global giants and small island chains, as well as both prosperous regional leaders and developing states.²⁵

²³ WTO GPA Art. XVIII, requires that signatory countries should develop domestic review procedures. Currently, the number of countries party to the GPA is at 20, which covers 48 WTO members because the European Union is a party to the GPA on behalf of its 27 member states. 36 WTO additional members/observers participate in the GPA Committee as observers, as do four international organizations. Twelve of these members with observer status are in the process of acceding to the Agreement. Many of these countries are contained in the following list of country bid standing profiles.

²⁴ This list was largely made possible due to the stellar research contained within the World Bank's Global Public Procurement Database, whose list is up to date as of 2018. See *Global Public Procurement Database*, WORLD BANK, <https://www.worldbank.org/en/topic/governance/brief/global-public-procurement-database> (last visited on Dec. 14, 2020). The database serves as an excellent starting point for learning more about a particular country's procurement laws. Other sites which were of great help with this list include the Law Reviews, 8th Edition; ICLG; and the official website for the European Union. See Jonathan Davey and Amy Gatenby, *The Government Procurement Review*, Edition 8, LAW REVIEWS (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227009/editors-preface>; *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations>; *Public Procurement*, EUROPEAN COMMISSION, https://ec.europa.eu/growth/single-market/public-procurement_en (last visited on Dec. 14, 2020).

²⁵ This list makes use of a mixture of both official and unofficial translations made of laws and regulations, the vast majority of which were directly sourced from the websites of the relevant procurement authorities for the different countries contained in this list. For those wishing to locate the website of a particular country's respective procurement agency, Ministry of Finance, or general government website containing that country's laws, the World Bank's Global Procurement Database is an excellent starting point.

1. The European Union

The European Union's rule governing procurement and bid challenges are widely influential.²⁶ EU member states are required to implement EU requirements into their own laws and regulations.²⁷ In addition, many non-member state countries look to EU directives on public procurement to use as a model on which to base their own procurement rules.²⁸ For this reason, the bid protest challenge system of the EU is placed first on this list, because it directly commands or otherwise influences many of the countries and states on this list.

EU Directive 2014/24 includes directions on implementing bid challenge mechanisms.²⁹ The EU directive refrains from imposing specific requirements of member states for the governance of bid challenge standing rights. Although the directive requires that mechanisms be in place to monitor procurement systems for potential issues and improvements, the directive directly states that member states do not have to grant challenge standing to all monitors.³⁰ Instead, Directive 2014/24/EU essentially sets a minimum requirement for member states to adhere to.³¹

Broadly speaking, the minimum standing requirement for member states to follow is to confer standing to "economic operators," a term which includes a wide range of bidders and potential bidders. This is the typical arrangement adopted by most Member States. However some member states have chosen to implement wider standing rights, conferring standing to a

²⁶ See *Government Procurement Law and Policy: European Union*, LIBRARY OF CONGRESS (July 24, 2020) <https://www.loc.gov/law/help/govt-procurement-law/eu.php>; *Public Procurement*, EUROPEAN COMMISSION, https://ec.europa.eu/growth/single-market/public-procurement_en (last visited on Dec. 7, 2020); Bill Gilliam et al., *European Union*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227010/european-union>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See Directive 2014/24, of the European Parliament and of the Council of February 26, 2014 on public procurement and repealing Directive 2004/18/EC 2014/24/EU, 2014 O.J. (L 94/65) 1, 121. This Directive can be found at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>.

³¹ *Id.*

wider class of entities to public entities and industry associations like unions.³² As such, standing granted before the respective protest systems of member states within the EU can delineate in significant ways, and, for that reason this list incorporates multiple member states.³³ In short, the EU directive sets a baseline, which is to be met by all member states, prospective member states, and certain countries in association with the EU, but which can also be exceeded.³⁴

2. Afghanistan

Afghanistan's official translation of its Procurement Law of 2017 includes "The Rights for Objection and Review" under Article 50 of the law.³⁵ Under Article 50, standing is conveyed to bidders who experience loss as a result of a violation by contracting authorities.³⁶ Protests are brought before the Administrative Review Committee, whose decisions are final.³⁷

As noted in Part I of this paper, a state's overall standing consists of a combination of various factors, including which classes of parties may protest and under which circumstances

³² Consider France, number 37 on this list.

³³ EU Member states included in this list contain a designation of "EU" next to their name. Further, prospective member states and EU affiliates included in this list will generally be noted within the profile for said country.

³⁴ Paragraph 122 of the introduction to Directive 2014/24/EU states:

(122) Directive 89/665/EEC provides for certain review procedures to be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement of Union law in the field of public procurement or national rules transposing that law. Those review procedures should not be affected by this Directive. However, citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to Directive 89/665/EEC do nevertheless have a legitimate interest, as taxpayers, in sound procurement procedures. They should therefore be given a possibility, otherwise than through the review system pursuant to Directive 89/665/EEC and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of this Directive to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities.

³⁵ See Procurement Law [Afghanistan], Official Gazette no.1223 (Sept. 17, 2016) (English Translation provided by Islamic Republic of Afghanistan, Administrative Office of the President National Procurement Authority. When discrepancies arise between the English translation and the Dari and Pashto version, the Dari and Pashto law rules); see also *Procurement*, AFGHANISTAN GOVERNMENT ELECTRONIC AND OPEN PROCUREMENT SYSTEM, <https://ageops.net/en/documents/procurement-law-and-rop/procurement-law> (last visited on Dec. 14, 2020); *Global Public Procurement Database: Afghanistan*, WORLD BANK, https://www.globalpublicprocurementdata.org/gppd/country_profile/AF (last visited on Dec. 14, 2020).

³⁶ *Id.*

³⁷ *Id.*

said parties may protest. When compared to rest of the countries within this list, Afghanistan's mixture of standing rights (e.g., bidders in the event that a violation causes harm) presents a fairly common combination of standing rights. That said, this combination is on the moderately restrictive side, as it does not appear to grant standing to potential bidders, nor other interested parties. Afghanistan also appears to require actual harm, not just the chance of harm.

3. Albania

Albania's bid protest standing requirements are found in its "Law on Public Procurement."³⁸ This law was originally passed on November 20, 2006, but has since been amended multiple times, most recently by Law no 182/2014 in 2014.³⁹ Chapter VII, titled "ADMINISTRATIVE REVIEW PROCEDURES" contains Article 63 which concerns the "rights of interested parties."⁴⁰ Paragraph 1 of Article 62 reads, "Any person having or having had an interest in a procurement procedure and who has been or risks being harmed by a decision made by a CA, which infringes this law, may challenge such decision."⁴¹

Albania's overall standing rights presents another common combination of factors. Compared, however, to Afghanistan's moderately restrictive granting of standing rights, Albania's overall standing is moderately open, in that Albania grants standing to interested parties, not just bidders, and does not require actual harm, permitting challenges instead where the party is at risk of harm.

³⁸ See Law on Public Procurement [Albania], Law no. 9643 (Nov. 20, 2006) (as amended by Law no. 9800, dated 10.09.2007, Law no. 9855, dated 26.12.2007, Law no. 10170, dated 22.10.2009, Law No. 10 309, dated 22.07.2010, Law no. 22/2012, Law no. 131/2012 and Law no. 182/2014); see also *Agjencia E Prokurimit Publik* [Public Procurement Agency], (last visited on Dec. 14, 2020) <http://www.app.gov.al/>; *Global Public Procurement Database: Albania*, WORLD BANK (last visited on Dec. 14, 2020) https://www.globalpublicprocurementdata.org/gppd/country_profile/AL; <http://www.app.gov.al/about-us/annual-reports/>.

³⁹ *Id.*

⁴⁰ Law on Public Procurement [Albania], Law no. 9643 (Nov. 20, 2006) (last amended 2014).

⁴¹ *Id.*

It is worth stating that although Albania is not a member-state of the EU, its law on procurement is consistent with the EU regulations. This is particularly apparent given the usage of the term “economic operator” in Article 62 paragraph 1.1, which as previously mentioned is a commonplace term found in EU regulations.⁴² Albania is in accession talks with the EU as of March 2020. Notably, the combination discussed in the previous paragraph (permitting challenges by interested parties who suffer or are likely to suffer harm) is the typical combination of standing factors for EU member states.

4. Algeria

Algerian bid challenge rights and procedures can be found in the Official Journal of the Algerian Republic No. 50 of September 20, 2015.⁴³ Section 6 of Chapter 3 concerns appeals. Article 82 provides that in addition to the rights of appeal provided by existing legislation, bidders may challenge provisional awards of contracts to the Public Procurement Committee.⁴⁴ This suggests that bid protest standing rights in Algeria are comparable to those in Afghanistan.

5. Angola

The “Public Procurement Law” of Angola of June 2016 contains regulations covering procurement challenge procedures.⁴⁵ Chapter IV, Article 15 states “Any acts practiced by the

⁴² Article 63 “Rights of interested persons” of the Albanian procurement law reads:

1. Any person having or having had an interest in a procurement procedure and who has been or risks being harmed by a decision made by a CA, which infringes this law, may challenge such decision.

1.1 In the case of appeals against the tender documents, the economic operators may file a appeal with the contracting authority within 7 days of publication of the contract notice on the website of the Public Procurement Agency.

Upon receipt of a written appeal, the contracting authority shall suspend the continuation of the procurement procedure until the appeal has been fully examined, including making of a decision within 3 days from the filing of the appeal. Under Paragraph 6 et sequens of this Article, the contracting authority's final decision may be appealed to the Public Procurement Commission. *Id.*

⁴³ See Official Journal of the Algerian Republic No. 50, Chapter 3, Section 6 (Sept. 20, 2015).

⁴⁴ *Id.*

⁴⁵ See Public Procurement Law [Angola], Law N° 9/16, Chapter IV (Jun. 2016). In 2019 Angola published a Proposal for A Partial Amendment of the Procurement Law. See Proposal for a Partial Amendment of the Public Procurement (Aug. 2019).

public contracting entity are susceptible to administrative impugnation in the framework of the procedures of this Law that may violate the interests legally protected of the individuals.”⁴⁶

Article 17 provides further that “The interested party shall explain in the claim or petition for presentation of hierarchical appeal or also inappropriate hierarchical appeal, all the grounds for impugnation and it may add the documents it deems required.”⁴⁷ As such, in Angola challenge standing is conferred to “interested parties” whose legally protected interests have or may have been violated. Angola, thus, provides standing on the same level as Albania and the EU.

6. Argentina

The relevant procurement law in Argentina is the General Regime for Public Procurement (GRPP).⁴⁸ Decree 1030/16 of September 15, 2016 shaped the GRPP as it currently stands.⁴⁹ The GRPP provides for a procedure for challenging non-binding evaluation commission decisions but does not provide a select procedure for challenging the actual award.⁵⁰ Instead, challenging the award is permitted as an administrative challenge under the Administrative Procedures Act, as authorized by Law no. 19,549.⁵¹ Challenges may be raised by unsuccessful bidders or other aggrieved persons, either before the procuring entity or the judiciary.⁵²

Both legal and non-legal circumstances can be challenged.⁵³ Legal claims can include violations in procedure and incorrect evaluation of a tenderer, whereas non-legal claims can center on comparisons between the selected vendor and other vendors (e.g., arguing that the

⁴⁶ Public Procurement Law [Angola], Law N° 9/16, Art. 17 (Jun. 2016). In 2019 Angola published a Proposal for A Partial Amendment of the Procurement Law. See Proposal for a Partial Amendment of the Public Procurement (Aug. 2019)

⁴⁷ *Id.*

⁴⁸ See Decree 1030/16 (Sept 15, 2016) [Argentina]; see also *OECD Integrity Review of Argentina: Achieving Systemic and Sustained Change*, OECD PUBLIC GOVERNANCE REVIEWS (2019) <https://doi.org/10.1787/g2g98ec3-en>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Administrative Procedures Act [Argentina], Law No. 19,549 (Mar. 4, 1972).

⁵² See *supra* note 48.

⁵³ *Id.*

protestor has a better reputation or that protestor's goods are better quality than the awardee).⁵⁴

In permitting protests against non-legal claims Argentina confers one of the widest sets of circumstances. This, coupled with providing challenge rights to bidders or other aggrieved persons, makes Argentina's overall conferral of standing rights one of the broadest.

7. Armenia

The Law of the Republic of Armenia on Procurement, adopted on December 16, 2016, includes challenge rights and procedures.⁵⁵ Article 46 "Right to Appeal" states:

1. Every person shall have the right to appeal against the actions (inaction) and decisions of the contracting authority, the evaluation commission and the person examining procurement-related appeals.
2. Relations pertaining to the procurement, including the relations with regard to examination of appeals, shall not be regarded as administrative relations and shall be regulated by the legislation of the Republic of Armenia regulating civil law relations.
3. According to this Law, every person shall have the right to: (1) appeal against the actions (inaction) and decisions of the contracting authority and the evaluation commission to the person examining procurement-related appeals, before conclusion of the contract; (2) appeal against the actions (inaction) and decisions of the person examining procurement-related appeals, the contracting authority and the evaluation commission through judicial procedure.
4. Every person interested in concluding a specific transaction and having suffered damages caused as a result of an action or inaction of the contracting authority, evaluation commission or the person examining procurement-related appeals shall have the right to claim compensation for damages through judicial procedure.⁵⁶

As shown, Armenia provides one of the widest applications of standing for challenging procurements, in that every person is given the right to appeal decisions and indecisions related procurement law.⁵⁷

⁵⁴ *Id.*

⁵⁵ See The Law of the Republic of Armenia on Procurement, Art. 46 (Dec. 16, 2016); *see also Assessing Public Procurement Practice in Armenia – 2017*, INSTITUTE FOR DEVELOPMENT OF FREEDOM OF INFORMATION (2017) www.tpp-rating.org; *Implementation Assessment of the Armenian Public Procurement Legislation*, FREEDOM OF INFORMATION CENTER OF ARMENIA (2017).

⁵⁶ *Id.*

⁵⁷ *Id.*

8. Australia

Bid challenge rights and procedures in Australia are governed by the “Government Procurement (Judicial Review) Act 2018.”⁵⁸ The Act provides that Australian courts can grant injunctions on claims filed by “suppliers.”⁵⁹ Part 1 states that a supplier is “(a) a person who supplies, or could supply, goods or services; or (b) a partnership (or other group) of 2 or more persons that supplies, or could supply, goods or services.”⁶⁰ Part 4 contains a provision for complaints made by suppliers.⁶¹ Suppliers “may make a written complaint about the conduct to the accountable authority of the entity” if either the government procuring entity has engaged, is engaging or proposes to engage in conduct in violation of the relevant procurement law, or if “the interests of the supplier are affected by the conduct.”⁶²

9. Austria (EU)

The Federal Public Procurement Act of 2018 governs procurement in Austria.⁶³ As expected, Austrian regulations align with EU directives, and as such standing is granted to “operators.”⁶⁴ Operators are defined as “legal entities such as natural or legal persons, public institutions or associations of these persons or institutions, registered partnerships or working and bidding groups who offer the execution of construction works, the delivery of goods or the

⁵⁸ Government Procurement (Judicial Review) Act [Australia], No. 129, 2018 (2018) <https://www.legislation.gov.au/Details/C2018A00129>; see also *Commonwealth Procurement Rules*, AUSTRALIAN GOVERNMENT: DEPARTMENT OF FINANCE (Dec. 14, 2020) <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules>. For a general sense of Australia’s procurement system, visit Geoff Wood et al., *Australia*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227011/australia>.

⁵⁹ See *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Government Procurement (Judicial Review) Act [Australia], No. 129, 2018 (2018) <https://www.legislation.gov.au/Details/C2018A00129>;

⁶³ See Bundesvergabe-gesetz 2018 [Federal Public Procurement Act of 2018][Austria]; see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/australia>; Philipp J. Marboe, *Austria*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227013/australia>.

⁶⁴ *Id.* This is loosely translated from “Unternehmer” which could be read as either “operator” or “entrepreneur.”

rendering of services on the market.”⁶⁵ Under § 342, operators can apply for review in the event that the operator asserts an interest in the conclusion of the contract and the illegal action of the procuring entity has caused or threatens to cause the operator damage.⁶⁶ Ultimately, Austria includes bidders and potential bidders, and therefore, grants moderately open standing rights.

10. Azerbaijan

The Law of the Republic of Azerbaijan on Government Procurements addresses bid challenge rights in Article 55.⁶⁷ Suppliers, who are defined as potential or actual parties to the procurement contract with the procuring entity, possess the right to file a complaint, provided they claim to be subject to damages because of failure of the procuring entity to fulfill its duties defined by the law.⁶⁸ Complaints can be filed administratively or through the courts.⁶⁹

Azerbaijan presents a good example of standing rights that fall in between Afghanistan and the EU countries, in that it confers standing to bidders and potential bidders, but not interested parties.⁷⁰ As such, Azerbaijan grants moderate standing rights when compared to other countries; not as open as some countries on this list but also not as restrictive as others.

11. Bahamas

The Public Procurement Bill of 2017 for the Bahamas includes bid challenge rights.⁷¹ Article 64, “Complaints,” states that “a potential or actual bidder who claims to have suffered, or to be likely to suffer, loss or injury due to a breach of duty imposed on a procuring entity by this Act may at any stage apply by way of complaint to the procuring entity for a review of the

⁶⁵ Bundesvergabegesetz 2018 [Federal Public Procurement Act of 2018][Austria] at §1, paragraph 38.

⁶⁶ *Id.* at § 342.

⁶⁷ See Law of the Republic of Azerbaijan on Government Procurements, No. 245-IIQ, Art. 55 (Dec. 27, 2001).

⁶⁸ *Id.*

⁶⁹ *Id.* at Arts. 55- 57, 60.

⁷⁰ Azerbaijan also seems to require actual harm suffered, not likelihood of harm.

⁷¹ See Public Procurement Act [Bahamas], (2017).

procurement proceedings.⁷² Unsatisfied complainants can appeal to the Procurement Review Tribunal, per Article 65.⁷³

12. Bahrain

Chapter Five of Bahrain's procurement law addresses "Review and Grievance" concerning government contracts.⁷⁴ Article 56 states that any supplier or contractor may claim he has suffered or may suffer damage or loss.⁷⁵ Complaints can be appealed, per Articles 57 and 58.⁷⁶ Supplier and contractor are not defined further in the law.

13. Barbados

Bid challenge rights in Barbados are covered by the Bill of February 14, 2018.⁷⁷ Part VII, titled "Challenge Proceedings," includes several articles on challenge proceedings. The relevant articles provide standing to suppliers, who can challenge and appeal violations of the Public Procurement Act that cause or a likely to cause injury to the supplier.⁷⁸ A "supplier" is defined as "a provider of goods, works or services" under Part I of the bill. Whether potential suppliers are also included is unclear.

⁷² *Id.* at Art. 64.

⁷³ *Id.* at Art. 65.

⁷⁴ See Legislative Decree No.36 of 2002: With Respect to Regulating Government Tenders and Purchases, No. 36, Chapter V (2002) <http://www.tenderboard.gov.bh/Laws.aspx?cms=iQRpheuphYtJ6pyXUGiNqpnucubnRdkps>.

⁷⁵ *Id.* at Art. 56.

⁷⁶ *Id.* at Arts. 57-58.

⁷⁷ See Public Procurement Act, 2018 [Barbados], Part VII (Feb. 14, 2018).

⁷⁸ *Id.* at Arts. 74, 76. Article 74 states:

Appeals to Tribunal in respect of registration, exclusion etc.

74. A supplier may, upon payment of the prescribed fee, appeal to the Tribunal against a decision

- a) to refuse to register him or renew his registration;
- b) that he is ineligible to participate in public procurement;
- c) to exclude him from participation in public procurement;
- d) or to remove his name from the Suppliers Register.

Id. at Art. 74. Further, Article 76 states:

Reconsideration of decision or action by procuring entity or tenders committee

76.(1) A supplier who participates in procurement proceedings and alleges that he has suffered or is likely to suffer loss or injury because a decision or action of a procuring entity or tenders committee in relation to the proceedings does not comply with this Act may, upon payment of such fee as may be prescribed, apply to the entity or committee to reconsider the decision or action. [...]

Id. at Art. 76.

14. Belarus

Article 51 of Belarusian procurement law gives standing to a participant or other legal or natural person, including an individual operator, to file a challenge a decision violating the rights and legitimate interests of participants, other legal entities, or individuals.⁷⁹ Challenge proceedings can be initially brought to the authorized state body for public procurement and can be further appealed in court.⁸⁰

15. Belgium (EU)

As an EU member state, Belgian procurement is subject to EU directives.⁸¹ Challenge procedures concerning Belgian government procurement are not incorporated in its law of June 17, 2016 governing general public procurement.⁸² Instead, challenge rights and proceedings are incorporated in the law of June 17, 2013.⁸³ Section 5 of the June 17, 2013 law concerns recovery procedures.⁸⁴

Any person who has an interest in the procurement award, or who suffers or may suffer damage because of a violation of Belgian or EU public procurement law, can challenge the decisions of a procuring entity.⁸⁵ Parties can bring challenges to courts or the administrative law division of the Council of State.⁸⁶ This is potentially broader than other previous EU states on this list, in that “interested parties” could include third parties, not just economic operators.

⁷⁹ See Law of the Republic of Belarus, No. 419-3, Art. 51 (July 13, 2012) pravo.by/document/?guid=3871&p0=H11200419.

⁸⁰ *Id.* at Art. 56.

⁸¹ See also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/belgium>; Frank Judo and Klaas Goethals, *Belgium*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227014/belgium>.

⁸² See Public Procurement Act [Belgium] (June 17, 2016) (last amended by Law of April 7, 2019).

⁸³ See Law of June 17, 2013, § 5, Subsection 1, 7 (last amended by Royal Decree of December 20, 2019).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

16. Bermuda

In Bermuda, government procurement and government contracts are governed by the July 2, 2018 Code of Practice for Project Management and Procurement.⁸⁷ Section 4 states that “All decisions, documents, quotations, tenders and contracts made, produced, submitted or executed under this Code may be subject to inspection and monitoring by the Financial Secretary or the Accountant General, the Director, the Director of Internal Audit, and the Auditor General.”⁸⁸

In addition, Section 29 pertains to “Awarding Contracts” and Section 41 addresses “Complaints and Disputes.”⁸⁹ Section 41 states “Complaints, including protected disclosures, regarding any aspect of the procurement process must be reported to the Director.”⁹⁰ Unsatisfied complainants have the right to have the matter adjudicated by the Supreme Court of Bermuda, per section 6(8) of the Constitution of Bermuda.⁹¹ Section 41 also provides that unsatisfied complainants must escalate matters to the Permanent secretary responsible for the Office for Project Management and Procurement or another public officer as determined by the Secretary to the Cabinet.⁹² However, which parties may become complainants is not specified.

17. Bhutan

Bhutan’s 2009 Procurement Rules & Regulations, last revised in July 2015, govern procurement challenge rights and procedures.⁹³ CHAPTER VIII, “Institutional Arrangements.” Section 8.1, “Procurement Grievance Mechanism,” reads:

⁸⁷ See Code of Practice for Project Management and Procurement [Bermuda] (Jul. 2, 2018); see also *Office of Project Management and Procurement*, GOVERNMENT OF BERMUDA, <https://www.gov.bm/departments/office-project-management-and-procurement> (last visited on Dec. 14, 2020).

⁸⁸ Code of Practice for Project Management and Procurement [Bermuda], § 4 (Jul. 2, 2018).

⁸⁹ See *id.* at § 29.

⁹⁰ Code of Practice for Project Management and Procurement [Bermuda], § 29 (Jul. 2, 2018).

⁹¹ See *Id.* at § 6.

⁹² *Id.* at § 41.

⁹³ See Procurement Rules and Regulations [Bhutan], (2009) (last revised July 2015). "In exercise of the power granted by section 104 of the Public Finance Act of Bhutan 2007, the Ministry of Finance hereby frames the Rules and Regulations for Procurement to be implemented by Government Agencies." *Id.*

8.1.1 The obligations of this Procurement Rules & Regulations and imposed on Procuring Agencies are duties owed to suppliers, contractors and service providers.

8.1.2 Any supplier, contractor or service provider who has or is likely to suffer, loss or injury resulting from an alleged breach of such duty, may make a complaint or seek review in accordance with this section, provided that the complaint or review procedure shall be brought promptly and in any event within the prescribed time.

8.1.3 A supplier, contractor or service provider may, in the event of a perceived breach of a duty imposed upon a Procuring Agency in respect of a specific procurement procedure, submit a written complaint to the head of the procuring agency responsible for such procedure promptly and in any event within 10 days of the letter of intent to award the contract.⁹⁴

As stated above, suppliers, contractors or service providers satisfy standing to bring a challenge.⁹⁵ Per Section 1.1.3 Definitions, paragraph 36, “Supplier” is defined as “an individual or a legal entity entering into a contract for the supply of goods or services.”⁹⁶

18. Bolivia

Supreme Decree 1497 dated February 20, 2013 concerns challenges and appeals.⁹⁷

Chapter VII, Article 90 provides that bidders may challenge resolutions issues, provided that the bidder suffers harm or may suffer harm.⁹⁸ Bolivia, however, does not have a set dispute resolution mechanism, and is not a signatory to the WTO or the WTO GPA.⁹⁹

19. Brazil

Procurement Law No. 8,666 of June 21, 1993 includes challenge rights for bidders in Brazil.¹⁰⁰ Article 41 provides that any citizen may challenge breaches of the procurement and

⁹⁴ Procurement Rules and Regulations [Bhutan], section 8 (2009) (last revised July 2015).

⁹⁵ *See id.*

⁹⁶ Procurement Rules and Regulations [Bhutan], Section 1.1.3 (2009) (last revised July 2015).

⁹⁷ *See* Decreto Supremo No. 1497 [Supreme Decree No. 1497], Chapter VII (Feb. 20, 2013); *see also* SICOES, <https://www.sicoes.gob.bo/portal/normativa/decretos.php> (last visited Dec. 8, 2020).

⁹⁸ *Id.*

⁹⁹ *See Bolivia-Selling to the Government*, EXPORT.GOV (July 12, 2019) <https://www.export.gov/apex/article2?id=Bolivia-Selling-to-the-Government>.

¹⁰⁰ *See* Procurement Law No. 8,666 [Brazil] (Jun. 21, 1993); *see also* Teresa Arruda Alvim and David Pereira Cardoso, *Brazil*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227020/brazil>; Ministerio da Economia, <https://www.gov.br/fazenda/pt-br> (last visited Dec. 2, 2020).

contracting rules contained in the Procurement Law.¹⁰¹ Similarly, Article 113 provides that any bidders, persons or entities may challenge violations of the Procurement Law before the Court of Auditors or the agency.¹⁰² Other Articles connected to bid challenges include Article 101 and Article 109, which address judicial procedure for reporting criminal action and administrative resources for bids, respectively.¹⁰³

20. Burkina Faso

Law 039-2016 concerns the general regulation of public contracting in Burkina Faso.¹⁰⁴ The law defines a “Candidate” as a natural or legal person who possesses an interest in participating or who is retained by a contracting authority to participate in a procurement or public service delegation procedure.¹⁰⁵ Redress procedures concerning bid challenges are governed under Title IV.¹⁰⁶ Article 38 states that candidates, bidders and awardees may lodge a preliminary appeal before the contracting authority against decisions grieving the candidate, bidder or awardee during the competitive bidding procedures.¹⁰⁷ Under Article 39, candidates, bidders, awardees, licensees, delegates, and private partners can refer matters to the non-legal appeal.¹⁰⁸

Further, per Article 40, decisions of the non-judicial appeals body during the solicitation phases are binding.¹⁰⁹ Chapter 2 provides for Judicial Appeal, but as stipulated in Articles 40 and 43, this option only exists for performance disputes, and not for procurement proceedings.¹¹⁰ In

¹⁰¹ See Procurement Law No. 8,666 [Brazil], Art. 41 (Jun. 21, 1993)

¹⁰² See *id.* at Art. 113.

¹⁰³ See *id.* at Art. 109.

¹⁰⁴ See *Portant Reglementation Generale de la Commande Publique Loi No. 039-2016/AN* [General Regulation of the Public Order] [Burkina Faso], No. 039-2016/AN (Dec. 2, 2016); see also Direction Generale du Controle des Marches Publics et des Engagement Financiers, <https://www.dgmp.gov.bf/> (last visited on Dec. 12, 2020).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at Art. 38.

¹⁰⁸ *Id.* at Art. 39.

¹⁰⁹ *Id.* at Art. 40.

¹¹⁰ *Id.*

spite of the binding nature of the non-judicial appeal option, the exclusively non-judicial nature of the sole option provided to bid challenges raises a concern over the efficacy of Burkina Faso's protest system.

21. Cambodia

The Cambodia Procurement Manual includes reference to a complaint handling mechanism under Section 4.6.¹¹¹ Section 4.6.1 outlines three distinct types of project issues:

(a) complaints concerning bid protest from aggrieved contractors, suppliers, service providers and consultants, which are addressed in this Section 4.6 of the Manual, (b) performance disputes, which are governed by the General Conditions of Contract (GCC) and Special Conditions of Contract (SCC/PCC), and, (c) non procurement related complaints from any parties, which are addressed in the SOP.¹¹²

More directly pertaining to standing for bid challenges, section 4.6.7 states:

Concerning bid protests, from time to time, with and without justification bidders, suppliers, contractors, service providers and consultants may choose to lodge a complaint concerning some aspect of the contract award process. In the event the contract has been awarded and a contractual relationship exists between the parties, there are established dispute mechanisms in the GCC that shall be followed, up to and including judicial review.¹¹³

The manual also makes it clear that whistleblowing is a central focus of the Cambodian complaint handling process, as demonstrated by explicit reference in section 4.63 which stipulates that the confidentiality of any complainant is to be ensured.¹¹⁴ As such, section 4.65 states "The complainant need not be personally aggrieved or impacted, and may be acting merely in accordance with a sense of civic duty, such as an NGO or private citizen, in bringing an

¹¹¹ See Sub-Decree on Promulgating the Updated Standard Procedures for Implementing All Externally Financed Projects/Programs, No. 74 ANK. BK, § 4.6 (Jun. 8, 2012); see also *Ministry of Economy and Finance*, <https://www.mef.gov.kh/>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

occurrence to the attention of project authorities.”¹¹⁵ This is one of the broadest mandates provided concerning standing rights.

22. Cameroon

Chapters IV and V of Decree 208/366, dated June 20, 2018, contain articles pertaining to complaint review.¹¹⁶ Chapter I, Section I concerns Litigation during the Award Phase.¹¹⁷ Sub-section I concerns Petitions by Candidates and Bidders.¹¹⁸ Article 170 states that any candidate or bidder who feels aggrieved from public award procedures may file a petition.¹¹⁹ The reviewing authority which handles complaints depends on the stage of the procurement; depending on this, complaints are to be filed with either the Procurement issuing entity or the Petitions Review Committee.¹²⁰

23. Canada

Generally, bidders and potential bidders in federal level procurements in Canada possess standing to bring bid challenges before the Canadian International Trade Tribunal (“CITT”) for procurements subject to trade agreements (such as the GPA, which Canada is a party to).¹²¹ Per section 1.35 of the Supply Manual:

CITT is authorized to receive complaints pertaining to any aspect of the procurement process up to and including contract award, and also to conduct inquiries and make determinations. In dealing with a complaint, CITT must

¹¹⁵ *Id.*

¹¹⁶ See Decree 208/366 [Cameroon], Chapters I, IV-V (June 20, 2018); see also *Ministere des Marches Publics* (Ministry of Public Contracts), <https://minmap.cm/>; see also *Website for Agence de Regulation des Marches Publics* (Public Contracts Procurement Agency) <http://armp.cm/Decrees.php?PHPSESSID=ajpn8m128l0f8k6ikfm0h29mf2#tzM11>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at Art. 170. Per Articles 171-173, what the protest is permitted to address is dependent on strict timing requirements; this means that certain aspects cannot be protested once the bid process has progressed beyond certain stages. *Id.* at Arts. 171-73.

¹²⁰ See Decree 208/366 [Cameroon], Chapters I, IV-V (June 20, 2018).

¹²¹ See SOR 87-402; Supply Manual, § 1-35 (last visited on Dec. 12, 2020) <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/1/35>; see also, *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/canada>; Theo Ling et al., *Canada, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW*, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227016/canada>.

determine whether the government institution responsible for the procurement under review has complied with the requirements of the trade agreements and such other procedural requirements, as prescribed in the Canadian International Trade Tribunal Procurement Inquiry Regulations.¹²²

Broadly speaking, however, bidders and potential bidders have other options in addition to the CITT. For example, suppliers can pursue litigation under the common law in courts.¹²³

Ultimately, the overall standing granted by Canada appears to be moderate, in that bidders and potential bidders, but not other interested parties, may file a protest in the event that the procuring entity commits a violation.

24. Chile

Chapter V of Law 19886 contains challenge rights.¹²⁴ Article 22 sets the parameters for the Court of Public Procurement.¹²⁵ Article 24 states that a challenge action may be filed against any arbitrary or illegal acts (or omissions) made by public procuring entities.¹²⁶ Any natural or legal person who has an interest currently in the respective administrative contracting procedure may file such a challenge.¹²⁷ Such action is taken before the Court of Public Procurement.¹²⁸ The extent of Chilean standing therefore seems comparable to the EU standard.

25. China

China has two laws which concern procurement, the Government Procurement Law of 2002 and the Bidding Law of the People's Republic of China from 2000.¹²⁹ Under Chapter VI of

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See Law No. 19886 [Chile], Art. 22 (July 30, 2003) (last amended on Apr. , 2018) <https://www.bcn.cl/leychile/navegar?idNorma=213004>; see also Chile Compra, <https://www.chilecompra.cl/ques-chilecompra/> (last visited on Nov. 23, 2020); Decree 250, Regulation for Law No. 19886, <https://www.bcn.cl/leychile/navegar?idNorma=230608>.

¹²⁵ *Id.*

¹²⁶ *Id.* at Art. 24.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Bidding Law of the People's Republic of China, (implemented on Jan. 1, 2000) http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004749.htm; see also National Development and Reform Committee, <https://www.ndrc.gov.cn/> (last visited on Nov. 3, 2020); Government Procurement Law and Policy: China, Library of Congress (Mar. 2010) <https://www.loc.gov/law/help/govt-procurement-law/china.php>.

the Bidding Law, Articles 62 and 65 state that bidders and other interested parties have the right to raise objections to the bid inviting party or may raise complaints to the relevant administrative supervision department in the event that a procuring unit commits a violation of the Bidding Law.¹³⁰

The law does not clarify what may constitute “other interested parties,” but it is clear that the scope of parties permitted to file protests goes beyond just bidders. Yet, the apparent lack of court access for bidders prompts questions regarding the efficacy of raising a protest in China. Currently there seem to be two options, an agency level protest and the “relevant administrative supervision department.”¹³¹ Whether that results in fair and independent decisions which lead to effective oversight and remedy is unclear.

26. Colombia

Article 24 of Law 80 of 1998 (dated October 28) states that interested parties have the opportunity to know and contest the reports, opinions and decisions rendered of contracting authorities during the contracting process.¹³² As such, standing is granted to “interested parties.”

27. Democratic Republic of the Congo

Under Law No. 10/010 of April 27, 2020 relating to public procurement, any candidate or tenderer may file a complaint with the procuring entity, per Article 73, in the event that an illegal action resulted in the candidate being outbid.¹³³ Unresolved disputes may be appealed and settled in court, according to Article 76.¹³⁴ Candidates are defined under Article 4 as natural or legal persons who express an interest in participating, or who is selected by the contracting authority

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Law 80 of 1998 [Colombia], Article 24 (October 28, 1998); *see also* Decree 4170 (Nov. 3, 2011); Columbia Compra, <https://www.colombiacompra.gov.co/> (last visited on Dec. 1, 2020).

¹³³ Law No. 10/010 [Democratic Republic of the Congo], Art. 73 (Apr. 27, 2020); *see also* Direction General du Control des Marches Publics, <http://dgcmp.cd/> (last visited on Dec. 4, 2020); <http://dgcmp.cd/loisdecrets.php>.

¹³⁴ *Id.* at Art. 76.

to participate in a public procurement procedure.¹³⁵ Standing is thus conferred to bidders or potential bidders in the event that a violation causes harm. In the greater context of the other countries on this list, the Democratic Republic of the Congo's standing rights are moderate, in that it falls between Afghanistan (bidders only) and the EU (interested parties).

28. Republic of the Congo

Per its 2009 law on procurement, Articles 141 and 142 provides that candidates and tenderers may lodge an appeal against procedures and decisions rendered during the procurement process.¹³⁶ Grounds for appeal include being unfairly excluded from competition and decisions which caused candidates and tenderers harm.¹³⁷ Appeals can be made to the procuring entity, whose decisions can be further appealed before the Dispute Resolution Committee.¹³⁸ Further, candidates are defined under Article 2 as natural or legal persons who express an interest in participating with the procurement, or those who are selected by the contracting authority to participate in a procurement procedure.¹³⁹ Like Azerbaijan and the Democratic Republic of the Congo, the scope of standing is moderate, being conferred to bidders or potential bidders in the event that a violation causes harm.

29. Cote d'Ivoire

Article 143 of Ordonnance 2019 provides that candidates and tenderers who demonstrate a legitimate interest or who consider themselves unfairly injured by procedures may raise a challenge.¹⁴⁰ Article 1 defines a candidate as a natural or legal person expressing an interest in participating or who is retained by the contracting authority to participate in the procurement.

¹³⁵ *Id.* at Art. 4.

¹³⁶ See Public Contract Code, Décret n° 2009-156 2009, arts. 141, 142 (May 2009); see also ARMP, <http://armp.cg/> (last visited on Dec. 2, 2020).

¹³⁷ *Id.* at Art. 141.

¹³⁸ *Id.*

¹³⁹ *Id.* at Art. 4.

¹⁴⁰ See Ordonnance No. 2019-679, Art. 143 (Jul. 24, 2019); see also Ordonnance No. 2018-594 (Jun. 27, 2018); Autorite National de Regulation des Marches Publics, <https://www.anrmp.ci/> (last visited on Dec. 12, 2020).

Article 143 stipulates that court appeal is available following exhaustion of administrative options. This is similar to Austria, albeit with a slightly more restrictive set of circumstances, as standing is granted in cases where harm occurs, not where it may occur. As such, Cote d'Ivoire falls between Austria and Azerbaijan.

30. Croatia (EU)

Under Croatia Procurement Law which first entered into law on July 20, 2011, Article 175, any person who has suffered damage due to of the Act shall have the possibility of awarding damages before the competent court under the general indemnification regulations.¹⁴¹ Notably, Croatia is an EU member state, and as such is subject to EU directives, yet its approach is distinct when compared with Austria. On the one hand, Croatia might permit wider standing in some cases, as the Article refers to “any person” not any economic operator.¹⁴² On the other hand, it only references actual harm suffered, not a possibility of harm, which could limit standing in some cases. As such, Croatia provides an excellent example of deviation within the EU and serves as a reminder that qualifying standing can be a difficult task as a result of the different standards that factor into standing.

31. Czech Republic (EU)

Economic operators possess standing to raise challenges to procurement procedures.¹⁴³ “Economic operator means any person or joint group of persons that offer supply of supplies, provision of services or execution of works. A branch of a business shall be also considered an economic operator; in such case the registered office of the branch of a business shall be

¹⁴¹ See Public Procurement Act [Croatia], (Jul. 15, 2011); see also *Portal of Public Procurement*, Republika Hrvatska Ministarstvo gospodarstva i održivog razvoja [Ministry of Economy and Sustainable Development] (2020) <http://www.javnabavava.hr/default.aspx?id=3987> (last visited on Dec. 2, 2020).

¹⁴² *Id.*

¹⁴³ See ACT of 19 April 2016 on Public Procurement [Czech Republic], 134/2016 Coll., §§ 5, 241.

considered the registered office of the economic operator.”¹⁴⁴ Czech procurement law provides in Section 241 that:

- (1) Objections may be filed by the economic operator who has been harmed or is at risk of being harmed by the practices of the contracting authority connected to the awarding of below-threshold or above-threshold public contracts including concession contracts, with the exception of small-scale concessions pursuant to Section 178, or to specific procedures defined in Book Six (hereinafter referred to as the ‘complainant’).¹⁴⁵

In summation, economic operators have standing to challenge when harmed or at risk of being harmed.

It should be noted that the Czech definition of “economic operator” on its face may not include unions or public entities and instead appears to be more in line with granting protest rights to bidders and potential bidders only.¹⁴⁶ This is largely similar to Austria, and reflecting the minimum standard required by Directive 2014/24 of the EU.¹⁴⁷ Whereas France and Croatia have chosen to grant standing beyond the floor, the Czech Republic seems to have adopted a more reserved approach.

32. Denmark (EU)

The Public Procurement Act, no. 1564 of 15 December 2015, provides that anyone with a legal interest or otherwise entitled to appeal under the act may bring complaints regarding breaches of the Act and procurement rules before the Danish Complaints Board for Public Procurement.¹⁴⁸ The Act on the Complaints Board, Section 6 also provides that an appeal to the Danish Public Contracts Appeals Board for may be submitted by anyone with a legal interest, the Danish Competition and Consumer Authority (which contains the Danish Complaints Board), in

¹⁴⁴ ACT of 19 April 2016 on Public Procurement [Czech Republic], 134/2016 Coll., at § 5.

¹⁴⁵ *Id.* at § 241.

¹⁴⁶ *Id.*

¹⁴⁷ See *Supra* text accompanying notes 31-32.

¹⁴⁸ See Public Procurement Act, no. 1564 (Dec. 15 2015). The Act can be found at <https://www.en.kfst.dk/>.

addition to other public authorities and organizations, including those in other member states.¹⁴⁹

Denmark's approach is reminiscent of Croatia's.

33. Dominica

Act 11 of 2012, concerning Public Procurement and Contract Administration, contains challenge and review rights and procedures.¹⁵⁰ Article 88 states:

88. (1) Subject to sections 87 and 104, a bidder who claims to have suffered, or is likely to suffer, loss or injury due to a breach of a duty imposed on a procuring entity or the Board by this Act may challenge the procurement proceedings at any time before the entry into force of the procurement contract.¹⁵¹

Moreover, Article 89 states that any supplier or contractor who suffers damage or is likely to suffer loss or injury arising out of a breach of duty of the contracting entity can seek review of a decision.¹⁵² Under Article 104, the High Court also possesses jurisdiction to review any acts of a public authority under the act.¹⁵³

34. Dominican Republic

Law No. 340-06 defines bidder as a natural person “or legal entity legally qualified to participate by submitting bid or proposal in the procurement of goods, works, services or concessions.”¹⁵⁴ Suppliers may bring an initial challenge under Article 67 to the governing body, whose decision can be appealed.¹⁵⁵ Article 14 also contains a list of persons who may not be

¹⁴⁹ See Act on the Complaints Board, No. 593 §6 (Feb. 6, 2016) The Act can be found at <https://www.retsinformation.dk/eli/lta/2016/593>.

¹⁵⁰ Act 11 of 2012: Public Procurement and Contract Administration Act [Dominica], arts. 88-89, 104 (gazetted on Jan. 31, 2013).

¹⁵¹ *Id.* at Art. 88.

¹⁵² *Id.* at Art. 89.

¹⁵³ *Id.* at Art. 104.

¹⁵⁴ See Ley No. 340-06 sobre Compras y Contrataciones con Modificaciones de la Ley No. 449-06 y su Reglamento de Aplicación No. 543-12 Transparencia para [Law No. 340-06 on Contracts with Modifications for Law No/ 449-06 and Rules of Application No. 543-12] [Dominican Republic], Art. 67 (2012); see also *Dirección General Contrataciones Públicas* [General Directorate for Public Procurement], <https://www.dgcp.gob.do/> (last visited on Nov. 12, 2020); Laws and Decrees, *Dirección General Contrataciones Públicas* [General Directorate for Public Procurement], <https://www.dgcp.gob.do/index.php/sobre-nosotros/marco-legal/leyes-y-decretos/> (last visited on Nov. 12, 2020).

¹⁵⁵ *Id.*

considered bidders.¹⁵⁶ The list largely consists of various types of officials and those convicted of crimes related to falsehood or dishonesty.¹⁵⁷

35. Estonia (EU)

The Public Procurement Act of June 14, 2017 implements EU Directive 2014/24.¹⁵⁸ Under Section 185, (1):

A tenderer, candidate or economic operator interested in participating in public procurement (hereinafter requester) may contest actions of the contracting authority or entity by filing a respective request for review with the Public Procurement Review Committee (hereinafter Review Committee) where it finds that an infringement of this Act by the contracting authority or entity infringes its rights or adversely affects its interests.¹⁵⁹

In essence, economic operators have standing if that operator's interests are infringed upon or its rights are adversely affected.¹⁶⁰

36. Finland (EU)

The Finnish Procurement Act provides that interested parties may bring an action against the decision of a contracting entity having an effect on the tenderer or candidate.¹⁶¹ A select number of certain discretionary choices cannot be contested, including the decision to divide a solicitation into smaller solicitations.¹⁶² Challenges are brought before the Market Court, pursuant to Sections 145 and 146.¹⁶³ Notably, Finland is a member state of the EU and conducts review proceedings in accordance with EU directives and to an extent in line with other EU

¹⁵⁶ *Id.* at Art. 14.

¹⁵⁷ *Id.*

¹⁵⁸ See Public Procurement Act, § 185 (Jun. 14, 2017). The act can be found at <https://www.riigiteataja.ee/en/eli/525032019011/consolide>; see also *Ranandusministeerium*, <https://www.rahandusministeerium.ee/en/public-procurement-policy> (last visited on Dec 5, 2020).

¹⁵⁹ Public Procurement Act, at § 185.

¹⁶⁰ See *id.*

¹⁶¹ See Procurement Act, no. 1397/2016, §§ 145-46 (Dec. 30, 2016); see also Public Procurement is Regulated, Ministry of Economic Affairs and Employment of Finland, <https://tem.fi/en/public-procurement> (last visited on Dec 6, 2020); *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/finland>.

¹⁶² *Id.*

¹⁶³ *Id.*

member states in this list. Depending on the definition of “interested party” it is possible that this includes third parties.

37. France (EU)

France codified its contracting rules into one code on April 1, 2019, effectively combining Ordinance no. 2015-899 and Decree no. 2016-360 into one code.¹⁶⁴ France complies with EU Directive 2014/24 and allows challenges from unsuccessful bidders in addition to interested parties in the event that the contracting entity violates rules and procedures.¹⁶⁵ Standing rights have also been conferred to third parties of administrative contracts, meaning that entities such as unions, local elected officials, and ordinary citizens may also issue challenges.¹⁶⁶

The explicitly broad class of parties permitted makes France a particularly notable entry in this list. Most EU member states, like Austria, the Czech Republic and Germany have elected to granted standing to economic operators but have not extended standing to other third parties. Thus, France demonstrates the variation that member states are permitted to pursue in implementing wider standing under EU directives and also serves as a prime example of a country with a large, established procurement market utilizing broad bid protest standing rights to effectuate greater transparency and accountability.

¹⁶⁴ See Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics [Public Contracts Ordinance no. 2015-899 from July 23, 2015]; Décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics [Decree no. 2016-360 from March 25, 2016]. These can be found at <https://www.economie.gouv.fr/daj/textes-marches-publics>.

¹⁶⁵ See *Commande publique*, MINISTERIE DE L’ECONOMIE DES FINANCES ET DE LA RELANCE, <https://www.economie.gouv.fr/daj/commande-publique> (last visited on Dec. 14, 2020); *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/france>.

¹⁶⁶ *Id.* (Taking note of a French court case, *CE, 4 April 2014, Département du Tarn-et-Garonne, No. 358994*, which explicitly confirms standing rights to third parties).

38. Georgia

Chapter VI, Article 23 of the Georgian Law on State Procurement provides rules for appealing and reviewing disputes concerning contract solicitation and formation.¹⁶⁷ It states that:

1. [...] a person interested in participating in procurement or a tenderer may appeal the actions of a contracting authority or of a tender committee to the contracting authority or with the Agency, if he/she/it believes that during the procurement proceedings the procedures prescribed by this Law and relevant normative acts have been violated and/or his/her/its rights have been infringed. The procedures and conditions for appealing a design contest shall be defined in a subordinate normative act.
2. A person interested in participating in the procurement, a tenderer or a supplier may appeal at any stage the actions of the contracting authority or the tender committee to a court, if he/she/it believes that during the procurement proceedings the procedures prescribed by this Law and relevant normative acts have been violated and/or his/her/its rights have been infringed.¹⁶⁸

Both bidders and potential bidders clearly have standing, based on the language of the above Article 23.¹⁶⁹

Appeals are made first to the procuring agency, whose decisions can be appealed in court.¹⁷⁰ Interestingly, Georgia confers rights in the event that a violation occurs *or* if a right has been infringed upon. This broad set of circumstances implies that ensuring accountability through a whistleblowing function is an objective of Georgia's bid protest system, in addition to providing a remedy to adversely affected parties.

¹⁶⁷ See Law of Georgia on Public Procurement (Apr. 20, 2005) (entered into force on Jan. 1, 2006) (accessible at https://publicprocurementinternational.com/wp-content/uploads/2019/10/Law-of-Georgia-on-PP_EN.pdf); see also State Procurement Agency, <http://procurement.gov.ge/Home.aspx> (last visited on Dec. 13, 2020); *Georgia: An E-Procurement Success*, WORLD BANK (Feb. 18, 2015) <https://www.worldbank.org/en/news/feature/2015/02/18/georgia-an-e-procurement-success>; *How Georgia is Handling Procurement Transparency*, OPEN CONTRACTING (Feb. 3, 2014) https://www.open-contracting.org/2014/02/03/how_georgia_is_handling_procurement_transparency/.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at arts. 4-1 and 12.

39. Germany (EU)

The German bid protest system is outlined in the Nachprüfungsverfahren (“Judicial Review”) Chapter of its “Gesetz gegen Wettbewerbsbeschränkungen” (“Act Against Restraints of Competition,” Germany’s federal competition law) which largely takes its direction on governing procurement from the EU guidelines.¹⁷¹

The German protest system permits economic operators to submit applications to challenge procurement decisions.¹⁷² “Every entity” possessing an interest in the procurement who claims to have had its rights violated by non-compliance with procurement law and can show harm or are at risk of being harmed, has the right to initiate review proceedings.¹⁷³ In practice this applies to bidders and potential bidders, but would not expand to other third parties that may be affected by decisions.¹⁷⁴

40. Ghana

Under Article 78. (1), a “supplier, contractor, or consultant that claims to have suffered, or that may suffer loss or injury due to a breach of a duty imposed on the procurement entity by this Act, may seek *redress* in accordance with this Part.”¹⁷⁵ Complaints may be made by an application to the procurement entity, and a request for administrative review may be made by an

¹⁷¹ See *Act Against Restraints of Competition*, Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), (June 26 2013) (last amended by Article 10 of the Act of 12 July 2018 (Federal Law Gazette I, p. 1151)) (accessed at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html); Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/Ec, EUR. PAR. DOC., (2014) (accessed at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>); see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/germany>; Jan Bonhage and Simone Terbrack, *Germany*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227018/germany>.

¹⁷² See *Act Against Restraints of Competition*, at § 155, § 160(2).

¹⁷³ *Id.* Article 160(2) states “jedes Unternehmen,” which translates to “every entity” or “undertaking” and likely refers to those entities that qualify as “economic operators.”

¹⁷⁴ *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/germany>.

¹⁷⁵ See Public Procurement Act [Ghana], Act 663, arts. 78-80 (2003) (accessed at <https://ppa.gov.gh/>).

application to the Board.¹⁷⁶ A tenderer, supplier, contractor or consultant may appeal such a decision taken in administrative review in court.¹⁷⁷

41. Greece (EU)

Law 4412/2016 transposes Directive 2014/24/EU and was published on August 8, 2016.¹⁷⁸ The law created an independent review authority called the Authority for the Examination of Preliminary Recourses (AEPP), whose decisions can be further appealed in Administrative Court and, in rare cases, the Council of State.¹⁷⁹ Any interested economic operator whose interests are negatively affected is entitled to file a challenge.¹⁸⁰

42. Hong Kong

Hong Kong is a party to the WTO GPA and has operated an independent Review Body on Bid Challenges since December 30, 1998.¹⁸¹ Appendix III (E)(1) of the Tender Procedures provides that suppliers may challenge breaches of procurement procedures, in accordance with the Review Body rules. Paragraph 4 of the Review Body's rules makes it clear that standing is granted to suppliers, stating:

The duties, functions and powers of the Review Body are to:

- (a) receive from a supplier any challenge made in respect of alleged breach of the relevant prescribed agreement by the procuring entity in respect of the relevant procurement in which the supplier has, or has had, an interest;
- (b) conduct inquiry only in respect of the challenge made by a supplier in accordance with Clause 4(a) above; and
- (c) make determination(s) and recommendations in accordance with these Rules of Operation.¹⁸²

¹⁷⁶ *Id.* at Art. 79.

¹⁷⁷ *Id.* at Art. 80.

¹⁷⁸ See Law 4412/2016 [Greece] (accessed at <https://www.eaadhsy.gr/n4412/>); see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/greece>; Emmanuel J. Velegakis, *Greece*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227021/greece>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See Tender Procedures for Government Procurement, Appendix III (E) (last revised, Sep. 20, 2020).

¹⁸² Rules of Operation of the Review Body on Bid Challenges [Hong Kong], ¶ 4 (Jan. 2020) (accessed at <https://www.tid.gov.hk/english/aboutus/advcommittee/reviewbody.html>).

Further, the Review Body rules define supplier, stating:

“supplier” means a supplier or a potential supplier (of goods or services) of either–

(a) a Party to the relevant prescribed agreement, or

(b) an economy which is not a Party to the GPA but intends to provide goods or services of any Party to the GPA

who has or has had an interest in a relevant procurement.¹⁸³

In addition, the guide to procurement provided by Treasury Branch of the Hong Kong Financial Services and The Treasury Bureau notes that “[a]ny supplier, contractor or consulting firm who feels aggrieved may lodge a complaint with the procuring entity or the relevant tender board....”¹⁸⁴

43. Iceland

Iceland’s “Act on Public Procurement” states that complaints may be referred to the Public Procurement Complaints Commission by “economic operators who enjoy rights as provided for under this Act and have legitimate interests in the resolution of the complaint.”¹⁸⁵

The Act also provides that “organisations or federations of economic operators have the authority to refer cases to the commission, provided that it conforms to their purpose to guard such interests.”¹⁸⁶ In essence, this confers standing rights not only to economic operators (meaning bidders and potential bidders), but also to unions and other similar associations.¹⁸⁷ Of additional note, Article 2 “Definitions” provides that “economic operator” is a “Generic term used in the interest of simplification and covers equally the concepts of contractor, supplier and service provider, irrespective of legal form.”¹⁸⁸ Iceland is not an EU member state, but as a

¹⁸³ *Id.* at ¶ 1.

¹⁸⁴ *Guide to Procurement*, The Treasury Branch Financial Services and the Treasury Bureau (Oct. 9, 2020) <https://www.fstb.gov.hk/tb/en/guide-to-procurement.htm#topic-12>.

¹⁸⁵ See Act on Public Procurement [Iceland], arts. 103-105 (entered into force on April 18, 2017).

¹⁸⁶ Act on Public Procurement at Art. 105 (titled “Right of Referral”).

¹⁸⁷ See *id.*

¹⁸⁸ Act on Public Procurement at Art. 2.

member of the European Economic Area is required to implement a number of EU directives and regulations.

44. India

In India, government procurement is covered by the 2017 General Finance Rules, which do not address review procedures.¹⁸⁹ However, the 2005 General Finance Rules, which were replaced by the 2017 rules, did contain review by a procuring entity.¹⁹⁰ Currently, India lacks an independent review procurement challenge mechanism, but aggrieved bidders may file complaints with arbitrators, the procuring entity or in court.¹⁹¹

Something that may provide an indication of the future for challenging government procurement issues in India is a Public Procurement Bill from 2012, which was proposed but did not pass.¹⁹² Article 40 of the proposed bill included explicit standing rights for bidders and prospective bidders.¹⁹³

45. Indonesia

Presidential Decree 16/2018 provides that disappointed bidders may challenge procurement awards on the basis of unfair competition or procedure violations per Regulation 14/2012, which is promulgated by the Agency for Government Procurement of Goods or

¹⁸⁹ See General Financial Rules 2005 [India] (accessed at <https://doe.gov.in/order-circular-archives/GENERAL%20FINANCIAL%20RULES>).

¹⁹⁰ See Devina Deshpande and Prashant Mara, *India: Procurement Rules and Trends in India*, MONDAQ (May 8, 2020) <https://www.mondaq.com/india/government-contracts-procurement-ppp/930028/procurement-rules-and-trends-in-india>; Bhabesh Hazarika and Pratap Ranjan Jena, *Public Procurement in India: Assessment of Institutional Mechanism, Challenges, and Reforms*, NATIONAL INSTITUTE OF PUBLIC POLICY AND FINANCE (Jul. 31, 2017) https://www.researchgate.net/publication/318851426_Public_Procurement_in_India_Assessment_of_Institutional_Mechanism_Challenges_and_Reforms; *Government Procurement Law and Policy: India*, LIBRARY OF CONGRESS (Mar. 2010) <https://www.loc.gov/law/help/govt-procurement-law/india.php> (last revised Jul. 24, 2020).

¹⁹¹ See General Financial Rules 2005 [India] (accessed at <https://doe.gov.in/order-circular-archives/GENERAL%20FINANCIAL%20RULES>).

¹⁹² See The Public Procurement Bill, 2012, Bill No. 58 of 2012, Art. 40.

¹⁹³ *Id.*

Services (“LKPP”).¹⁹⁴ Upon rejection by the procuring entity, challenges can be appealed before the Supervisory Commission on Business Competition or in Administrative Court.¹⁹⁵

46. Ireland (EU)

In conforming with EU directives, S.I. 130/2010 provides that review procedures are available to an “eligible person,” which is defined as a person who:

- (a) has, or has had, an interest in obtaining the reviewable concession contract, and
- (b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable concession contract, of the law of the European Union in the field of public procurement, or of a law of the State transposing that law.¹⁹⁶

Eligible persons possess the right to file an application to challenge procurement procedure violations in court.¹⁹⁷ Ireland thus assigns challenge rights in the typical EU fashion, similar to Austria and Germany, by permitting challenges by bidders and potential bidders, but not other third parties, as occurs in France.

¹⁹⁴ See *Public Procurement and Government Contracts: Indonesia*, Chambers Practice Guides (2019); see also <https://jdih.lkpp.go.id/regulation/peraturan-presiden/peraturan-presiden-nomor-16-tahun-2018>.

¹⁹⁵ See Law No. 5 of 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition; Law No. 51 of 2009 on Administrative Courts.

¹⁹⁶ See S.I. 284/2016 (transposing Directive 2014/24/EU) <http://www.irishstatutebook.ie/eli/2016/si/284/made/en/print>; S.I. 130/2010 (review procedures) <http://www.irishstatutebook.ie/eli/2010/si/130/made/en/print>; S.I. No. 326/2017 (concerning award of concession contracts); see also Office of Government Procurement, <https://ogp.gov.ie/> (last visited on Dec. 13, 2020); Peter Curran and Aine Smith, *Public Procurement in Ireland*, Lexology-Eversheds Sutherland (June 11, 2019) <https://www.lexology.com/library/detail.aspx?g=fae572f0-8129-4095-b482-3b61f509e1c2>.

¹⁹⁷ See S.I. 130/2010 at regulation 8(1).

Application to Court

8.— (1) An eligible person may apply to the Court—

- (a) for interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the eligible person’s interests, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract concerned or the implementation of any decision taken by the contracting authority, or
- (b) for review of the contracting authority’s decision to award the contract to a particular tenderer or candidate.

47. Italy (EU)

Procurement review is contained in Italy's Public Contracts Code, which implements EU directive 2014/24/EU.¹⁹⁸ Interested parties can pursue challenges to procurement decisions through alternative dispute resolution methods or in the administrative courts.¹⁹⁹ The decisions of a Regional Administrative Court can be appealed to the Council of State (a court of appeal).²⁰⁰

48. Japan

As a party to the GPA, Japan created the Office for the Government Procurement Challenge System ("CHANS").²⁰¹ Suppliers with an interest may challenge procurement decisions through this system or may file suit in court.²⁰² In most cases, supplier refers to agents that supply or are capable of supplying the product or service solicited during procurement. However, in some cases, including for the procurement for public projects or design/consulting operations for procurement of public products, the term "supplier" possesses a more limited meaning, where standing is limited to "eligible agents" meaning those entities who registered to

¹⁹⁸ See Public Contracts Code, Law no. 28 January 2016, n. 11 [Italy] (entering into force on April 19, 2016) (accessible at <http://www.anticorruzione.it/portal/public/classic/AttivitaAutorita> (last visited on Dec. 14, 2020).

¹⁹⁹ See Leg. Decree 104/2010 [Italy] (July 2, 2010); see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/italy>; Filippo Pacciani and Ada Esposito, *Italy*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227022/italy>.

²⁰⁰ *Id.*

²⁰¹ See *Government Procurement Challenge System*, OFFICE FOR GOVERNMENT PROCUREMENT CABINET OFFICE, GOVERNMENT OF JAPAN (containing Regulations on Government Procurement-Related Complaint Review Procedure of January 11, 1999 (last revised on Apr. 4, 2014)) (accessible in English at https://www5.cao.go.jp/access/english/chans_main_e.html#:~:text=The%20Government%20Procurement%20Challenge%20System,of%20domestic%20and%20foreign%20interests); see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/japan>; Shigeki Kusunoki, *Japan's Government Procurement Regimes for Public Works: A Comparative Introduction*, 32 BROOKLYN J. OF INT. LAW 2 (2007) (accessible at <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1249&context=bjil>); *Challenging Systems*, EU-JAPAN CENTRE FOR INDUSTRIAL COOPERATION, <https://www.eu-japan.eu/government-procurement/tendering-process/challenging-systems> (last visited on Dec. 14, 2020).

²⁰² See *Government Procurement Challenge System*, OFFICE FOR GOVERNMENT PROCUREMENT CABINET OFFICE, GOVERNMENT OF JAPAN (accessible in English at https://www5.cao.go.jp/access/english/chans_main_e.html#:~:text=The%20Government%20Procurement%20Challenge%20System,of%20domestic%20and%20foreign%20interests) (last visited on Dec. 14, 2020).

confirm their eligibility to participate in bidding.²⁰³ This places Japan's bid challenge standing rights in line with countries like Canada, allowing bidders and potential bidders to file challenges, but not other interested parties.

49. Jordan

Article 3 of Jordan's Bid Challenge System Rules provides standing to bidders (defined as "goods suppliers, service providers and contractors, etc") to file a protest before the Bid Challenge Tribunal.²⁰⁴ Bidders may not file a challenge in court until a protest has been filed and a decision rendered by the Bid Challenge Tribunal.²⁰⁵ Absent an interpretation widening the definition of "bidder" to include potential suppliers, service providers and contractors, Jordan appear to provide bid challenge standing rights to an extent similar to Afghanistan.

50. Kazakhstan

Suppliers and potential suppliers are able to submit complaints related to procurement procedures in Kazakhstan.²⁰⁶ Reviews are conducted by the Internal Audit Committee, which is located under the Ministry of Finance. Decisions of the Committee can be appealed in the court system.²⁰⁷

According to a 2019 Organization for Economic Co-operation and Development ("OECD") report, the number of complaints has risen five-fold following the adoption of amendments to reform public procurement in December 2018.²⁰⁸ However, it is believed that a significant number of these complaints are brought by "professional complainers," who seek to

²⁰³ *Id.*

²⁰⁴ See Bid Challenge System Rules [Jordan], Art. 3.2. (accessible at <http://www.gtd.gov.jo/en/index>).

²⁰⁵ *Id.* at Art. 1.

²⁰⁶ See Law of February 18, 2001 No. 407-IV (accessed at <http://adilet.zan.kz/rus/docs/Z1100000407>); see also *Public Procurement in Kazakhstan: Reforming for Efficiency*, OECD (2019) <https://www.oecd-ilibrary.org/sites/c11183ae-en/index.html?itemId=/content/publication/c11183ae-en>.

²⁰⁷ *Id.*

²⁰⁸ See *Public Procurement in Kazakhstan: Reforming for Efficiency*, OECD (2019) <https://www.oecd-ilibrary.org/sites/c11183ae-en/index.html?itemId=/content/publication/c11183ae-en>.

disadvantage and blackmail competitors.²⁰⁹ Thus, Kazakhstan demonstrates the trade-off between heightened transparency and decreased efficiency. Determining the efficacy of Kazakhstan's challenge system and increased standing rights ostensibly depends on the extent to which complaints either reveal actual corruption or mistakes in awarding public contracts or are instead used to target economic rivals.

51. Kenya

Kenya's Public Procurement Act, Part XV, addresses administrative review of procurement.²¹⁰ Section 167 provides standing to candidates or tenderers, which are respectively defined as "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity" and "a person who submitted a tender pursuant to an invitation by a public entity."²¹¹ In short, potential bidders are likely excluded, because both definitions are predicated on having actually submitted bids.²¹²

Moreover, bidders must claim to have suffered or to be at risk of suffering, loss or damage due to the breach of a duty imposed on a procuring entity.²¹³ Curiously, Kenya's regulations provide for requiring a refundable deposit (worth no less than 10% of the contract) to be submitted by bidders seeking to appeal a decision.²¹⁴ Reviews are required to be heard in an "open forum" unless it would compromise national security, which suggests that transparency is

²⁰⁹ *Id.*

²¹⁰ See Public Procurement and Assets Disposal Act, No. 33 of 2015, Part XV (accessed at <http://ppra.go.ke/ppda/>). Section 167 states:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. *Id.*

²¹¹ Public Procurement and Assets Disposal Act, No. 33 of 2015 at § 2.

²¹² See *id.*

²¹³ *Id.* at § 167, paragraph 1.

²¹⁴ *Id.* at § 167, paragraph 2.

an important consideration.²¹⁵ In addition, the choice of procurement method is not reviewable.²¹⁶

52. South Korea

Section 25 of the General Instructions provided by South Korea's Public Procurement Service states that:

A bidder or/and supplier, who consider(s) himself(themselves) disadvantageous [sic] in the course of the purchasing process, may raise an objection to the decision made by PPS for the purpose of cancellation or correction of the decision within 15 days from the date of having done the decision or 10 days from the date of having been aware of the decision. The bidder/supplier dissented to follow-up measures according to the objection will request a retrial for the conciliation on the Conciliation Committee of International Contract Dispute within 15 days from the date of having been notified about the results of the follow-up measures.²¹⁷

As stated, bidders who have been disadvantaged possess standing to raise challenges.²¹⁸

Absent legislation widening the definition of bidder, South Korea would appear to confer standing in a fashion similar to Afghanistan.

53. Kuwait

Law No. 49 for 2016 addresses public tender procedures for Kuwait.²¹⁹ Part 8, Article 77 confers standing to tenderers and interested parties.²²⁰ It states:

1- Any tenderer suffered from loss or damage as a result of breach of any of the authorities competent in the procurement or tenders of any obligation under the provisions of this law or the regulation issued accordingly, may submit, in accordance with the provisions of this law, a complaint at any stage of the

²¹⁵ *Id.* at § 167, paragraph 3.

²¹⁶ *Id.* at § 167, paragraph 4.

²¹⁷ See *General Instructions*, Public Procurement Service (Jun. 18, 2008), <https://www.pps.go.kr/eng/index.do>. The respective rules on “domestic” and “foreign” (meaning subject to GPA requirements) can be found in subpages under the PPS website at <https://www.pps.go.kr/eng/jsp/wedo/domestic/overview.eng> and <https://www.pps.go.kr/eng/jsp/wedo/foriegn/overview.eng> respectively. <https://www.lexology.com/library/detail.aspx?g=9e39c3ae-8893-45d0-969f-e9de75c5d550>; <https://www.export.gov/apex/article2?id=Korea-Selling-to-the-Government>; <https://www.trade.gov/country-commercial-guides/south-korea-selling-public-sector>

²¹⁸ *Id.*

²¹⁹ See Law No. 49, Art. 77 (assessable at <https://capt.gov.kw/en/laws/>); see also Central Agency on Public Tenders, <https://capt.gov.kw/ar/> (last visited on Dec. 6, 2020).

²²⁰ *Id.*

procurement, requesting to reconsider procedure from which he is affected him, or non-taking action, if the damage resulted from it.

2- Any interested party shall have a right to submit a complaint with the competent procurement authority of any shortcoming that afflicts the preparation of technical documents of the tender or its general conditions in breach of the rules of equality, justice and equal opportunities until the closure of the bidding

...²²¹

Kuwait thus confers fairly wide standing, albeit it in a unique manner.²²² Kuwait confers standing to bidders in the event of a breach causing harm, yet also confers standing to “any interested party” to submit complaints regarding shortcomings in the procurement process.²²³

54. Kyrgyz Republic

Article 48 of the Kyrgyz Republic Law on Public Procurement states that suppliers and consultants have the right to file a complaint before the Independent Interagency Commission at any stage of the procurement proceedings.²²⁴ Suppliers can also bring disputes arising in procurement proceedings to the courts, and similarly can appeal the decision of the Independent Interagency Commission.²²⁵ Thus, bid challenge rights are afforded to bidders.

55. Laos

Bid challenge rights are included within the January 4, 2004 Decree of the Prime Minister on Government Procurement of Goods, Construction, Maintenance and Services.²²⁶ The decree defines bidder as “an individual, companies, enterprises, joint venture or international enterprises meeting the selection criteria and participating in competitive bidding under a

²²¹ Law No. 49, Art. 77.

²²² *See id.*

²²³ *Id.*

²²⁴ *See* Kyrgyz Republic Law on Public Procurement, No. 72 Art. 48-49 (Apr. 3, 2015) (accessed at <http://zakupki.gov.kg/popp/>).

²²⁵ *Id.* at Art. 49; Art. 50.

²²⁶ *See* Decree of the Prime Minister on Government Procurement of Goods, Construction, Maintenance and Services, No. 03/PM (Jan. 4, 2004).

procedure selected by the procuring entity or project owner.”²²⁷ This definition makes it clear that potential bidders are excluded, per the “*and participating in competitive bidding.*”²²⁸

Article 40 provides that bidders may submit written complaints to the chairperson of the tender committee regarding improper actions by the procuring entity.²²⁹ While the preceding Article 39 includes reference to court proceedings in the event of improper actions by the bidder, Article 40 contains no such reference for court proceedings against improper actions by the procuring entity. Further, it does not seem that a nation-wide bid challenge system exists.²³⁰

56. Latvia (EU)

Latvia’s Public Procurement Law of 2017 implements the 2014 EU directive and gives standing to a person who has or has had an interest in acquiring the right to enter into a procurement contract.²³¹ The law also gives standing to those applying for the award of a procurement contract.²³² Clearly, Latvia gives standing to bidders and potential bidders, but not other interested third parties like unions, local governments, or other potentially affected entities.²³³ This stands in contrast with France, who elected to confer standing rights to third parties. As such, Latvia is largely in line with other EU countries like Germany and Austria.

²²⁷ *Id.* at Art. 2.

²²⁸ *Id.* (emphasis added).

²²⁹ *Id.* at Art. 40.

²³⁰ *Id.* at Art. 39.

²³¹ See Public Procurement Law of 2017, Latvijas Vēstnesis 254 [Latvian Journal 254] (accessed at <https://likumi.lv/ta/id/287760-publicisko-iepirkumu-likums>); see also *Procurement Monitoring Bureau*, <https://www.iub.gov.lv/lv/sudzibas> (last visited Dec. 6, 2020). Paragraph (1) of Article 68 “The right to submit an application regarding violations of the procurement procedure,” states:

A person who has or has had an interest in acquiring the right to enter into a procurement contract or framework agreement, or is applying for the award of a procurement contract and which, in connection with the specific procurement procedure to which subject to this law, considers that its rights have been infringed or are likely to be infringed by a possible Violation of regulatory enactments of the European Union or other regulatory enactments, is entitled to submit an application regarding a candidate or tenderer selection rules, technical specifications and other requirements relevant to the specific procurement procedure, or on the activities of the contracting authority or the procurement commission during the procurement procedure. For the purposes of this chapter, the procurement procedure and design contest referred to in Section 10 of this Law shall also be considered a procurement procedure.

²³² *Id.* at Arts. 67-68.

²³³ *Id.*

57. Liberia

Liberia's procurement law of 2005 states that:

Right to Review 125.

- (1) The following shall have the right to lodge a complaint in pursuit of this Act.
- (a) Any bidder who has suffered or is at the risk of suffering a loss or damage as a result of the breach of this Act or in any procurement process;
 - (b) Any person who has grounds to believe that he or she or the Entity he or she represents has been prevented from becoming a bidder;
 - (c) Any person who has reason to believe that there has been a breach of this Act; Shall have a right to lodge a complaint to the Procuring or Concession Entity and may seek review or redress from the Entity in the first instance or from the Commission if he or she is dissatisfied with the Entity's decision or its failure to decide within the time stipulated in subsection (4) of this section.
- ²³⁴

Complaints are initially filed with the Procurement and Concessions Commission, whose decision can be appealed to the Complaints, Appeals and Review Panel.²³⁵ The decision of the Complaints, Appeals and Review Panel can only be appealed in a "Court of competent jurisdiction."²³⁶ Liberia's bid protest rights include both bidders (per paragraph (a)) and potential bidders (per paragraph (b)) suffering harm, yet also seems to leave the door open to general complaints attesting to breaches of Liberian procurement law, *without* any need to show harm or risk of harm.²³⁷ Moreover, paragraph (c) makes it clear that pursuing the latter option entitles a challenger to a full review, including escalating the complaint on appeal.²³⁸ Taking all of

²³⁴ The Public Procurement And Concessions Act [Liberia], Art. 125 (Approved on Sep. 8, 2005) (published on Sep. 21, 2005) (accessed at <http://www.ppcc.gov.lr/>).

²³⁵ *See id.*

²³⁶ *Id.* at Art. 128.

²³⁷ *Id.* at Art. 125.

²³⁸ *Id.*

Liberia's standing elements together, this makes Liberia one of the most generous countries evaluated in this list.

58. Lithuania (EU)

Lithuania's procurement law ("LPP") provides that suppliers possess the right to challenge the contracting authority in the event that the authority failed to comply with procurement regulations.²³⁹ Suppliers are further defined as "economic operators" under Article 2 of the LPP, meaning a "natural person, private or public legal person, other organization and their division or group of such persons, including temporary associations of economic operators, which offer to perform works, supply goods or provide services on the market."²⁴⁰ Challenges can be brought to court after a claim has been submitted to the contracting authority in writing.²⁴¹

59. Luxembourg (EU)

Luxembourg's Law of November 10, 2010 institutes appeals concerning public procurement.²⁴² Article 1 states "The appeal procedures are accessible to any person having or having had an interest in obtaining a given contract and having been or likely to be harmed by an alleged violation of Community law or of national law transposing Community law on public contracts."²⁴³ This provides standing to bidders and potential bidders.²⁴⁴ Remedies can be sought in Administrative Court, whose decision can be appealed to the Administrative Court of Appeals.²⁴⁵

²³⁹ See Lietuvos Respublikos Viešųjų Pirkimų Įstatymas [Lithuanian Republic Law on Public Procurement], No. I-1491 at Art. 101 (first passed on Aug. 13, 1996) (most recently amended in 2017) (accessible at <https://www.e-tar.lt/portal/lt/legalAct/TAR.C54AFFAA7622/asr>); see also *Public Procurement Office*, <https://vpt.lrv.lt/en/> (last visited on Dec. 6, 2020).

²⁴⁰ *Id.* at Art. 2, para. 36.

²⁴¹ *Id.* at Art 101.

²⁴² See Law of November 10, 2010 [Luxembourg] (accessible at <http://www.legilux.public.lu/eli/etat/leg/loi/2010/11/10/n1/jo>); see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/luxembourg> (noting that the 2014 EU Directive is implemented in a separate law, the Law of 8 April 2018).

²⁴³ Law of November 10, 2010 at Art. 1.

²⁴⁴ *Id.*

²⁴⁵ See *id.*

60. Macau

Interested parties whose rights are affected may challenge government procurement decisions under Article 113 of the Administrative Litigation Procedure Code of Macau (“CPAC”).²⁴⁶ To raise the challenge in court, bidders must first submit an administrative claim to the contracting entity.²⁴⁷ Unlike Hong Kong, Macau is not a party or an observer to the WTO GPA.²⁴⁸

61. Malawi

Malawi’s Act No. 27 of 2017 defines bidder as any participant who has expressed interest in procurement proceedings by submitting a bid.²⁴⁹ Further, Part IX of the Act concerns administrative review and appeals, and states that standing is provided to bidders who claim to have suffered damages or may suffer damages due to a breach of duty by the procuring entity.²⁵⁰

Review applications are submitted first either to the procuring entity or by a Review Committee under the Public Procurement and Disposal of Assets Authority.²⁵¹ Decisions of the entity can be appealed to the Director General, whereas decisions of the Review Committee shall be subject to review by the High Court.²⁵²

62. Malaysia

Malaysia does not have any specific legislation for public procurement: its two main acts on the subject are the Financial Procedure Act of 1957 and the Government Contract Act of

²⁴⁶ See Administrative Litigation Procedure Code of Macau, Art. 113. (accessible at <https://bo.io.gov.mo/bo/i/99/50/codpacpt/>).

²⁴⁷ See Administrative Litigation Procedure Code of Macau, Art. 113; see also Bruno Almeida et al., *Public Procurement & Government Contracts 2020: Macao*, CHAMBERS AND PARTNERS (Apr. 6, 2020) <https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2020/macao>.

²⁴⁸ See *Parties, Observers and Accessions*, WTO, https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited on Jan 21, 2021).

²⁴⁹ See Act No. 27 of 2017 (Aug. 22, 2017) (accessible at <https://www.pdda.mw/laws/>).

²⁵⁰ *Id.* at Art. 59.

²⁵¹ *Id.* at Art. 60.

²⁵² *Id.*

1949.²⁵³ Bidders, nonetheless, possess options for lodging complaints, including the Government Procurement Division, the Malaysian Anti-Corruption Commission, the Prime Minister’s Department, and the National Audit Department.²⁵⁴ Further, decisions by public authorities are subject to judicial review by the High Court per Order 53 of the 2012 Rules of Court.²⁵⁵

63. Malta (EU)

Article 262 of Malta’s procurement law, S.L. 174.04 provides standing to prospective candidates and tenderers to bring challenges prior to the closing date of a call for competition.²⁵⁶ However, per Article 270, after the closing of competition, any tenderer, candidate or interested party who has been harmed or may suffer harm may file an appeal of objection to the Public Contracts Review Board, whose decision is subject to judicial review.²⁵⁷ This would place Malta closer to Denmark and Iceland’s implementation of bid challenge rights, as the juxtaposition of including “any interested party” in Article 270 suggests that standing is intentionally conferred to third parties and not just bidders and potential bidders.²⁵⁸

64. Mexico

Determining which entities have standing to file complaints challenging federal procurement decisions in Mexico depends on what is being challenged.²⁵⁹ Actions concerning the call for bids and clarification meeting can be challenged only by participants that had

²⁵³ See *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/malaysia>; Public Procurement Regime Malaysia 2018, *Malaysia Country Profile: Global Public Procurement Database*, WORLD BANK, https://www.globalpublicprocurementdata.org/gppd/country_profile/MY.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ See S.L. 174.04, art. 262 (Malta) (accessible at <https://contracts.gov.mt/en/Pages/Home-DepartmentOfContracts.aspx>).

²⁵⁷ *Id.* at Art. 270; see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/malta>.

²⁵⁸ *Id.*

²⁵⁹ See Fernando Mejia Mendez et al., *Mexico: Public Procurement & Government Contracts 2020*, CHAMBERS AND PARTNERS (Apr. 6, 2020) <https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2020/mexico>; Federico Hernandez Arroyo, *Mexico*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227023/mexico>.

officially expressed an interest in taking part.²⁶⁰ Acts concerning official restricted invitations can only be challenged by those who were invited to bid.²⁶¹ Acts concerning the presentation and opening of bid proposals, as well as the cancellation of the procurement, can only be challenged by those who submitted a bid.²⁶² Further, only the awarded bidder can challenge acts or omissions that prevented the execution of the contract.²⁶³ In general, Mexico grants protest rights to participants only, and not to non-participants/potential bidders.

65. Netherlands (EU)

The Public Procurement Act of 2012 (as amended on July 1, 2014 to comply with directive 2014/24/EU) stipulates that operators who consider themselves disadvantaged by an award decision may bring a claim for annulment.²⁶⁴ As such, the Netherlands is in line with most EU member states, in providing bid challenge standing rights to bidders and potential bidders, but not to other third parties.

66. New Zealand

Rule 50 of New Zealand's government procurement rules confers bid challenge standing rights to suppliers in the event of a perceived violation.²⁶⁵ New Zealand's guide to supplier feedback and complaints defines suppliers as "as person, business, company or organisation that supplies or can supply goods or services or works to an agency."²⁶⁶ Therefore, New Zealand provides standing rights to bidders and potential bidders. Following complaint to an agency,

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ See Public Procurement Act of 2012 [Netherlands] at art. 4.15 (accessible at <https://www.pianoo.nl/en/public-procurement-law-netherlands>).

²⁶⁵ Government Procurement Rules [New Zealand], Rule 50 (accessible at <https://www.procurement.govt.nz/procurement/principles-charter-and-rules/government-procurement-rules/awarding-the-contract/supplier-complaints/>). New Zealand law can also be found at <http://www.legislation.govt.nz/>.

²⁶⁶ Guide to Supplier Feedback and Complaints (accessible at <https://www.procurement.govt.nz/procurement/principles-charter-and-rules/government-procurement-rules/awarding-the-contract/supplier-complaints/>).

unsatisfied suppliers or potential suppliers, possess several options, which include litigation in court or an investigation by the Auditor-General, the Ombudsman, the State Services Commission, or the Commerce Commission.²⁶⁷

67. Nigeria

Nigeria's Public Procurement Act of 2007 provides that a bidder may seek administrative review for any omissions or breaches of procurement regulations.²⁶⁸ Complaints are first submitted to the Bureau of Public Procurement and, following exhaustion of administrative remedies, can be appealed in federal court.²⁶⁹

68. Norway

Section 10 of the Public Procurement Act of 17 June 2016, no. 73 states that suppliers are entitled to compensation for losses suffered as the result of a breach of law or regulations.²⁷⁰ Suppliers can bring cases before the Complaints Board, or can file a complaint in court, per section 8.²⁷¹ Norway is not a member state of the EU but is closely affiliated and is subject to most of the EU's economic policies. As such it is likely that "supplier" includes potential suppliers as well.

69. Pakistan

Section 48 of Pakistan's Public Procurement Rules of 2004 provides that bidders may lodge a written complaint with a procurement review committee should they feel aggrieved by an

²⁶⁷ See *id.*

²⁶⁸ See Public Procurement Act, no. 65 Federal Republic of Nigeria Official Gazette 94 at art. 54 (accessible at <https://www.bpp.gov.ng/>).

²⁶⁹ *Id.*

²⁷⁰ See Public Procurement Act of 17 June 2016, no. 73 at Section 8-11 [Norway] (accessible at <https://lovdata.no/dokument/NL/lov/2016-06-17-73/%C2%A72#§2>); see also Direktoratet for forvaltning og økonomistyring [Government Agency for Public and Financial Management], <https://www.anskaffelser.no/> (last visited on Dec. 7, 2020).

²⁷¹ *Id.* at § 8.

action taken the procuring entity.²⁷² Procurement review committees are run by the procuring entity.²⁷³ Bidders unsatisfied with the decision of the committee may lodge an appeal in court.²⁷⁴

70. Panama

Articles 146 and 153 of Panama's Law 22 of 2006 confer standing to challenge procurement decisions to interested parties.²⁷⁵ While neither article contains a definition for "interested parties," Article 30, which addresses advertising principles of procuring entities, includes reference to "proponents, contractors and other interested parties."²⁷⁶

All unlawful or arbitrary actions may be contested.²⁷⁷ Interested parties may bring challenges to General Directorate of Public Procurement or to the Public Contracting Administrative Tribunal, the court which has exclusive authority to hear bid challenges.²⁷⁸

71. Peru

Peru's Legislative Decree on public procurement confers standing to participants and bidders, as stated in Article 41, to challenge government actions taken during procurement development and bidder selection proceedings.²⁷⁹ Third parties and potential bidders are not addressed.²⁸⁰ Appeals can only be filed after the award results have been published, after which it is heard by the Court of Contracting.

²⁷² See Public Procurement Rules [Pakistan], S.R.O. 432(I)/2004 at § 48 (accessible at <https://www.ppra.org.pk/rules.asp>).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See Ley 22 de 27 de junio de 2006 [Law 22 of June 27, 2006] [Panama] (amended by Law 153 of May 8, 2020) at arts. 146, 153 (accessible at <https://www.dgcp.gob.pa/leyes>); see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/panama>.

²⁷⁶ Ley 22 de 27 de junio de 2006 [Law 22 of June 27, 2006] at art 30.

²⁷⁷ See *id.* at art 146.

²⁷⁸ See *id.* at arts. 146, 153.

²⁷⁹ See Legislative Decree No. 1444, art. 41 (Sep. 16, 2018) (accessible at <https://www.gob.pe/institucion/osce/colecciones/135-legislacion-del-osce>); see also *Peru Country Profile: Global Public Procurement Database*, WORLD BANK, https://www.globalpublicprocurementdata.org/gppd/country_profile/PE (last visited on Dec. 2, 2020).

²⁸⁰ *Id.*

72. Philippines

Republic Act No. 9184 contains the Philippine's protest mechanisms.²⁸¹ Section 55 states that decisions of the Bids and Awards Committee ("BAC") can be protested, after which court action can be pursued.²⁸² Section 12 states that the BAC's functions are to "advertise and/or post the invitation to bid, conduct pre-procurement and pre-bid conferences, determine the eligibility of prospective bidders, receive bids, conduct the evaluation of bids, undertake post-qualification proceedings, recommend award of contracts to the Head of the Procuring Entity or his duly authorized representative."²⁸³ Section 58 states that appeals are governed by Rule 65 of the 1997 Rules of Civil Procedure and are initially made to the regional trial court.²⁸⁴ Rule 65 gives standing before the courts to "aggrieved persons."²⁸⁵ Whether that includes potential bidders and/or third parties is unspecified.

73. Poland (EU)

Under Poland's 2018 rules on public procurement, economic operators and participants of design contests possess standing to lodge an appeal to the National Appeal Chamber in the event that the procuring entity violated the law.²⁸⁶ Parties may appeal the decision of the National Appeal Chamber in court.²⁸⁷ This is line with the minimum set by EU directive 2014/24 and on par with Austria, Germany and the majority of EU member states.

74. Portugal (EU)

Articles 269 to 271 of Portugal's Public Procurement Code provide standing to interested parties to challenge adverse administrative decisions concerning both public contract formation

²⁸¹ See Republic Act No. 9184, Article XVII (Protest Mechanism)(accessible at <http://www.ps-philgeps.gov.ph/welcome/>).

²⁸² *Id.* at § 55.

²⁸³ Republic Act No. 9184 at § 12.

²⁸⁴ See *id.* at § 58.

²⁸⁵ 1997 Rules of Civil Procedure, Rule 67 (accessible at https://lawphil.net/courts/rules/rc_1-71_civil.html).

²⁸⁶ See Act of 29 January 2004 Public Procurement Law, Chapters 2,3 at art. 180 (since amended to correspond to the requirements of the 2014 EU directive) (accessible at <https://www.uzp.gov.pl/>).

²⁸⁷ *Id.* at art. 198a.

and the procedures themselves.²⁸⁸ Alternative Dispute Resolution is also available, subject to acceptance by all interested parties candidates and competitors in disputes over procedure related to formation of government contracts.²⁸⁹ Whereas the article addressing ADR procedures mentions interested parties, candidate and competitors, Article 271 mentions “interested parties.” As such, it is possible that Portugal extends standing rights beyond bidders and potential bidders.

75. Qatar

Law No. 24 of 2015 governs government procurement in Qatar.²⁹⁰ While Articles 37 and 38 introduce the President’s ability to create ad hoc Dispute Settlement Committees for contractual disputes, Law No. 24 does not include any mention of an ability to challenge the award decision itself.²⁹¹ While Article 38 states that all administrative disputes prior to the conclusion of the contract can be adjudicated by the Committee, it is unclear whether the Committee can adjudicate formation issues.²⁹² Moreover, Article 34 states that parties having entered into a contract may seek arbitration to resolve a dispute, but no mention is made of disputes concerning contract formation.²⁹³

Article 12 includes appeal rights in the event that a bidder withdraws a bid which results in the government penalizing the bidder by confiscating the bidder’s bond or by barring the bidder from future solicitations.²⁹⁴ However, no other mention of a formation-specific remedy

²⁸⁸ See Decreto-Lei n.º 111-B/2017 de 31 de Agosto [Law Decree no. 111-B/2017 of August 31] at arts. 269-271 (accessible at <http://www.impic.pt/impic/>); see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/portugal>.

²⁸⁹ *Id.* at art. 476

²⁹⁰ See Law No. 24 of 2015 promulgating the law regulating tenders and auctions (accessible at <https://www.almeezan.qa/LawPage.aspx?id=6812&language=ar>).

²⁹¹ *Id.* at art. 37-38.

²⁹² *Id.* at art 38; see also Julian Bailey and Michael Turrini, *New Qatar Public Procurement Law*, WHITE AND CASE (June 18, 2016) <https://www.whitecase.com/publications/alert/new-qatar-public-procurement-law> (note that the summary of the new Dispute Settlement Committee provided in this blog is similarly nondescriptive regarding bid protest rights).

²⁹³ *Id.* at art. 34.

²⁹⁴ *Id.* at art. 12.

process is included in the law. Further, the previous law governing public procurement in Qatar, Law No. 26 of 2005, conferred onto contractors only a limited appeal ability for decisions related to government contract formation.²⁹⁵ Article 22 of Law No. 26 provided that contractors could appeal decisions pertaining to qualifying and classifying contractors to the Minister of Finance.²⁹⁶ No other mention was made of any other ability to contest or otherwise challenge contract-formation related issues.

As such, it is unclear whether Qatar confers bid challenge rights under its current law. Based on its past law, it would appear that Qatar only permitted bidders to challenge a mistake involving their classification by the Ministry of Finance.²⁹⁷

76. Russia

Federal Law No. 44-FZ on the Contract System in State and Municipal Procurement of Goods, Works and Services, dated 5 April 2013, provides two key procedures for reviewing complaints concerning perceived violations of procurement law: administrative review through the Federal Antimonopoly Service or Federal Service on Defense Orders, or court review.²⁹⁸ Participants in the procurement process (meaning bidders) are provided standing in utilizing these options.²⁹⁹

77. Saudi Arabia

Articles 86 and 87 of the Government Tenders and Procurement Law, dated July 16, 2019, confer standing to challenge procurement proceedings to competitors of the

²⁹⁵ See Law No. 26 of 2005 promulgating the Tenders and Bids Regulatory Law (accessible at <https://www.almeezan.qa/LawView.aspx?opt&LawID=3974&language=en>).

²⁹⁶ *Id.* at art. 22.

²⁹⁷ *Id.*

²⁹⁸ See Federal Law No. 44-FZ on the Contract System in State and Municipal Procurement of Goods, Works and Services (accessible in Russian at <http://publication.pravo.gov.ru/Document/View/0001201304080023>); see also Olga Revzina et al., *Russia*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227028/russia>.

²⁹⁹ *Id.*

proceedings.³⁰⁰ As such, potential bidders and third parties are excluded. Challenges are brought before a specially designated committee, whose decisions are binding on the government entity.³⁰¹ Article 87(1) states that competitors are entitled to complain to the government regarding any decision taken.³⁰²

78. Senegal

Irregularities in the procurement process may be brought by “Interested parties” or “any other person having knowledge.”³⁰³ Challenges are brought before the Dispute Settlement Committee, as stipulated in Articles 18 and 20 of Senegal’s procurement law of April 25, 2007.³⁰⁴ Decisions are binding unless appealed in administrative or judicial court.³⁰⁵

79. Serbia

Serbia’s Law on Public Procurement of 2012 confers standing to bidders, applicants, candidates, and interested persons, provided they have an interest in the award of the contract and suffer or may suffer damage due to contracting authority decisions in violation of the law.³⁰⁶ Depending on how “interest in the award of the contract” is interpreted, it is possible that third parties are able to bring challenges; however, it seems more likely that such right is typically limited to bidders and potentially bidders only.³⁰⁷ Challenges are brought to the Republic Commission for Protection of Rights in Public Procurement Procedures.³⁰⁸ The Republic

³⁰⁰ See Government Tenders and Procurement Law, Royal Decree No. M/128 of 1440 H at arts. 86, 87 (<https://www.mof.gov.sa/en/docslibrary/RegulationsInstructions/Pages/default.aspx>).

³⁰¹ *Id.*

³⁰² *Id.* at Art. 87.

³⁰³ DECRET N° 2007-546 du 25 AVRIL 2007 (Decree No. 2007-546 of April 25, 2007) at art. 20 (accessible at <http://www.armp.sn/>).

³⁰⁴ See *id.*

³⁰⁵ *Id.* at art. 21.

³⁰⁶ See Law on Public Procurement of 2012, Official Gazette no. 124 at arts. 148-150, 159 (since amended, including in 2015) (accessible at <http://www.pravno-informacioni-sistem.rs/SIGlasnikPortal/eli/rep/sgrs/skupstina/zakon/2012/124/1/reg>); see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/serbia>.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at arts. 138-147.

Commission's decisions are binding and non-appealable, although a party can raise an administrative dispute.³⁰⁹

80. Singapore

Singapore's Government Procurement Act (Chapter 120) provides for a bid protest mechanism, in accordance with its place as party to the GPA.³¹⁰ Suppliers who suffer loss or risk suffering loss can bring a claim to the Government Procurement Adjudication Tribunal in the event that the procuring entity breaches a duty.³¹¹ However, the law expressly prohibits bringing an action concerning public procurement breach before the court.³¹² As such, Singapore is a good example of limits on standing that arise by having constrained forum options. This is not to suggest that Singapore's tribunal is inadequate or fails to remedy procurement issues, but the lack of appellate possibilities or remedy in court is not ideal. It may also signal a distrust in challenging the government.

81. Slovenia (EU)

Slovenia's Public Procurement Act confers standing to seek legal protection against infringements of public procurement procedures to economic operators.³¹³ As noted in country previous profiles on this list, this conferring of rights to bidders and potential bidders is in line

³⁰⁹ *Id.* at art. 159.

³¹⁰ See Government Procurement Act (Chapter 120) [Singapore], §§ 7-8, 12 (accessible at <https://sso.agc.gov.sg/Act/GPA1997?ValidDate=20201127&TransactionDate=20201127#pr8->); see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/singapore>.

³¹¹ *Id.* at § 7.

³¹² *Id.* ("A breach of a duty referred to in subsection (1) shall not be the subject of any proceedings in any court but may be the subject of a challenge brought before the Tribunal by a supplier to whom the duty is owed and who has suffered, or reasonably risks suffering, loss or damage as a result of the breach.").

³¹³ See Public Procurement Act, Official Gazette no. 91/15 [Slovenia] at arts. 2-3 (accessible at <https://ejn.gov.si/sistem/pravno-varstvo.html>); see also *System Change in Slovenia: Making Public Procurement More Effective*, OECD, <https://www.oecd-ilibrary.org/sites/ffb347c9-en/index.html?itemId=/content/component/ffb347c9-en> (last visited on Dec 14, 2020); *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/slovenia>.

with most EU member states. Operators can bring challenges before the National Commission for Reviewing Public Procurement Award Procedures or before the district court.³¹⁴

82. Somalia

The Public Procurement, Concessions and Disposal Act, 23 November 2015 regulates procurement in Somalia.³¹⁵ Article 163 confers standing to potential or actual bidders who claim to have suffered or are likely to suffer loss or injury due to a breach.³¹⁶ Applications for review are brought before the Independent Procurement Review Panel, per Article 165.³¹⁷ The Panel's decisions may be appealed only in a court of law pursuant to Article 161 of the Act.³¹⁸

83. South Africa

Section 33 of South Africa's constitution states that every person has a right to administrative action.³¹⁹ Further, the Promotion of Administrative Justice Act ("PAJA") of 2000 includes under Section 6(2) various grounds for when the award of a tender (as a type of administrative action) can be challenged by an unsuccessful bidder.³²⁰ Section 5 of PAJA reiterates that any person whose rights have been materially and adversely affected by administrative action may pursue judicial review.³²¹

As indicated by the general constitutional right to administrative action, South Africa represents a somewhat different approach to conferring bid protest rights, in that it is considered under administrative action in general, whereas in other countries (such as the United States) bid

³¹⁴ See Public Procurement Act, Official Gazette no. 91/15 at art. 2.

³¹⁵ See Public Procurement, Concessions and Disposal Act, 23 November 2015 (accessible at <https://mof.gov.so/public-procurement>).

³¹⁶ *Id.* at art. 163.

³¹⁷ *Id.* at art. 165.

³¹⁸ *Id.* at art. 161.

³¹⁹ See Claire Tucker, Bowman Gilfillan, *Public Procurement in South Africa: Overview*, Thomson Reuters Practical Law (Feb 1, 2014) [https://content.next.westlaw.com/2-520-8348?_lrTS=20201101134920862&transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a45671](https://content.next.westlaw.com/2-520-8348?_lrTS=20201101134920862&transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a45671).

³²⁰ See Promotion of Administrative Justice Act of 2000, no. 20893/416 at § 6. (accessible at <http://www.treasury.gov.za/>).

³²¹ *Id.* at § 5.

challenges occur outside the framework of other agency challenges. Based on this general constitutional right, it would appear that bidders, potential bidders and third parties possessing an interest are able to challenge procurement decisions.

84. South Sudan

South Sudan's "interim" procurement rules of 2006 provides a right to review to any supplier, contractor or consultant that claims to have suffered or may suffer loss or injury because of a breach of duty.³²² This would appear to constrain standing to bidders only. Challenges are first submitted to the procuring entity, and then to the Procurement Policy Unit, which possesses final say, per Section 57.³²³

85. Sweden (EU)

The Procurement Act of 2016 provides that suppliers may seek review in general administrative court, provided that the supplier considers that he has suffered or may suffer harm.³²⁴ Notably, Chapter 4, § 4 states that suppliers, who have rights as determined by the state in which the supplier conducts activities, may not be excluded from participation.³²⁵ Taken in the context of Sweden's placement within the EU, Sweden confers standing rights to bidders and potential bidders.

Section 20, under the heading "Skadestånd" (Damages), states that the contracting authority who has not complied with the provisions of this Act shall compensate the supplier for the damages.³²⁶ Section 20 states further that the right to damages includes compensation to a

³²² See Interim Public Procurement and Disposal Regulation, 2006 at arts. 56-57 (accessible at <http://www.mofep-grss.org/>).

³²³ *Id.*

³²⁴ See Procurement Act of 2016 [Sweden], SFS 2016:1145 Chapter 20, §§ 4-6 (accessible in Swedish at https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-20161145-om-offentlig-upphandling_sfs-2016-1145); see also *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/sweden>; Fredrik Linder et al., *Sweden: Public Procurement & Government Contracts 2020*, CHAMBERS AND PARTNERS (Apr. 6, 2020) <https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2020/sweden>.

³²⁵ See Procurement Act of 2016 at Chapter 4, § 4.

³²⁶ *Id.* at Chapter 20, § 20.

supplier who has participated in a procurement for costs it has had to prepare tenders and otherwise participate in the procurement if the violation of the provisions of this law has adversely affected the supplier's ability to be awarded the contract.³²⁷

86. Switzerland

Until January 2021, the Federal Act on Public Procurement of 1994 (last updated in 2011) provided for rights of legal action for bid protests.³²⁸ Switzerland adopted a revised procurement regime in June 2019, which went into effect on January 1, 2021.³²⁹ The new act (referred to as the “rPPA”) moderately expanded scope of review by lowering the minimum threshold to be met by challengers (for non-construction federal contracts the threshold is at or over CHF 150,000.00; for construction the threshold is CHF 2 million).

Per Articles 51 and 52, the tenderer may file an application for damages to the contracting authority, with appeals being sent to the Federal Administrative Court.³³⁰ Article 3 defines a tenderer as “an individual or legal entity under private or public law, or a group of such persons or entities, which supplies goods, work or services or which applies to participate in a public tender, the delegation of a public task or the granting of a concession.”³³¹ However,

³²⁷ *Id.*

³²⁸ See Federal Act on Public Procurement of 1994 [Switzerland] (accessible at https://www.simap.ch/shabforms/COMMON/application/applicationGrid.jsp?template=1&view=1&page=/MULTI_LANGUAGE/simap/content/start.jsp&language=EN); see also Astrid Waser and Benoit Merkt, *Switzerland*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227025/switzerland>; Ramona Weiss et al., *Switzerland: Public Procurement & Government Contracts 2020*, CHAMBERS AND PARTNERS (Apr. 7, 2021) <https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2020/switzerland/trends-and-developments>.

³²⁹ See Federal Act on Public Procurement of 2021 [Switzerland] (accessible at <https://www.fedlex.admin.ch/eli/cc/2020/126/en>); Ramona Weiss et al., *Switzerland: Public Procurement & Government Contracts 2020*, CHAMBERS AND PARTNERS (Apr. 7, 2021) <https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2020/switzerland/trends-and-developments>. While Switzerland provides an English translation of its law, it notes that the English translation does not carry legal force and is for informational purposes only. The official versions are in German, French and Italian.

³³⁰ See Federal Act on Public Procurement of 2021 [Switzerland] at arts. 51-52. The 2021 rPPA did not change standing requirements. See Federal Act on Public Procurement of 1994 [Switzerland] at arts. 26-29, 35.

³³¹ Federal Act on Public Procurement of 2021 [Switzerland] at art. 3.

Article 56 states that “Only those that can prove that they can and wish to provide the goods, work or services requested or equivalent goods, work or services may appeal against awards in the direct award procedure.”³³² As such, standing is conferred to bidders and potential bidders.

No standing is conferred until a contracting decision has been made.³³³ Challenges may be filed only on the grounds that a violation of award procedures occurred or if the “contract was awarded based on corruption.”³³⁴

87. Taiwan

Chapter IV, titled “Dispute Settlement,” of Taiwan’s government procurement law confers standing to challenge procurement decisions.³³⁵ Article 75, in conjunction with Article 74, states that a supplier may file a protest with the Complaint Review Board for Government Procurement in the event that a breach impairs a supplier’s rights or interests in the procurement.³³⁶ Under Article 8, a supplier is “any company, industrial or commercial firm under partnership or sole proprietorship, or any natural person, juridical person, institution or organization that may offer construction work, property or service to the entity.”³³⁷ Thus, standing to raise a bid protest in Taiwan is conferred to suppliers and potential suppliers. This places Taiwan in a similar situation to Canada and most EU member states.

88. Thailand

Thailand’s Public Procurement and Supplies Administration Act of 2017 contains a chapter on appeals.³³⁸ Section 114 provides that a person having tendered a proposal to a state

³³² *Id.* at art. 56.

³³³ *See id.* at art. 51.

³³⁴ Federal Act on Public Procurement of 2021 [Switzerland] at art. 56.

³³⁵ *See* Government Procurement Act [Taiwan], Chapter VI, arts. 8, 74-75 (accessible at <https://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030057>); *see also* *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/taiwan>.

³³⁶ *Id.*

³³⁷ Government Procurement Act [Taiwan] at art. 8.

³³⁸ *See* Procurement and Supplies Administration Act of 2017 [Thailand], B.E. 2560 Chapter XIV (accessible at http://www.gprocurement.go.th/new_index.html).

agency for the procurement of supplies has the right to submit an appeal actions taken by the procuring entity in violation of procurement law that disadvantage the bidder.³³⁹ Thus, bidders are conferred standing rights. Review petitions are initially directed to the procuring agency, the decisions of which can be appealed to the Appeals Committee, whose decisions are final.³⁴⁰

89. Tunisia

Article 180 of Tunisia's public procurement law confers standing to seek recourse to any person with an interest in the award of the public procurement procedure, provided an unlawful decision was issued which caused the party prejudice.³⁴¹ Challenges are initially reviewed by the procuring entity, whereafter a party can appeal to the Monitoring and Investigation Committee of Public Contracts.³⁴²

90. Turkey

Section Two, Article 54 of the Public Procurement Law confers bid challenge standing to candidates, tenderers or potential tenderers who claim they have suffered or are likely to suffer a loss of right or damage due to unlawful procedures or actions.³⁴³ Complaints are submitted to the Public Procurement Authority, per Article 56.³⁴⁴ Final decisions of the Public Procurement Authority may be appealed in court, per Article 57.³⁴⁵

³³⁹ *Id.* at § 114.

³⁴⁰ *Id.* at §§ 118-19.

³⁴¹ *See* Décret n° 2014-1039 du 13 mars 2014, portant réglementation des marchés publics [Decree no. 2014-1039 of March 13, 2014, Pertaining to the Regulation of Public Contracts][Tunisia], (accessible in French at <http://www.marchespublics.gov.tn/onmp/documents/document.php?id=456&lang=fr>).

³⁴² *Id.* at arts. 147, 181.

³⁴³ *See* Public Procurement Law [Turkey], 4734 art. 54 (Jan. 22, 2002) (accessible at <http://www.lawsturkey.com/law/public-procurement-law-4734>).

³⁴⁴ *Id.* at art. 56.

³⁴⁵ *Id.* at art. 57

91. Uganda

Uganda's procurement law of 2003 (whose most recent amendment went into effect in 2014) contains procedures and rights concerning administrative review.³⁴⁶ "Bidder" is defined as "a physical or artificial person intending to participate or participating in public procurement or disposal proceedings."³⁴⁷ Under Part VII, "Administrative Review," bidders are conferred standing to bring challenges to the Accounting Office, whose decisions may be appealed to a Tribunal.³⁴⁸ Bidders may challenge in the event that they are aggrieved by a decision taken by the procuring entity.³⁴⁹ The Decisions of the Tribunal are appealable to the High Court.³⁵⁰

92. Ukraine

The Law of Ukraine on Public Procurement, last amended on November 22, 2020, provides protection for the rights and legitimate interests of persons involved in the participation of procurement procedures.³⁵¹ "Participant" means those who submitted offers or were involved in negotiations, and includes natural persons (meaning operator or legal entity), including residents and non-residents and associations of participants.³⁵² As such, Ukraine gives standing to bidders and participants, but not potential bidders or third parties. The Antimonopoly Committee of Ukraine serves as the reviewing authority for complaints concerning violations of procurement law, and the Committee's decisions can be appealed to the district administrative court.³⁵³

³⁴⁶ See Public Procurement and Disposal of Public Assets Act, 2003 (amended Feb. 28, 2014) (accessible at <https://www.ppda.go.ug/>).

³⁴⁷ Public Procurement and Disposal of Public Assets Act, 2003 at § 3.

³⁴⁸ See *id.* at §§ 89-91.

³⁴⁹ *Id.* at § 90.

³⁵⁰ *Id.* at § 91 M.

³⁵¹ See Law of Ukraine on Public Procurement, Vedomosti Verkhovnoi Rady (VVR), 2016, No. 9, p.89 art. 18 (last amended Nov. 22, 2020) (accessible at <https://zakon.rada.gov.ua/laws/show/922-19?lang=en#Text>).

³⁵² *Id.* at art. 1, ¶ 37.

³⁵³ *Id.* at arts. 22-23

93. United Kingdom (England, Wales and Northern Ireland)

Procurement in England, Wales and Northern Ireland is governed by Public Contracts Regulations (2015).³⁵⁴ Under Section 91 of the regulations, any economic operator who suffers or risks suffering loss or damage may challenge procurement proceedings in the High Court.³⁵⁵ Section 2-1 defines economic operator as “any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market.”³⁵⁶

Claimants have to show “sufficient interest,” a term which has been broadly construed.³⁵⁷ For the purposes of analyzing standing, the sufficient interest standard is notable because of its similarity to the prejudice requirement in the United States. The UK’s sufficient interest standard is the closest that another state in this survey comes to the “substantial chance of award” requirement required in the United States.

³⁵⁴ See Public Contracts Regulations, 2015 No. 102 (accessible at <https://www.legislation.gov.uk/uksi/2015/102/contents/made>). The PCR notably implements EU directives. Note that Scotland has its own system per Section 53 of the Scotland Act, and implements EU directives on its own (although in a largely similar manner to the rest of the UK). See Louise Dobson and Ryan Geldart, *United Kingdom*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227029/united-kingdom>. How the UK will proceed post-Brexit is beyond the scope of this paper, yet it should be noted that the UK could alter its standing once it is no longer bound to follow EU directives.

³⁵⁵ See Public Contracts Regulations, 2015 No. 102 at § 91 (titled “Enforcement of Duties through the Court”); Louise Dobson and Ryan Geldart, *United Kingdom*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW, EDITION 8 (June 2020) <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227029/united-kingdom>.

(“Some bidders and third parties, such as subcontractors, who do not enjoy protection under the procurement regulations, bring claims in judicial review in the High Court, asking the Court to review the decision of the public authority. However, it does appear that the approach to procurement challenges by subcontractors is changing after the Sysmex case, when Sysmex challenged as an embedded subcontractor only, even when it was not in a position to sign the contract, nor to deliver the services required as a whole.”) (internal citations omitted).

³⁵⁶ Public Contracts Regulations, 2015 No. 102 at § 2-1.

³⁵⁷ See *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/england-and-wales>.

94. Uruguay

Article 73 of Decree No. 150/012 provides that an “interested party” may challenge administrative acts during procurement proceedings.³⁵⁸ This term is not defined further in the Decree. Challenges may be submitted to the Tribunal de Cuentas (“Court of Accounts”).³⁵⁹

95. Venezuela

Decree No. 1,399 of November 13, 2014 states that bidders have the right to request the review of the file following selection of a contractor.³⁶⁰ However, non-bidders, including those parties precluded from submitting a bid, have no right to access files or to request a review.³⁶¹ It is doubtful that this limited ability to request a review of the file qualifies as a bid protest system.

96. Vietnam

Government procurement in Vietnam is governed by Law on Bidding No. 43/2013/QH13 and Decree No. 63/2014/Nd-CP.³⁶² Article 92 of the Decree provides that contractors (bidders) may submit a written petition to the procuring entity on issues affecting the rights and interests of the bidder in the contractor selection process.³⁶³ Unsatisfied bidders can appeal the procuring entity’s decision or lack of a decision to the Advisory Council.³⁶⁴

³⁵⁸ See Decreto N° 150/012 (Decree No. 150/012) [Uruguay] at arts. 33, 73 (accessible in Spanish at <https://www.impo.com.uy/bases/tocaf2012/150-2012>).

³⁵⁹ *Id.*

³⁶⁰ See Decree No. 1,399 [Venezuela], Gazette No. 6.154 at Art. 20 (Nov. 13, 2014)(accessible in Spanish <http://www.snc.gob.ve/sobre-el-snc/base-legal>).

³⁶¹ See Daniel Rosa Rivero, *Venezuelan Public Procurement: A great challenge lies ahead*, TPP (Apr. 16, 2020) <https://www.tpp-rating.org/page/eng/publications/33>.

³⁶² See Law on Bidding No. 43/2013/QH13 (Nov. 26, 2013); Decree No. 63/2014/Nd-CP (Jun. 26, 2014)(implementing Law on Bidding No. 43/2013/QH13); see also *Public Procurement in Vietnam*, SWISS GLOBAL ENTERPRISE (Dec. 3, 2019) <https://www.s-ge.com/en/article/export-knowhow/20194-c3-vietnam-public-procurement>. Both laws are accessible in Vietnamese at <http://muasamcong.mpi.gov.vn/csdl/van-ban>.

³⁶³ See Decree No. 63/2014/Nd-CP at arts. 90-94.

³⁶⁴ *Id.*

97. Yemen

Law No. 23 of 2007 on Government Tenders, Auctions and Stores Law confers standing under Article 77 to anyone who submits a bid.³⁶⁵ As such, bidders, but not potential bidders or third parties, are permitted to file a challenge. Reviews are initially heard by the High Authority, after which parties can appeal the issue in court.³⁶⁶

98. Zimbabwe

Zimbabwe's 2018 law on procurement confers standing to "challengers," which the law defines as "a bidder or other person that challenges procurement proceedings in terms of Part X of the Act."³⁶⁷ Accordingly, Part X contains references to "challengers" and "applicants" and appears to use the terms interchangeably.³⁶⁸ While not restricted only to bidders, it is unclear based on the language of the procurement law regarding what other parties may be considered as applicants. Review is initially undertaken by a panel, after which appeals can be brought before courts such as the Administrative Court.³⁶⁹

A Note on Other Countries

The preceding list of country profiles is not all inclusive of every country in the world. An additional 35 countries were surveyed while researching this paper but were ultimately not included in this paper because of a variety of reasons, most of which concern research obstacles. One particularly salient reason is a lack of an easily identifiable protest system, in which case the

³⁶⁵ Law No. (23) of 2007 regarding the Government Tenders, Auctions and Stores Law, art. 77 (accessible in Arabic at <https://hatcyemen.org/documents/law/document.php?ID=975>); see also *High Authority for Tender Control*, <https://hatcyemen.org/#en> (last visited on Dec. 14, 2020).

³⁶⁶ Law No. (23) of 2007 at arts. 77-78.

³⁶⁷ Public Procurement and Disposal of Public Assets (General) Regulations, 2018, Statutory Instrument 5 of 2018 (accessible at http://www.praz.gov.zw/index.php?option=com_phocadownload&view=category&id=1&Itemid=705&lang=en).

³⁶⁸ See *id.*

³⁶⁹ *Id.* at arts. 43-44, 61.

question of standing is answered by default.³⁷⁰ Countries which potentially fit this classification include Cuba, Iran, Libya, North Korea and Syria, although further research is likely needed to confirm the lack of a protest mechanism in each.³⁷¹

Part III: Global Trends and Reanalysis of *Acetris*: What the US system should do

It is clear from the above country list that various configurations of bid challenge standing rights have been adopted by countries around the globe. Before returning to *Acetris* and the United States, a closer look at overall developments is warranted. To do so, this section will first examine the three standing elements more closely (parties, circumstances, protest forum). After which, analysis will turn to discussing how these three elements together can form a comprehensive look at bid protest standing requirements.

A. Trends: A Closer Look at Individual Standing Elements

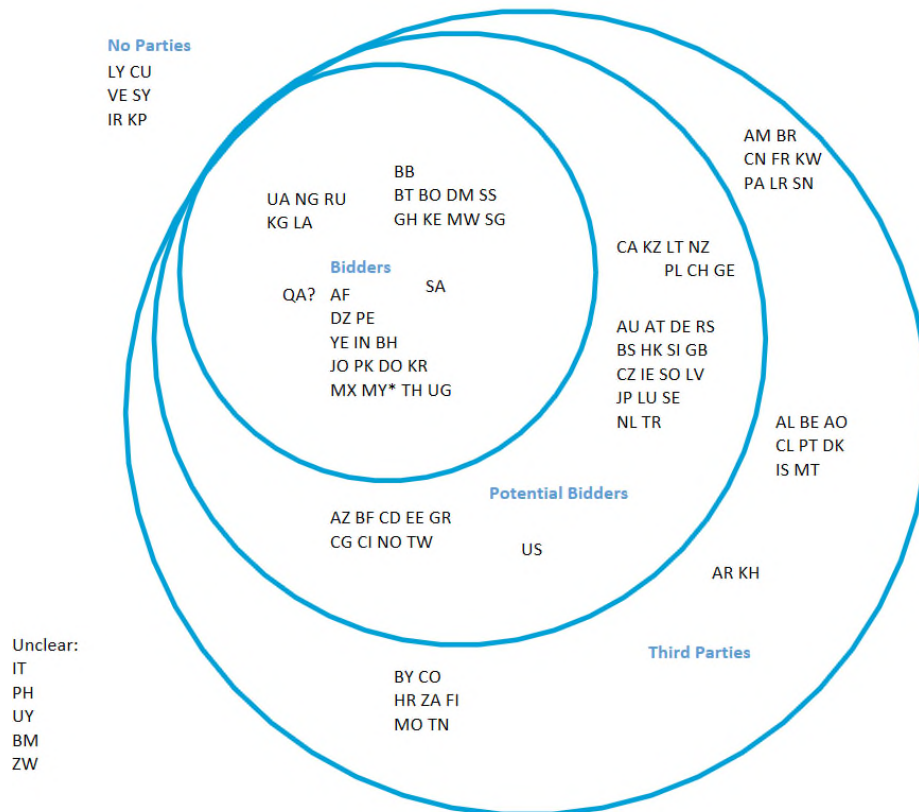
As observed in Part I, an analysis of standing requires determining (1) which type of party, (2) under which circumstances, can bring a challenge before (3) which protest forum. Typically, the best place to start in analyzing any one country is to first determine what classes of parties are initially granted standing. From there, the next step is to determine whether circumstantial requirements or a lack of confidence in a protest forum's abilities reduce standing.

³⁷⁰ Another reason concerns the existence of language barriers in translating and locating relevant legislation. In some cases, some legislation could be located on the subject of public contracts or even a protest system, but not on protest standing. See *Council for Development and Reconstruction* [Lebanon], <https://www.cdr.gov.lb/en-US/Procurement.aspx> (last visited on Dec. 27, 2020); see also *Bolstering SME participation in public procurement: Policy options for Lebanon*, International Growth Center (Jan 3, 2020) <https://www.theigc.org/publication/bolstering-sme-participation-in-public-procurement-policy-options-for-lebanon/>.

³⁷¹ This is a difficult statement to fully substantiate, because of the difficulty in proving the absence of something's existence. However, research into the aforementioned countries did not reveal respective locatable protest systems. For example, Iran's website for its Ministry of Industry, Mine and Trade does not contain any reference to procurement codes or regulations, let alone a protest system. See *Ministry of Industry, Mine and Trade* [Iran] (last visited on Jan. 2, 2021) https://en.mimt.gov.ir/web_directory/30693-%D8%B5%D9%81%D8%AD%D9%87-%D8%A7%D8%B5%D9%84%D9%8A.html. See also *Syrian Ministry of Finance*, <http://syrianfinance.gov.sy/> (last visited on Jan. 4, 2021); *Ministerio Finanzas y Precios* [Ministry of Finance and Prices] [Cuba], <http://www.mfp.gob.cu/inicio/portada.php> (last visited on Dec 30, 2020).

i. Which Type of Party

Starting first with addressing the element of “which types of parties” can bring a challenge, many countries in the above list make use of use of the same terms. Common terms include “bidder,” “potential” or “prospective” bidder, and “interested party,” to name a few. Ostensibly, these terms demonstrate a widening scale.



First, generally speaking, “bidders” refers only to those who actually participated in the solicitation process by submitting bids. While a small number of countries broaden the definition of bidder, the more common usage of the term “bidder” excludes parties that did not participate in the solicitation process. Alternative terms that are often used interchangeably with bidder are “candidates,” “tenderers,” and “participants.” Notably, “supplier” can be used to describe those

parties who actually submitted bids, but this is not a universal definition: other countries define the term supplier to include potential bidders as well.³⁷²

The next category on the scale is “potential bidder.” This includes bidders, but also includes contractors and vendors who have not yet submitted bids but would be capable of performing the work. Parties not included under this category are third parties such as unions, banks, local governments, and subcontractors. This category also fits the EU’s definition of “economic operator,” as set down as the baseline in directive 2014/24 and adopted as the delegation of choice by most of the EU member states.³⁷³ Other terms sometimes used instead of “potential bidder” are “supplier” and “interested party.” In some cases, “supplier” can be interpreted as referring only to bidders, whereas “interested party” can include some third parties.

As discussed above, the interpretation of “interested party” can be somewhat complicated to decipher absent additional context or express definition. In some cases, “interested party” can include third parties such as unions, subcontractors, and local governments in addition to bidders and potential bidders. Yet in other cases, the term is limited in referring to bidders and potential bidders only, without the inclusion of third parties (for example, this is the interpretation favored by the United States).³⁷⁴ Nonetheless, third parties are sometimes granted rights to appeal decisions.³⁷⁵ This right is often in connection with a prejudice requirement (as is discussed in greater detail in the next section), meaning that some sort of harm, likelihood of harm, or general legal interest is often required.

³⁷² Consider New Zealand, which provides standing to suppliers, which is defined as including both bidders and potential bidders.

³⁷³ See *supra* notes 29-31 and accompanying text.

³⁷⁴ See *supra* notes 10-11 and accompanying text.

³⁷⁵ For example, France.

The remaining category is “no parties permitted.” No parties permitted is synonymous with no protest system or administrative challenge system in existence. Such lack of standing appears to be found in authoritarian or failed states.³⁷⁶

As a final note of caution before moving onto the second element of circumstances (and how circumstances can be configured to loosen or restrict standing), it should be reiterated that the lines between the categories can be blurred, often because of ambiguities in the language (for example, not defining what an “interested party” is) or because of subtle differences in how certain terms are used.³⁷⁷ In general, classifying countries’ protest systems into overarching groupings is not always a straightforward task. Additional reasons for this are more thoroughly examined in the next section.

Overall, standing should be thought of as a spectrum, one that is significantly, but not entirely, impacted by which classes of parties are provided standing rights. A country’s choice of what classes of parties can bring challenges is the most impactful element of standing, because while the circumstances and forum options can severely limit standing, the parties element is the element which the initial groundwork for bid protest standing.

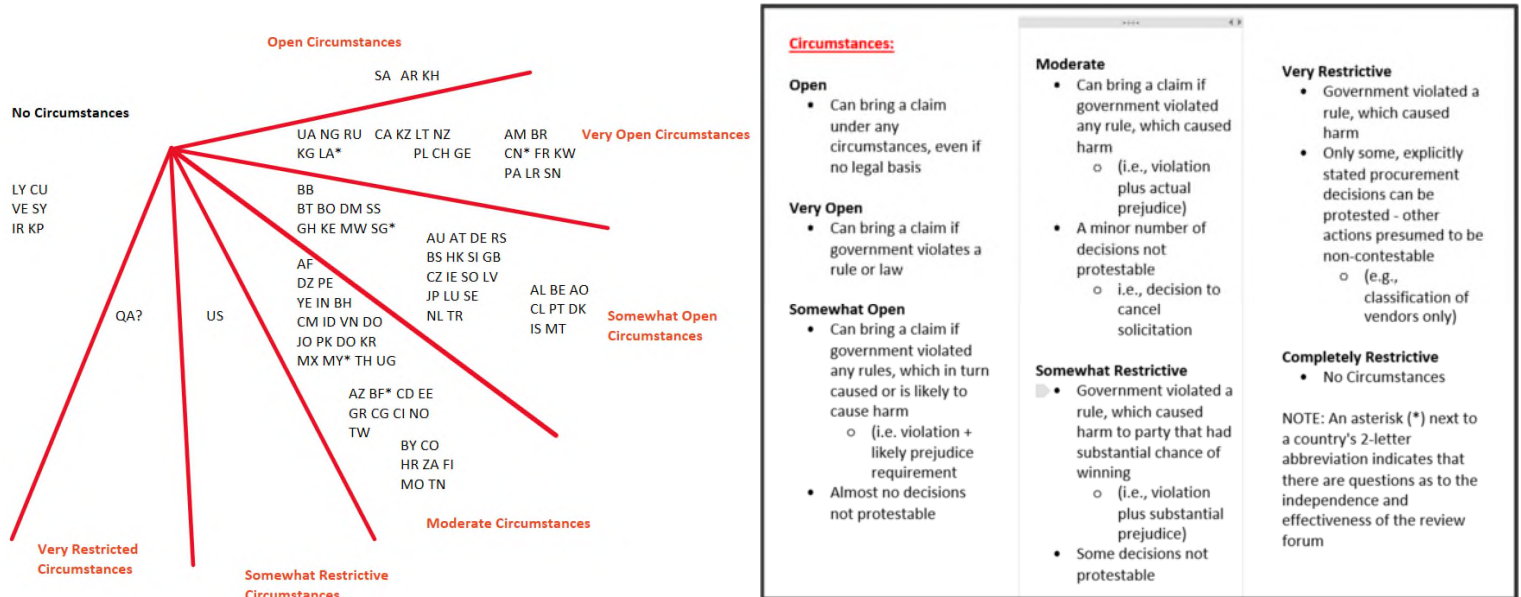
ii. Which Circumstances

Unlike stipulating which classes of parties may bring suit (where countries in effect choose from a handful of available options: i.e., bidders, potential bidders, or third parties), the possibilities for constricting the circumstances for bringing challenges are almost infinite. As demonstrated in Part II, countries can (and do) add all sorts of requirements to qualify standing. Generally speaking, however, configuring circumstantial limitations on standing happens in three

³⁷⁶ See *supra* text accompanying notes 370-371.

³⁷⁷ A useful example of this latter point can be observed with the word “interested,” for while the term “interested parties” connotes a potential for a broad class of parties beyond bidders and potential bidders, the term “*parties interested in receiving award*” clearly limits the class of protestors to bidders and potential bidders and thereby excludes third parties.

ways: (1) adding prejudice requirements, (2) limiting what kinds of decisions can be protested, and (3) requiring that a violation of law occurred. In conjunction with one another, these three ways can create a variety of overall effects on standing. While perhaps a touch subjective, the following chart demonstrates how circumstances can ratchet up limitations on standing.



Turning to discuss the different ways that countries can affect standing, the prejudice requirement can significantly limit standing. In Croatia, law granting standing stipulates that actual harm needs to have been suffered.³⁷⁸ Likely harm is not addressed, and thus, might reasonably be construed to be excluded. In Germany and most other EU countries, however, the prejudice requirement is actual harm *or* likely harm – meaning that the protestor (assuming they are a permitted party, per the previous section) has to argue that they suffered harm or are likely to suffer harm as the result of the procuring entities' violation.³⁷⁹ This latter prejudice

³⁷⁸ See *supra* text accompanying notes 141-142.

³⁷⁹ Note that Germany folds in the requirement that the government need have violated procurement law. While most countries require successful protests to identify a violation of procurement law, not all countries do. See, for example, Argentina. See *supra* text accompanying notes 48-54.

requirement is less restrictive, as it would permit challenges in more cases as a result of it allowing likelihood and not just actual harm to be challenged.

In comparison, the United States employs the “substantial chance of award” rule, requiring that any bidders and potential bidders seeking to protest a decision must be able to claim that they would have been the next highest bidder were it not for the violation of law and regulations.³⁸⁰ In effect, only a few parties are actually capable of exercising a right to file a protest after each award decision, because the substantial chance of award barrier constitutes a substantial limitation on the overall grant of standing rights.³⁸¹ This is, when compared to other countries, a substantial limitation. As such, while the United States starts with a moderately broad standing given that it provides standing rights to bidders and potential bidders, the extent of standing is significantly restricted with its unique prejudice requirement.

On the opposite end of the spectrum, a handful of countries do not require that a party be prejudiced as a prerequisite to exercise one’s standing rights. Instead, asserting that a rule was violated is enough to be granted standing. While the vast majority of countries require the occurrence of a violation of procurement to be present, most of those countries do so in conjunction with a prejudice requirement. The laws of a sizable minority of those countries, however, require only the existence of a violation.³⁸² Even further, in Argentina, no legal violation needs to have occurred, as the law clearly provides standing even in non-legal challenges. This is the widest set of circumstances permitted.

Another limitation on circumstances occurs by limiting the types of claims that can be challenged. In practice, almost every system has some sort of action that cannot be contested.

³⁸⁰ See *supra* text accommodating notes 8-13.

³⁸¹ *Id.*

³⁸² See the “Very open circumstances category” of the circumstances chart.

One of the most common, for example, is to make decisions to cancel the solicitation a non-protestable issue. As such, for most countries this limitation on the types of claims is unlikely to significantly impact a country's standing "ranking." A rarer example, however, was evident in Qatar's previous procurement rules from 2005, which allowed bidders to challenge only a few actions related to procurement formation issues: specifically, an agency mistake concerning the classification of a bidder.³⁸³

In summation, upon reviewing the protest systems of 98 countries, it is clear that countries can constrict standing by limiting the circumstances in which approved parties can raise challenges, even where a country may otherwise provide for a wider selection of types of parties (i.e., the standing element discussed in the previous section). This can counteract the effect of granting standing to a wide class of parties.

iii. Which Tribunal or Decision-Making Authority

Finally, the third standing element of "before which authorities can challenges be brought" can impact the overall composition of standing rights as well. If standing rights are conferred to a large variety of individuals under a wide set of circumstances, but no suitable tribunal exists to hear the challenge, then the issue of standing can be made moot. If only limited tribunal access exists, then the effect standing rights can significantly weakened. China's law provides for an agency protest system but does not refer to any independence of such review, nor does it indicate any potential for court proceedings.³⁸⁴ Another example of this is Singapore, which provides a special tribunal to decide bid challenges, but explicitly prohibits any challenges from being heard in court.³⁸⁵ As such, the effectiveness of Singaporean law conferring standing

³⁸³ See *supra* text accompanying notes 295-296.

³⁸⁴ See *supra* text accompanying notes 129-131.

³⁸⁵ See *supra* note 312.

to bidders is arguably made lesser because of limited access to appeal.³⁸⁶ Nonetheless, the existence of at least some protest authority is preferable over none. It is doubtful that Venezuela's review process counts as a viable protest system, in that it only allows bidders (and only bidders) to see the file, but not contest it.³⁸⁷ Moreover, several countries such as Iran, North Korea, Syria, Libya and Cuba do not appear to possess a redress system for public procurement decisions.³⁸⁸

iv. Taking into Account All of the Standing Elements as a Whole

Ultimately, all three elements must be accounted for when analyzing the various bid challenge systems that exist. As such, it is important to consider a country's standing requirements based on the overall configuration of the various elements.

The following graphic approximates where the different countries on the list fall in comparison to one another based on consideration of the three factors. While some placement on this graphic is subjective, it demonstrates how each standing element can have considerable effects on the overall "grade" of a country's bid protest standing rights.

³⁸⁶ *Id.*

³⁸⁷ *See supra* note 361.

³⁸⁸ *See supra* text accompanying notes 370-371.

Iceland's inclusion of third-party rights is clearly broader than New Zealand's exclusion of third parties, New Zealand appears to possess a less stringent prejudice requirement than Iceland.³⁹⁰ As such, determining which country confers broader standing becomes largely subjective, dependent on whether one thinks that the element of circumstances is more influential than the parties element. Determining whether the parties or circumstances element is more consequential likely depends on a variety of factors which could vary from country to country. If third parties are being routinely adversely affected by award decisions, then the parties element is more influential. On the other hand, if protestors are routinely failing to show that actual harm occurred, then the circumstances element would have a greater effect.

Similarly, China appears to have few restrictions on the circumstances that can be challenged while allowing bidders and potential bidders to challenge actions.³⁹¹ However, as noted, whether China's protest forum is adequate is highly questionable.³⁹² It is thus difficult to argue that China confers wider standing rights than many of the countries located in the less "open" areas of the chart, if it does not possess a suitable forum for addressing disputes.

Third, when considering how the different standing elements are configured together within the different countries' respective bid protest systems, it becomes clear that a non-insignificant collection of countries confers broad standing rights. France and Iceland have provided standing to unions and other third parties in addition to bidders and prospective bidders in cases where the parties are likely to suffer harm.³⁹³ Armenia, Georgia and Liberia provide for less restrictive circumstances, in that their laws only stipulate that a violation is required for

³⁹⁰ See *supra* text accompanying notes 185-188, 265-267.

³⁹¹ See *supra* text accompanying notes 129-131.

³⁹² *Id.*

³⁹³ See *supra* text accompanying notes 164-166, 185-188.

standing to be proper.³⁹⁴ Some countries appear to make a trade off: for example, standing in Nigeria extends only to bidders, but bidders can report any violation, apparently regardless of effect.³⁹⁵ Further still, some countries provide for challenge rights only under very limited overall circumstances. Venezuela, for example, provides an extremely limited mechanism that only applies to small number of contractors, whereas the old regulations for Qatar only addresses standing for bidders to challenge government actions concerning contractor classification, and not all procurement actions.³⁹⁶

Overall, the different configurations of the three standing elements contained in the protest systems of the observed countries in Part II shows multiple ways to balance protecting the interests of its participants while safeguarding the efficiency of procurement. Moreover, what works for one country may not work for another. Yet the one fact that ultimately remains clear, is that ignoring or restricting any one element can severely affect a country's overall configuration of standing rights.

B. Weighing Preferences

Do protest systems exist to provide a remedy or to force accountability upon the government? Ideally, the answer is “both,” as the government is able to identify internal issues more quickly while private parties receive compensation for damage caused and suffered. Yet this may result in some level of increased inefficiency (protests can result in a stay in the procurement and take resources to analyze and litigate). Arguably, a successful protest makes up

³⁹⁴ See *supra* text accompanying notes 55-57 (Armenia), 167-170 (Georgia), 234-238 (Liberia).

³⁹⁵ See *supra* text accompanying notes 268-269.

³⁹⁶ Another observation of interest concerns the variation in providing definitions within the applicable regulations. Some challenge regulations provide definitions for interpreting terms, others do not. As such, in some cases, standing rights might be limited by case law or interpretations contained outside the regulations. As noted above for example, the United States does not define “interested person” in the regulations providing jurisdiction to the Court of Federal Claims. Nonetheless, interested person has been interpreted to apply to only bidders and potential bidders that can meet a limited set of circumstances. *Supra* note 12.

for the inefficiency, as protests can uncover the occurrence of flaws or violations.³⁹⁷ An overly restrictive system can mask inefficiencies in the name of preventing inefficiency.³⁹⁸

Conferring a reasonably broad standing is the best path to ensure both outcomes, in ensuring that there is a balance between increased accountability and remedy while limiting protests from parties without an interest. Increased access provides a fast-tracked and enforceable line of communication from the whistleblower to the government. Moreover, bid protest systems are external, so whereas internal whistleblowing systems can be slow to function and can be subject to internal pressures, external whistleblower systems face no such obstacles. Further, it is no coincidence then that procurement systems in often undergo significant changes following corruption scandals.³⁹⁹ Private parties are theoretically more aggressive in pursuing such challenges to their end results. As such, allowing for more parties to raise issues provides a check on the government that carries a more tangible and direct legal effect.⁴⁰⁰

Yet installing the broadest possible standing rights may not be desirable. One possible justification for conferring more restrictive standing rights is that many countries also maintain whistleblower complaints systems which operate tangent to protest systems. EU directive 2014/24 implicitly endorses this as an option, providing that countries must maintain other mechanisms for receiving and handling complaints in the event that standing is not provided to

³⁹⁷ See Carlos Pimenta and Natalia Rezai, *Public Procurement in Latin America*, IMF (Jan. 2016). This study by the IMF found that procurement systems are often implemented following corruption scandals. Further, it highlights the whistleblowing/accountability aspect rather than remedy aspect and pushes back against idea of efficiency as a reason against widening standing.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ A similar, but separate identifiable trend is that protest boards have a tangible, positive impact, as demonstrated in Yemen and Kazakhstan, where the strengthening of protest mechanisms (which includes incorporating sufficient standing requirements) results in more oversight and action. See *supra* text accompanying notes 206-209; text accompanying notes 365-366.

non-bidders.⁴⁰¹ As such, while perhaps decisions cannot be directly challenged, some level of complaint is theoretically provided.

This may not be a perfect or complete means of providing oversight in procurement procedures, because alternate avenues could lack the force of law and might allow for corrupt or negligent government authorities to simply ignore complaints. On the contrary, a number of countries inherently expect their respective bid protest systems to serve as a route for whistleblowers, as is demonstrated in the number of countries which do not impose prejudice requirements.⁴⁰² Further still, the imputation of a whistleblower-type function within a protest system is squarely addressed in Cambodia's law.⁴⁰³ In addition, some parties may not feel the need to disclose violations of procurement law if they feel that it will not result in any compensation.

A further fear of overly broad standing is that wider standing may open the door to frivolous litigation and challenges. Observers of Kazakhstan's procurement challenge mechanisms have noted that "professional complainers" have accounted for a significant portion of challenges raised.⁴⁰⁴ Such parties file frivolous suits with the expectation that the awardee will have to pay the professional complainant to in return for the withdrawal of the complaint. This indicates that other factors, such as socio-economic environment factors, cultural preferences and regional trends, can have substantial effects on the effectiveness and use of challenge systems.

Kazakhstan is a good example of how opening standing and access to protest systems can result in both increased whistleblowing and in decreased efficiency. Whether Kazakhstan has found the right balance depends on one's point of view: simply, if the increased whistleblowing

⁴⁰¹ See *supra* note 34.

⁴⁰² See the "very open circumstances" group of countries.

⁴⁰³ See *supra* text accompanying notes 111-115.

⁴⁰⁴ See *supra* text accompanying notes 206-209.

is effective and reveals bad actors or poor decision making, then the increased positive effects could very well offset the bad faith challenges.

There are other ways to combat bad-faith complaints without limiting standing and protections can be built in to safeguard against bad-faith protestors. For example, enhancing false claim actions might reduce the frequency of professional complainers (provided that said false claim action is not used to target and retaliate against good-faith protestors). For this reason, having overly broader standing rights is more desirable than having overly restrictive standing rights. If critical formation issues cannot be addressed because the issue is not brought by the right party, then arguably the system is not functioning ideally.

Ultimately, the existence of so many developed bid challenge systems is a promising indicator of an increasing role for private parties in holding governments accountable, and there is much that remains to be learned. It is clear that many countries view bid protest mechanisms as being a useful accountability and oversight tool. The majority of countries surveyed have adopted laws that confer standing to bidders and potential bidders at minimum, and under a reasonable set of circumstances.

C. Revisiting *Acetris*: How the United States Can Improve Its Bid Protest Standing Rights To Achieve a More Optimal Balance

Shifting focus to the United States, the United States moderately opens standing by conferring challenge rights to bidders and potential bidders.⁴⁰⁵ Yet it restricts standing by requiring such bidders and potential bidders to show that they not only suffered harm or a likelihood of harm, but that they would have won were it not for the violation.⁴⁰⁶ This combination places the United States in a league of its own.

⁴⁰⁵ See *supra* text accompanying notes 8-13.

⁴⁰⁶ *Id.*

Yet this distinction is not desirable, as it indicates that the United States has adopted an overly restrictive approach to standing, particularly when compared to other countries. Further, the pre-*Acetris* approach prevents known issues from being adequately addressed, which thus limits the effectiveness of the overall U.S. bid protest system.⁴⁰⁷ This does not represent an optimal balance between efficiency with the accountability/whistleblowing function inherent in a bid protest system. Moreover, it precludes otherwise interested parties from pursuing a remedy.

i. Comparing the United States to the World

The vast majority of the countries surveyed in this paper have installed credible bid challenge mechanisms. Of those, approximately 60 countries confer standing under a wider set of circumstances than the United States to both bidders and potential bidders (and in some cases also to third parties).

The reasons for this wider standing is often stated or clearly implied: protests are considered to be an effective form of oversight. As it stands, the ability for private parties to air grievances is hindered in the United States and this hinderance has system-wide consequences.⁴⁰⁸ As noted, the substantial chance of award rule effectively limits standing on any given decision to only a few parties. These parties, for whatever reason, may not have much incentive to engage in a protest.⁴⁰⁹ Pre-*Acetris*, in order to confront pressing issues, judges are essentially forced to wait for the perfect plaintiff to raise the issue on protest.⁴¹⁰ This is not to suggest that all issues and violations should be protestable. Instead, this is to suggest that an enhanced prejudice

⁴⁰⁷ See *supra* text accompanying notes 15-17.

⁴⁰⁸ *Id.* Note that a primary reason for the Federal Circuit's decision in *Acetris* was that the central issue was recurring. Were the court to find that *Acetris* did not possess adequate standing, then this issue would have gone unaddressed.

⁴⁰⁹ Litigation is expensive and time consuming.

⁴¹⁰ See *supra* note 10.

requirement is a harmful restriction on the system because recurring issues have a lesser chance of getting resolved quickly.⁴¹¹

One particularly salient comparison to the United States is the UK.⁴¹² While the language behind the UK's standing includes a similar prejudice requirement to the United States, the UK has interpreted the requirement much less stringently.⁴¹³ Perhaps on this issue, the United States should once again turn to British precedent in order to relax the strict adherence to substantial chance of award.

ii. Revisiting *Acetris*

Upon reviewing how bid protest standing rights are conferred by other countries, the *Acetris* decision has the potential to redefine the parameters of the U.S. bid protest system. This survey of countries proves that the U.S. bid protest system does not exist in a vacuum and that the approach taken by the United States towards bid protest standing is an outlier. While the United States should not necessarily feel compelled to adopt the exact same standing requirements as found in any one particular country, the United States can and should strive to achieve the right balance between accountability and remedy, and between oversight and efficiency.

With that in mind, the United States (pre-*Acetris*) has not achieved the optimal balance between accountability, remedy, and efficiency. As noted in the decision, a primary reason for finding that *Acetris* had standing was the fact that the issue had been recurring.⁴¹⁴ Thus, *Acetris* showed that it had a reasonably likely chance of being adversely affected in future bid competitions.⁴¹⁵ This view on standing is much more in line with the “causes harm or likely

⁴¹¹ See *supra* notes 15-17.

⁴¹² See *supra* text accompanying note 357.

⁴¹³ *Id.*

⁴¹⁴ See *supra* notes 15-17.

⁴¹⁵ *Id.*

causes harm” prejudice requirement in place in countries like Canada, the UK, Germany, Australia and Japan, than it is with the “substantial chance of award” requirement traditionally enforced in the United States.

The Federal Circuit’s decision in *Acetris* signals a potential future for relaxing restrictions on standing, which could result in greater accountability and more thorough justice. Taken in the greater context of standing rights from around the world, *Acetris* should be viewed as a positive development. Changing to an interpretation more in line with the APA definition of interested parties and softening the interpretation of the “substantial chance of award” prejudice requirement would effectively place the United States on a similar plane with the UK (pre-Brexit), Canada and most of Europe. This would substantially broaden standing in the United States and would thus induce a greater amount of accountability and access to remedy for parties involved in government procurement.

Further, the broadest reading of *Acetris* might suggest that there is a future in which third party protestors may exist in the United States.⁴¹⁶ At the very least it is not inconceivable that judges in the Federal Circuit and the Court of Federal Claims might permit other aggrieved parties (like subcontractors, unions, etc.) to raise protest issues if the APA definition returns to the forefront.⁴¹⁷ This might not necessarily be a negative consequence; if a third party affected by a procurement decision can raise a viable issue, where the government violated its own regulations and laws, then arguably that third party should be able to utilize the bid protest

⁴¹⁶ See generally *Acetris Health*, 949 F.3d at 726. Admittedly, the Federal Circuit was focused on the potential future disadvantage that *Acetris* would suffer in competition, meaning that a reasonable reading of *Acetris* might accept a relaxation of the substantial chance of award requirement, but not an expansion of the classes of parties granted standing. As such, third parties may not be covered by *Acetris*, because third parties do not compete or intend to compete in award competitions. Yet *Acetris* also signals a willingness to step away from the existing approach to bid protest standing in the United States. As such, if the Federal Circuit is willing to consider previously non-accepted rationales as a justification for finding that a party is in fact an “interested party,” then it is within the realm of possibility that interested third parties will find standing.

⁴¹⁷ See supra notes 10-12 and accompanying text.

system. That way, the government becomes aware of an issue and is held accountable, and the affected party is able to receive some sort of remedy.

Notably, protests before GAO are still subject to the limited standing conferred by CICA absent amending legislation from Congress, which creates the very real possibility for the existence of differing standards for standing between the Court of Federal Claims and GAO. Ultimately, however, having separate standing thresholds between GAO and the Court of Federal Claims is acceptable if the trade-off is increased accountability. Ultimately, *Acetris* is a positive example of what wider standing permits - the court can address recurring problems and can give competitors more opportunities to raise issues.

Conclusion

The U.S. bid protest system has become an outlier in conferring standing rights, overtaken by the wave of countries who have modified their procurement challenge systems and enhanced access to standing rights in recent years. In light of the various challenge systems in place around the world, the recent decision of the Federal Circuit is an encouraging development, which potentially signals an increased amount of accountability and an increased role played by government contractors in United States government procurement in the future.

The United States' bid protest system should be read as to grant more parties standing, so as to provide greater oversight and enhanced accountability on government procurement. Taking their cues from Judge Dyk's decision in *Acetris*, the judges in the Court of Federal Claims should utilize the APA definition of interested parties over the CICA definition, thereby allowing aggrieved parties to bring protests to the Court of Federal Claims. Further, the Federal Circuit should remove the "substantial chance requirement."

Afghanistan	AF	Italy	IT	Venezuela	VE
Albania	AL	Jordan	JO	Vietnam	VN
Armenia	AM	Japan	JP	Yemen	YE
Angola	AO	Kenya	KE	South Africa	ZA
Argentina	AR	Kyrgyz Rep.	KG	Zimbabwe	ZW
Austria	AT	Cambodia	KH		
Australia	AU	South Korea	KR	Cuba	CU
Azerbaijan	AZ	Kuwait	KW	Iran	IR
Barbados	BB	Kazakhstan	KZ	North Korea	KP
Belgium	BE	Laos	LA	Libya	LY
Burkina Faso	BF	Liberia	LR	Syria	SY
Bahrain	BH	Lithuania	LT		
Bermuda	BM	Luxembourg	LU	United States	US
Bolivia	BO	Latvia	LV		
Brazil	BR	Macau	MO		
Bahamas	BS	Malta	MT		
Bhutan	BT	Malawi	MW		
Belarus	BY	Mexico	MX		
Canada	CA	Malaysia	MY		
Dem. Rep. Congo	CD	Nigeria	NG		
Rep. Congo	CG	Netherlands	NL		
Switzerland	CH	Norway	NO		
Cote d'Ivoire	CI	New Zealand	NZ		
Chile	CL	Panama	PA		
Cameroon	CM	Peru	PE		
China	CN	Philippines	PH		
Colombia	CO	Pakistan	PK		
Czech Rep.	CZ	Poland	PL		
Germany	DE	Portugal	PT		
Denmark	DK	Qatar	QA		
Dominica	DM	Serbia	RS		
Dominican Rep.	DO	Russia	RU		
Algeria	DZ	Saudi Arabia	SA		
Estonia	EE	Sweden	SE		
Finland	FI	Singapore	SG		
France	FR	Slovenia	SI		
United Kingdom	GB	Senegal	SN		
Georgia	GE	Somalia	SO		
Ghana	GH	South Sudan	SS		
Greece	GR	Thailand	TH		
Hong Kong	HK	Tunisia	TN		
Croatia	HR	Turkey	TR		
Indonesia	ID	Taiwan	TW		
Ireland	IE	Ukraine	UA		
India	IN	Uganda	UG		
Iceland	IS	Uruguay	UY		

