

International Comparative Legal Guides



Public Procurement 2020

A practical cross-border insight into public procurement

12th Edition

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Expert Chapters

- 1** EU Public Procurement Rules
Euan Burrows & Edward McNeill, Ashurst LLP
- 9** Procurement Rules and Trends in India
Prashant Mara & Devina Deshpande, BTG Legal

Q&A Chapters

- | | | | |
|------------|--|------------|--|
| 13 | Australia
Holding Redlich: Andrew Hynd & Olivia Fielding | 135 | Malaysia
Rahmat Lim & Partners: Kamilah Kasim |
| 20 | Austria
FSM Rechtsanwälte: Sebastian Feuchtmüller & Karlheinz Moick | 142 | Malta
Mamo TCV Advocates: Joseph Camilleri & Matthew Cutajar |
| 28 | Belgium
Stibbe: David D'Hooghe & Lieselotte Schellekens | 151 | Netherlands
AKD: Prof. Dr. Pieter Kuypers & Tom Binder |
| 35 | Brazil
Pinheiro Neto Advogados: Ricardo Pagliari Levy & Heloisa Figueiredo Ferraz | 159 | Nigeria
Olaniwun Ajayi LP: Ogunmuyiwa Balogun |
| 41 | Canada
Blake, Cassels & Graydon LLP: Clémentine Sallée & Marianne Smith | 166 | Norway
Advokatfirmaet Berntgaard AS: Mari Benkow & Inger Roll-Mathiesen |
| 48 | England & Wales
Ashurst LLP: Euan Burrows & Edward McNeill | 173 | Panama
ALFARO, FERRER & RAMIREZ: Annette Bárcenas Olivardía & Paulette Michineau T. |
| 60 | Finland
Borenius Attorneys Ltd: Ilkka Aalto-Setälä & Henrik Koivuniemi | 179 | Portugal
Morais Leitão, Galvão Teles, Soares da Silva & Associados: Margarida Olazabal Cabral & Ana Robin de Andrade |
| 68 | France
Bignon Lebray Avocats: Kévin Holterbach & Jean-Baptiste Dubrulle | 188 | Romania
VASS Lawyers: Iulia Vass & Bianca Bello |
| 77 | Germany
BLOMSTEIN: Dr. Pascal Friton & Rita Zuppke | 200 | Serbia
JCLegal: Jovan Crnogorčević |
| 85 | Greece
Michailopoulos & Associates Law Firm: Greg Michailopoulos & Marios Markatos | 207 | Singapore
Allen & Gledhill LLP: Kelvin Wong & Tan Wee Meng |
| 95 | Ireland
A&L Goodbody: Anna-Marie Curran & Jessica Egan | 215 | Slovenia
Law Firm Neffat: Njives Prelog Neffat |
| 104 | Italy
Legance – Avvocati Associati: Filippo Pacciani & Ada Esposito | 225 | Sweden
Mannheimer Swartling Advokatbyrå AB: Johan Carle & Sven Vaxenbäck |
| 119 | Japan
Anderson Mori & Tomotsune: Reiji Takahashi & Makoto Terazaki | 231 | USA
Fried, Frank, Harris, Shriver & Jacobson LLP: James J. McCullough & Michael J. Anstett |
| 127 | Luxembourg
Stibbe: Benjamin Marthoz | | |

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Prof. Dr. Pieter Kuypers



Tom Binder

1 Relevant Legislation

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

The Public Procurement Act 2012 (as amended on 1 July 2016; hereinafter PPA 2012) implements Directives 2014/23/EU, 2014/24/EU and 2014/25/EU.

The PPA 2012 is further detailed in the Public Procurement Decree, which in turn covers the Proportionality Guide 2016 (*Gids Proportionaliteit*), the Works Procurement Regulations 2016 (ARW 2016), and the European Single Procurement Document (ESPD).

The Defence and Security Procurement Act 2013 implements Directive 2009/81/EC.

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

The basic underlying principles of the regime consist of the general principles of public procurement law (equal treatment, non-discrimination, mutual recognition, proportionality, effective competition and transparency), as well as the general principles of Dutch civil law (e.g. the pre-contractual standards of reasonableness and fairness (“*redelijkheid en billijkheid*”) and the pre-contractual duty of good faith (“*goede trouw*”)).

1.3 Are there special rules in relation to procurement in specific sectors or areas?

Part 3 PPA 2012 provides for special rules in relation to procurement by special sector companies for their core business (e.g. potable water companies, energy companies, and public transport companies). In addition, the Utilities Procurement Regulations 2016 may be applicable.

The Defence and Security Procurement Act 2013 (implementing Directive 2009/81/EC) governs procurement in the area of defence and security.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The – written and unwritten – general principles of good governance (e.g. due care, equal treatment, fair play) are relevant

to public procurement, to the extent the contracting authority constitutes an administrative body within the meaning of the General Administrative Law Act. In this context, principles on the allocation of limited public rights may also be relevant. In addition to rules in the PPA 2012, there is a general obligation to provide access to documents.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

As stated under question 1.1, PPA 2012 implements the EU Directives. In addition, article 1.23 PPA 2012 provides that, to the extent the GPA so prescribes, a contracting authority shall not impose less favourable conditions on third-country undertakings than it does on EU undertakings. Since the EU and GPA thresholds are harmonised, the Dutch regime (on the one hand) and supra-national regimes (on the other hand) apply separately.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The PPA 2012 covers both contracting authorities and special sector companies (“*speciale-sectorbedrijf*”).

Article 1.1 PPA 2012 defines “contracting authority” as: the state; a province; a municipality; a water authority; or bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.

In accordance with article 2.8 PPA 2012, the rules applicable to a contracting authority also apply to entities awarding contracts for specific works and related services that are subsidised for at least 50% by a contracting authority.

Article 1.1 PPA 2012 defines “special sector company” as: (a) a contracting authority; (b) a public company; or (c) a company or institution having been granted a special or exclusive right by a contracting authority; to the extent such authority, company or institution is engaged in an activity as referred to in articles 3.1 to 3.6 PPA 2012, unless the activity concerned is excluded on the basis of article 3.21 PPA 2012.

The term “special sector company” relates to contracts that must be awarded in accordance with Directive 2014/25 (where the term “contracting entities” is used instead).

2.2 Which types of contracts are covered?

The PPA 2012 covers: public contracts for works, services and supply; concession contracts for works and services; special sector contracts for works, services and supply; framework agreements; and dynamic purchasing systems.

2.3 Are there financial thresholds for determining individual contract coverage?

As of 1 January 2020, in accordance with Commission Delegated Regulation 2019/1827 the threshold for determining individual concession contracts is as follows:

- Concession contracts for works/services: €5,350,000 (article 2.a.2 PPA 2012).

As of 1 January 2020, in accordance with Commission Delegated Regulation 2019/1828 the thresholds for determining individual public contract coverage are as follows:

- Public works contracts: €5,350,000 (article 2.1 PPA 2012).
- Public services/supply contracts with central government authorities: €139,000 (article 2.2(1) PPA 2012).
- Public services/supply contracts with non-central government authorities: €214,000 (article 2.3 PPA 2012).
- Public works contracts subsidised for at least 50%: €5,350,000 (article 2.8(1)(a) PPA 2012).
- Public services contracts subsidised for at least 50%: €214,000 (article 2.8(1)(b) PPA 2012).

As of 1 January 2020, in accordance with Commission Delegated Regulation 2019/1829 the thresholds for individual special sector contract coverage are as follows:

- Special sector contracts for works: €5,350,000 (article 3.8(a) PPA 2012).
- Special sector contracts for services/supply: €428,000 (article 3.8(b) PPA 2012).

In accordance with article 1.7(b) PPA 2012, even if the indicated financial thresholds are not met, a public contract, special sector contract or concession contract is still governed by the general principles provided for in Section 1.2.2 PPA 2012, where the contract at hand is of cross-border interest.

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

In accordance with article 1.5(1) PPA 2012, the contracting authority or special sector company shall not unnecessarily combine contracts (known as the cluster prohibition). Before combining contracts, the following factors will be considered:

- (a) the composition of the relevant market and the effect clustering has on the access SMEs will have to the contract;
- (b) the organisational effects and risks clustering has for the contracting authority, the special sector company, and the undertaking; and
- (c) the extent of cohesion between the contracts.

In accordance with article 1.5(2) PPA 2012, where contracts are combined, the contracting authority or special sector company must provide grounds in the procurement documents.

Following article 1.10a(1) PPA 2012, the contracting authority or special sector company shall not design a public contract, special sector contract or concession contract with the intent to evade the application of Parts 2, 2a or 3 PPA 2012.

In this regard, article 2.14(1) PPA 2012 holds that the contracting authority shall not divide a contract into multiple contracts with the intent to evade the application of the PPA 2012. Moreover, following article 2.14(2) PPA 2012, the method for calculating the estimated value of the contract must not serve such aim.

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

Part 2a PPA 2012 regulates concession contracts. Article 1.1 PPA 2012 defines “concession contract” as a concession contract for services or a concession contract for works.

A “concession contract for services” is defined as: a written agreement for pecuniary interest concluded between one or more services providers and one or more contracting authorities or special sector companies, relating to the provision of services other than those falling under public contracts for works, the compensation of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

A “concession contract for works” is defined as: a written agreement for pecuniary interests concluded between one or more contractors and one or more contracting authorities or special sector companies, relating to:

- (a) the execution of the design and the execution of works relating to one of the activities designated in Annex I to Directive 2014/23/EU; or
 - (b) a work or the realisation, with whatever means, of a work that meets the requirements of the contracting authority or special sector company having a decisive influence on the type or design of the work,
- the compensation of which consists either solely in the right to the work, or in that right together with payment.

2.6 Are there special rules for the conclusion of framework agreements?

Article 1.1 PPA 2012 defines “framework agreement” as a written agreement between one or more contracting authorities or special sector companies and one or more undertakings, for the purpose of establishing the conditions governing contracts to be awarded during a given period.

Part 2, paragraph 2.2.3.3 (articles 2.44 to 2.47) PPA 2012 provides for the general procedure to conclude a framework agreement.

Part 2, Section 2.4.1 (articles 2.139 to 2.143) PPA 2012 provides for special rules for awarding public contracts on the basis of a framework agreement.

Part 3, article 3.80 PPA 2012 provides for special rules for awarding special sector contracts by means of a framework agreement.

2.7 Are there special rules on the division of contracts into lots?

In principle, following article 1.5(3) PPA 2012, a contacting authority or special sector company divides the contract into multiple lots. However, where the contracting authority or special sector company considers the division of contract into lots inappropriate, motivation must be provided in the procurement documents.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Article 1.10b(1) PPA 2012 provides that the contracting authority or special sector company shall take appropriate measures to effectively prevent, acknowledge and solve fraud, favouritism, corruption and conflict of interests during the procurement procedure, in order to avoid distortion of competition, maintain transparency, and safeguard the equal treatment of all undertakings.

In accordance with article 1.12(1) PPA 2012, the contracting authority or special sector company shall treat undertakings equally and non-discriminately.

As stated under question 1.5, article 1.23 PPA 2012 provides that, to the extent the GPA so prescribes, a contracting authority or special sector company shall not impose less favourable conditions on third-country undertakings than it does on EU undertakings.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

Section 2.2.1 PPA 2012 provides for seven general award procedures:

1. Open procedure (paragraph 2.2.1.2), main stages:
 - a. Announcing the notice of the public contract.
 - b. Testing tenderers for exclusion grounds.
 - c. Testing non-excluded tenderers for suitability requirements.
 - d. Testing tenders for technical specifications, conditions and norms.
 - e. Assessing valid tenders on the basis of award criteria.
 - f. Drawing up an individual report.
 - g. Announcing the decision to award.
 - h. Concluding the public contract.
 - i. Announcing the awarded public contract.
2. Restricted procedure (paragraph 2.2.1.3), main stages:
 - a. Announcing the notice of the public contract.
 - b. Testing candidates for exclusion grounds.
 - c. Testing non-excluded candidates for suitability requirements.
 - d. Assessing non-excluded or non-rejected candidates on the basis of selection criteria.
 - e. Inviting selected candidates to submit a tender.
 - f. Testing tenders for technical specifications, conditions and norms.
 - g. Assessing valid tenders on the basis of award criteria.
 - h. Drawing up an individual report.
 - i. Announcing the decision to award.
 - j. Concluding the public contract.
 - k. Announcing the awarded public contract.
3. Competitive dialogue (paragraph 2.2.1.4), main stages:
 - a. Announcing the notice of the public contract.
 - b. Testing candidates for exclusion grounds.
 - c. Testing non-excluded candidates for suitability requirements.
 - d. Assessing non-excluded or non-rejected candidates on the basis of selection criteria.
 - e. Inviting selected candidates to participate in the dialogue.
 - f. Opening dialogue with selected candidates to identify and define the means best suited to satisfying the needs of the contracting authority, as well as defining solution(s).
 - g. Requesting participants to submit a tender.
 - h. Testing tenders for compliance with the solution(s) defined during the dialogue.
 - i. Assessing valid tenders on the basis of the award criteria and the most economically advantageous tender by means of the best price-quality ratio.
 - j. Drawing up an individual report.
 - k. Announcing the decision to award.
 - l. Concluding the public contract.
 - m. Announcing the awarded public contract.
4. Competitive procedure with negotiation (paragraph 2.2.1.5), main stages:
 - a. Announcing the notice of the public contract.
 - b. Testing candidates for exclusion grounds.
 - c. Testing non-excluded candidates for suitability requirements.
 - d. Assessing non-excluded or non-rejected candidates on the basis of selection criteria.
 - e. Inviting selected candidates to submit a first tender.
 - f. Negotiating first and subsequent tenders with tenderers to improve their contents, provided that the minimum requirements and the award criteria shall not be subject to negotiation.
 - g. Assessing definitive tenders on the basis of minimum requirements and award criteria.
 - h. Drawing up an individual report.
 - i. Announcing the decision to award.
 - j. Concluding the public contract.
 - k. Announcing the awarded public contract.
5. Innovation partnership (paragraph 2.2.1.6), main stages:
 - a. Announcing the notice of the public contract.
 - b. Testing candidates for exclusion grounds.
 - c. Testing non-excluded candidates for suitability requirements.
 - d. Assessing non-excluded or non-rejected candidates on the basis of selection criteria.
 - e. Inviting selected candidates to submit a first tender.
 - f. Negotiating first and subsequent tenders with tenderers to improve their contents, provided that the minimum requirements and the award criteria shall not be subject to negotiation.
 - g. Assessing definitive tenders on the basis of minimum requirements and the award criteria and the most economically advantageous tender by means of the best price-quality ratio.
 - h. Drawing up an individual report.
 - i. Announcing the decision to award.
 - j. Concluding the public contract.
 - k. Announcing the awarded public contract.
6. Negotiated procedure without prior publication (paragraph 2.2.1.7), main stages:
 - a. Negotiating with the economic operators concerned.
 - b. Drawing up an individual report.
 - c. Announcing the decision to award.
 - d. Concluding the public contract.
 - e. Announcing the awarded public contract.
7. Procedure for social and other specific services (paragraph 2.2.1.8), main stages:
 - a. Announcing the prior information notice or notice of the public contract.
 - b. Tests tenders for technical specifications, conditions and norms.
 - c. Drawing up an individual report.
 - d. Concluding the public contract.
 - e. Announcing the awarded public contract.

For every procedure, the relevant paragraph describes when the contracting authority can apply said procedure as well as the stages it entails. With the exception of the open and restricted procedures, the choice amongst the different award procedures is restricted, as follows from articles 2.28 (competitive dialogue), 2.30 (competitive procedure with negotiation), 2.31a (innovation partnership), 2.32–2.36 (negotiated procedure without prior publication) and 2.38 (social and other specific services) PPA 2012.

In addition to the general award procedures, Section 2.2.3 PPA 2012 provides for three special award procedures:

1. Design contest (paragraph 2.2.3.2)
 - a. Announcing the notice of the design contest.

- b. Testing participants for exclusion grounds.
 - c. Testing non-excluded participants for suitability requirements and selection requirements.
 - d. Composing a jury:
 - i. Jury examines plans and designs.
 - ii. Jury may invite participants to answer questions.
 - iii. Jury decides.
 - iv. Jury composes a report with the ranking of participants.
 - e. Announcing jury decision and results of the design contest.
2. Framework agreement (paragraph 2.2.3.3)
- a. Concluding the framework agreement with a single or multiple economic operator(s), by applying one of the seven general award procedures.
- In the event of a single economic operator*
- b. Awarding the contract within the limits of the terms laid down in the framework agreement.
- In the event of multiple economic operators*
- c. Applying the terms laid down in the framework agreement, without calling for competition.
 - d. If not all terms are laid down in the framework agreement:
 - i. Requesting the economic operators to submit tenders.
 - ii. Assessing the tenders on the basis of award criteria.
 - iii. Awarding the contract.
3. Dynamic purchasing system (paragraph 2.2.3.4)
- a. Announcing the dynamic purchasing system by notice of the public contract.
 - b. Testing candidates for exclusion grounds.
 - c. Testing non-excluded candidates for suitability requirements.
 - d. Admitting non-excluded and non-rejected candidates to the dynamic purchasing system.
 - e. Inviting admitted candidates to submit a tender.
 - f. Testing tenders for technical specifications, conditions and norms.
 - g. Assessing valid tenders on the basis of award criteria.
 - h. Drawing up an individual report.
 - i. Announcing the decision to award.
 - j. Concluding the public contract.
 - k. Announcing the awarded public contract.

Proportionality Guide 2016 (Instruction 3.4 A) holds that the contracting authority must examine which award procedure is suitable and proportional for each contract, while at the same time considering the following aspects: scope of the assignment; transaction costs for the contracting authority and the tenderers; number of potential tenderers; desired end result; complexity of the assignment; type of contract; and the nature of the market.

3.2 What are the minimum timescales?

For open procedures the minimum timescale for submitting tenders is 45 days following the date on which the notice was sent (article 2.71(1) PPA 2012).

For restricted procedures and competitive procedures with negotiation the minimum timescale for submitting requests to participate is 30 days following the date on which the notice was sent (article 2.71(2) PPA 2012). The minimum timescale for submitting tenders is 40 days following the day on which the invitation to submit tenders was sent (article 2.71(4) PPA 2012).

For competitive dialogues and innovation partnerships the minimum timescale for submitting requests to participate is 30 days following the date on which the notice was sent (article 2.71(3) PPA 2012).

The minimum timescales for submitting tenders can be reduced to 22 days if a prior information notice was announced (article 2.71(5) and (6) PPA 2012). Where the PPA 2012 so provides, the timescales can also be extended (articles 2.72 and 2.73 PPA 2012).

3.3 What are the rules on excluding/short-listing tenderers?

Paragraph 2.3.5.1 PPA 2012 regulates the exclusion grounds. Article 2.86 PPA 2012 provides for an exhaustive list of mandatory exclusion grounds (final conviction for particular offences listed in the EU Directives). Article 2.87 PPA 2012 provides for an exhaustive list of facultative exclusion grounds (such as past performance). Application of articles 2.86 and 2.87 PPA 2012 may be restricted on grounds of overriding reasons in the public interest or proportionality.

Tenderers may be short-listed by application of suitability criteria and selection criteria in accordance with Section 2.3.6 PPA 2012.

3.4 What are the rules on evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The contracting authority awards a public contract to the most economically advantageous tender (article 2.114(1) PPA 2012). The most economically advantageous tender is determined on the basis of the best price-quality ratio, lowest costs calculated on the basis of cost-effectiveness, or lowest price (article 2.114(2) PPA 2012). Where the contracting authority does not apply the best price-quality ratio, this must be motivated in the procurement documents (article 2.114(4) PPA 2012).

Where the best price-quality ratio is used, the contracting authority determines what further criteria are taken into account (article 2.115(1) PPA 2012). Article 2.115(2) PPA 2012 requires the criteria to be linked to the subject matter of the contract, and provides for a non-exhaustive list (such as: aesthetic and functional features; social, environmental and innovative features; as well as customer service).

3.5 What are the rules on the evaluation of abnormally low tenders?

When a tender appears abnormally low, the contracting authority requests an explanation of the price or costs of the tender (article 2.116(1) PPA 2012). Article 2.116(2) PPA 2012 provides for a non-exhaustive list of aspects that the requested explanation may consider. The contracting authority examines the evidence provided in consultation with the tenderer (article 2.116(3) PPA 2012). The contracting authority can only reject the tender if the low price or costs are not amply explained by the evidence provided (article 2.116(4) PPA 2012). It is widely accepted in Dutch case law that competitors cannot invoke successfully that the offer by a competitor is abnormally low.

3.6 What are the rules on awarding the contract?

In addition to the answer to question 3.4, award criteria must ensure the possibility of effective competition and are accompanied by specifications that allow the information provided by the tenderers to be effectively tested in order to assess to what extent the tenders meet the award criteria (article 2.113a PPA 2012).

3.7 What are the rules on debriefing unsuccessful bidders?

The contracting authority informs the concerned candidates or tenderers in writing of their rejection or exclusion as soon as possible (article 2.103(1) PPA 2012). Upon request, the contracting authority informs the candidate or tenderer of all reasons for rejection or exclusion as soon as possible, but no later than 15 days after receiving the request in writing (article 2.103(2) PPA 2012). Further rules are provided in article 2.130 *et seq.* PPA 2012.

3.8 What methods are available for joint procurements?

Paragraph 2.1.1.1a PPA 2012 provides for centralised purchases through central purchasing bodies (article 2.11 PPA 2012), the joint performance of a procurement procedure by two or more contracting authorities (article 2.11a PPA 2012), and the joint performance of a procurement procedure by two or more contracting authorities from different Member States (article 2.11b PPA 2012).

3.9 What are the rules on alternative/variant bids?

Paragraph 2.3.3.5 PPA 2012 governs variant bids. The contracting authority can allow and even demand the submission of variant bids (article 2.83(1) PPA 2012), which must be specified in the notice of the public contract (article 2.83(2) PPA 2012). The contracting authority must safeguard that the award criteria are applicable to both variant and regular bids (article 2.83(4) PPA 2012). The variants must be linked to the subject matter of the contract (article 2.83(5) PPA 2012).

3.10 What are the rules on conflicts of interest?

The contracting authority shall take appropriate measures to effectively prevent, acknowledge and solve conflict of interests during the procurement procedure (article 1.10b(1) PPA 2012). A conflict of interests may arise, for example, where an employee of the contracting authority, who is involved in the execution of the procurement procedure or may influence the outcome of this procedure, has, directly or indirectly, a financial, economic or other personal interest that may be considered to jeopardise the authority's impartiality or independence (article 1.10b(2) PPA 2012).

A conflict of interest that cannot be solved effectively by less restrictive means constitutes an optional exclusion ground (article 2.87(1)(e) PPA 2012).

Conflicts of interests and the appropriate measures taken must be included in the individual report (article 2.132(1)(m) PPA 2012).

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

If a candidate, a tenderer or a company associated with a candidate or tenderer has advised the contracting authority or was otherwise involved in the preparation of a procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer (article 2.51(1) PPA 2012). The contracting authority shall exclude a candidate or tenderer who

has been involved in the preparation of a procurement procedure from the procurement procedure only if there are no other means of ensuring compliance with the principle of equal treatment (article 2.51(3) PPA 2012).

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Section 2.1.3 PPA 2012 governs the principal exclusions, which include: public contracts or design contests related to defence and security (article 2.23 PPA 2012); public contracts for specific services (article 2.24 PPA 2012); "quasi-in-house" arrangements such as institutionalised cooperation (article 2.24a PPA 2012); institutionalised cooperation with jointly exercised control (article 2.24b PPA 2012); and non-institutionalised cooperation between contracting authorities (article 2.24c PPA 2012).

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

In accordance with the answer to question 4.1, the PPA 2012 does not apply to "in-house" and "quasi-in-house" arrangements.

Nothing in the EU Directives obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts (*cf.* recital 5 Directive 2014/24/EU). Accordingly, neither the EU Directives themselves nor the PPA 2012 explicitly provide for pure "in-house" arrangements. However, the PPA 2012 does regulate the "quasi-in-house" arrangements described above in accordance with the EU Directives.

5 Remedies

5.1 Does the legislation provide for remedies and if so what is the general outline of this?

The PPA 2012 implements Directive 2007/66/EC.

In the first place, articles 2.127 and 2.131 PPA 2012 provide for the possibility to lodge injunctive relief proceedings ("*kort geding*" ex article 254 Code of Civil Procedure) against the award decision during the standstill period of at least 20 calendar days.

In the second place, Section 4.3.1 PPA 2012 regulates the annulment of contracts before the civil courts.

A contract concluded as the result of an award decision can be annulled on the following grounds (article 4.15(1) PPA 2012):

1. The contract is concluded without prior notification in the Official Journal of the European Union.
2. The contract is concluded in disregard of the standstill period of 20 calendar days following the award decision.
3. The contract is awarded on the basis of a framework agreement or dynamic purchasing system, in disregard of the standstill period of 20 calendar days following the award decision and without a call for competition.

In the third place, where a contract is not annulled by application of article 4.18 PPA 2012, the court may nonetheless shorten the duration of that contract (article 4.19(1) PPA 2012).

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

Where the contracting authority constitutes an administrative

body within the meaning of the General Administrative Law Act, the complaint procedure provided for in that act may be utilised.

Moreover, concession contracts for services in the area of passenger transportation are regulated by the Passenger Transport Act 2000 (“*Wet personenvervoer 2000*”). In contrast with other procurement procedures, remedies against the award of these concession contracts must be sought before the Administrative High Court for Trade and Industry (CBb).

5.3 Before which body or bodies can remedies be sought?

Save for the exception discussed in the answer to question 5.2, remedies can be sought before the civil courts. Remedies can be sought through either injunctive relief proceedings or proceedings on the merits (“*bodemprocedure*”).

5.4 What are the limitation periods for applying for remedies?

In the first place, the limitation period for the remedy provided by articles 2.127 and 2.131 PPA 2012 coincides with the standstill period of (at least) 20 calendar days.

In the second place, article 4.15(2) PPA 2012 provides that the limitation period for bringing an action for annulment constitutes:

- (a) 30 calendar days starting on the day after:
 - the contract award notice was announced, provided that this announcement justifies the decision to award the contract without prior publication of a contract notice; or
 - the tenderers and candidates concerned were notified of the conclusion of the contract, provided that the notification is accompanied by the relevant reasons for the award decision; or
- (b) six months starting on the day after the conclusion of the contract, in cases other than those referred to under (a).

5.5 What measures can be taken to shorten limitation periods?

In the first place, as the limitation period for applying the remedy provided by articles 2.127 and 2.131 PPA 2012 coincides with the standstill period, this “limitation” period may be shortened in accordance with article 2.127(4) PPA 2012.

In the second place, the PPA 2012 does not provide for measures to shorten the limitation period for applying the remedy provided in article 4.15 PPA 2012.

5.6 What remedies are available after contract signature?

The remedies provided for in articles 4.15 and 4.19 PPA 2012 are available after contract signature.

In addition, a prohibition on further implementation or an order to terminate the contract may be sought in injunctive relief proceedings. Furthermore, a claim for damages may be lodged in proceedings on the merits. A contracting authority can be ordered to terminate an unlawful contract.

5.7 What is the likely timescale if an application for remedies is made?

This is highly dependent on the circumstances of the case, as well as the type of procedure. Injunctive relief proceedings may

be concluded in a matter of weeks, while proceedings on the merits may take months or even years.

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

It must be noted that annulment of contract is a remedy that is not easily obtained. However, in 2014, the Arnhem-Leeuwarden Court of Appeal awarded this very remedy in a leading case (8 April 2014, ECLI:NL:GHARL:2014:2878).

More recently, in Arnhem-Leeuwarden Court of Appeal 1 October 2019, ECLI:NL:GHARL:2014:2878, two contracts for the exploitation of advertisement carriers in railway stations had been concluded in breach of the PPA 2012 (and previously applicable legislation). Consequently, the contracting authority was prohibited from further implementing these contracts and ordered to pay damages to the claimant.

5.9 What mitigation measures, if any, are available to contracting authorities?

Articles 4.16 and 4.17 PPA 2012 provide for an exception to the grounds for annulment in the event of voluntary *ex ante* transparency.

Article 4.18 PPA 2012 provides that the annulment of a contract may be prevented on grounds of overriding reasons in the public interest.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Chapter 2.5 PPA 2012 regulates changes during the duration of a public contract. It provides for an exhaustive system of acceptable changes. Changes can be allowed: where the accompanying change in monetary value is limited (article 2.163b PPA 2012); where the change is based on a revision clause in the procurement documents (article 2.163c PPA 2012); for certain additional activities (article 2.163d PPA 2012); under unforeseen circumstances (article 2.163e PPA 2012); where the contractor is replaced (article 2.163f PPA 2012); and where it does not amount to a substantial change (article 2.163g PPA 2012).

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

Even if the award procedure does allow for negotiation following a tender (such as the competitive dialogue, the competitive procedure with negotiation, and the innovation partnership), the negotiation is strictly limited to the first and subsequent tenders. Negotiation following submission of a final tender is explicitly prohibited (see, for instance, articles 2.111(5), 2.126a(1) and 2.126c(1) PPA 2012).

6.3 To what extent are changes permitted post-contract signature?

See the answer to question 6.1: Chapter 2.5 PPA 2012 regulates

changes during the duration of a public contract. It provides for an exhaustive system of acceptable changes. Changes can be allowed: where the accompanying change in monetary value is limited (article 2.163b PPA 2012); where the change is based on a revision clause in the procurement documents (article 2.163c PPA 2012); for certain additional activities (article 2.163d PPA 2012); under unforeseen circumstance (article 2.163e PPA 2012); where the contractor is replaced (article 2.163f PPA 2012); and where it does not amount to a substantial change (article 2.163g PPA 2012).

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

See the answer to question 6.1: article 2.163f PPA 2012 provides for limited possibilities to replace the original contractor without having to start a new procurement procedure.

7 Privatisations and PPPs

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

The PPA 2012 does not provide for special rules in relation to privatisation, but does apply to public contracts that are awarded to the privatised entity during the course of the privatisation.

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

The PPA 2012 does not explicitly provide for rules in relation to PPPs. However, see the answer to questions 4.1 and 4.2: the “quasi-in-house” arrangements of institutionalised cooperation (article 2.24a PPA 2012) and institutionalised cooperation with jointly exercised control (article 2.24b PPA 2012) could be of relevance for a private-public partnership.

8 The Future

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

There are currently no proposals to change the PPA 2012.

8.2 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

Remedies in procurement procedures is a current topic in the Netherlands. On 12 June 2019, a research paper titled “Legal protection in the procurement practice” was published. Although the paper focused on improving remedies within the current framework and will most likely not result in regulatory developments, its importance for public procurement in the Netherlands should not be underestimated.



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