

# The International Comparative Legal Guide to: Public Procurement 2010

A practical insight to cross-border Public Procurement



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# Cyprus

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## 1 Relevant Legislation

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

Cyprus joined the European Union on 1st May 2004. As an EU Member State Cyprus has enacted legislation on public procurement law in order to comply with the public procurement European legislation.

The Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts, Public Service Contracts and for the Related Matters Law of 2006 (Law 12(I)/06) is the basic legislation governing the tender procedure regarding public contracts. This Law is based on the EU Directive 2004/18 as amended.

The Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts in the Water, Energy, Transport and Postal Services Sectors and for Related Matters Law of 2006 (Law 11(I)/2006) is based on the EU Directive 2004/17 as amended.

The Subsidiary Legislation, the General Regulations for the Award of Public Supply Contracts, Public Works Contracts and Public Service Contracts (KDP 2001/2007) regulate procedural matters and provide for the establishment and the operation of the appropriate public organs for handling the public tenders and set the rules for the requirements and the procedure of tender invitation, the submission of tenders, the evaluation of tenders and the award of tenders.

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

As noted above, the Cyprus legislation is based on the EU Public Procurement Directives.

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

The basic underlying principles of the regime are those underlying the European Union Public Procurement Directives. These principles are non-discrimination and equal treatment, transparency, exemption of tenders in cases of non-compliance with an essential tender term and together with the principles of administrative law, they are relevant to the interpretation of the legislation.

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

Subject to article 296 of the Treaty establishing the European Community, the Law applies to the public agreements in the military sector. Nevertheless, the Council of Ministers has the right, if considered appropriate, to exempt public agreements which it classifies as secret or the implementation thereof has to be accompanied by special security measures or when it is appropriate for the protection of essential interests of the Republic.

In accordance with the Directive, the Law provides for specific areas to be excluded from the Law appliance, e.g.:

- (a) Contracts awarded pursuant to international rules.
- (b) Specific exclusions in the field of telecommunications.
- (c) Specific service contracts such as: the acquisition or rental of land, existing buildings or other immovable property or concerning rights thereon (nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to the Law), the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time; arbitration and conciliation services; financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services; employment contracts; and research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority.
- (d) Public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.
- (e) The Council of Ministers reserves the right to exclusively allow sheltered workshops to participate in public tender procedures or to provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

## 2 Application of the Law to Entities and Contracts

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

The Law implements the European Union Public Procurement Directives and accordingly entity coverage is as required by those Directives. Law 12(I)/2006 and Law 11(I)/2006 apply to the state, the regional and local authorities, organisations governed by public law, unions and associations formed by one or more of such authorities or bodies.

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

As mentioned above, the Law implements the European Union Public Procurement Directives and accordingly entity coverage is as required by those Directives. In general, private entities are not covered by the Law. There are exemptions to this rule, the most important of which is the case of works concessionaires, following concession agreements.

### 2.3 Which types of contracts are covered?

The Law covers in general all works contracts, supply contracts and service contracts, which fall under the thresholds.

Public works contracts are contracts for general building and Civil Engineering Works. Public supply contracts are contracts for the purchase, hire and also the sitting and installation of the goods purchased/hired.

Service Contracts are contracts for services and are divided into two parts (e.g. maintenance and repairing services, financial services, information technology services etc.).

Concession contracts and design contest contracts are treated differently by the Law.

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

The Law applies only where the estimated value of the contract in question is above the relevant threshold value. The threshold values differ according to the type of the contract and in some cases according to the identity of the contracting authority.

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

There are particular rules concerning aggregation, which prevent the avoidance of law implementation by the use of a series of contracts which individually fall below the threshold values.

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

Concession contracts are treated differently and a specific chapter in Law 12(I)/2006 regulates the procedure. This chapter imposes amongst others the obligation to the private sector (concessionaire) to follow public procurement principles. A service concession contract is according to the Law, a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

## 3 Procedures

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

The Law provides for four different types of procedures: the open procedure; the restricted procedure; the negotiated procedure; and the competitive dialogue procedure.

- The open procedure is the procedure whereby any interested economic operator may submit a tender.
- The restricted procedure is the procedure whereby any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender.
- Negotiated procedure means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with or more of these.
- Competitive dialogue is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

There is not a free choice amongst the procedures.

- (1) The contracting authorities only for particularly complicated contracts and if according to their judgment the use of the open or the restricted procedure does not allow the award of the contract may use the competitive dialogue procedure. A particularly complex contract exists, where the contracting authorities are not objectively able to define the technical means, capable of satisfying their needs or objectives, and/or are not objectively able to specify the legal and or financial make-up of a project.
- (2) Contracting authorities may award the public contracts by negotiated procedure, after publication of a contract notice, in the following cases:
  - (a) In the event of irregular tenders or the submission of tenders which are unacceptable, in response to an open or restricted procedure or a competitive dialogue insofar as the original terms of the contract are not substantially altered.
  - (b) In exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing.
  - (c) In the case of services, and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures.
  - (d) In respect of public works contracts, for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.
- (3) Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:
  - For public works contracts, public supply contracts and public service contracts:
    - (a) when no tenders or no suitable tenders or no applications have been submitted in response to an open procedure or a restricted procedure, provided

that the initial conditions of contract are not substantially altered and on condition that a report is sent to the Commission if it so requests;

- (b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator; and
  - (c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.
- For public supply contracts:
    - (a) when the products involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;
    - (b) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years;
    - (c) for supplies quoted and purchased on a commodity market; and
    - (d) for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations.
  - For public service contracts, when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates, in the latter case, all successful candidates must be invited to participate in the negotiations.
  - For public works contracts and public service contracts:
    - (a) for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on the condition that the award is made to the economic operator performing such works or services:
      - when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities; or
      - when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.
- However, the aggregate value of contracts awarded for additional works or services may not exceed 50% of the amount of the original contract; and
- (b) for new works or services consisting in the repetition of similar works or services entrusted to the economic

operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure.

As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities.

This procedure may be used only during the three years following the conclusion of the original contract.

### 3.2 What are the rules on specifications?

Technical specifications identify the characteristics of the work, service or supply which are required under the contract.

The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements, and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case. Contracting authorities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label providing the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and providing the label is accessible and available to all interested parties. Contracting authorities should, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover.

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

There are specific rules concerning the situations in which contracting authorities may or shall exclude an economic operator for the contract in question. The mandatory exclusion includes cases where the economic operator has been convicted by final judgment to the knowledge of the contracting authority of the following offences: participation in a criminal organisation; bribery; fraud to the detriment of the financial interest of the European Union; or money laundering.

Any economic operator may be excluded from participation in a contract where that economic operator:

- (a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;
- (b) is the subject of proceedings for a declaration of bankruptcy,

for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

- (c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;
- (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;
- (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the Republic;
- (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the Republic; or
- (g) is guilty of serious misrepresentation in supplying the information required under a specific section of the Law or has not supplied such information.

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

The identification of providers from which the winner will be selected is made on the basis of the provider's economic and financial standing and technical professional ability, according to the tender documents.

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

Contracts must be awarded on grounds which are specified in the tender documents and contract note. Contracting authorities are free to choose between awarding the contract on the basis of the "most economically advantageous" offer or on the basis of the "lowest price" offer. Contracting authorities are obliged to clearly specify from the beginning of the procedure the award criteria.

When the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject of the public contract in question are considered. These criteria include for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

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

Although the Law allows joint procurements, there has not been to our knowledge any case where joint procurement has been undertaken.

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

Where the criterion for the award is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit alternative bids. Contracting authorities authorising alternative bids shall indicate so in the contract notice. In the absence of such indication, alternative bids are not allowed.

In any case, only alternative bids meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration.

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

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

As mentioned above, the Law implements the European Union Public Procurement directives and accordingly the exclusions/exemptions are as required by those directives. It is allowed to exempt certain utility activities from the legislation if the activity is directly exposed to competition on markets to which access is not restricted. The Commission determines the application of the exemption following an inquiry by the local public procurement office.

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

The law applies to "in house" arrangements when an organisation governed by public law participates in a public procurement procedure, e.g. the University of Cyprus participates in public tenders of the State in relation to consultancy services.

## 5 Remedies and Enforcement

### 5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

A Tender Review Authority (TRA) has been established and is empowered by Law to review decisions of the contracting authorities.

Every person who has interest in being awarded the contract and has sustained loss as a result of a decision of the contracting authority which violates any provision of the legislation and precedes the signature of the contract, has the right to file a hierarchical recourse to the TRA. Prior to filing a hierarchical recourse the person must, within a deadline of five days from the time of becoming aware of such decision, give notice in writing to the contracting authority.

To file a hierarchical recourse to the TRA, the applicant must pay a non-refundable fee which is deposited into the General Government Account. The hierarchical recourse must be filed within ten days from the date he became aware of the contracting authority's reasoned decision (if issued) or from the expiration of the previously mentioned period of five days.

The TRA has full power to review the contracting authority's decision and to annul or confirm it.

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

If the third party does not wish to file a hierarchical recourse, he can file a recourse before the Supreme Court. The Supreme Court in Cyprus has, amongst others, exclusive jurisdiction for the review of all administrative matters. In practice, since 2004, when the TRA was established, the majority of public procurement cases are brought before the TRA and not before the Supreme Court.

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

Remedies/enforcements can be sought from the TRA and the Supreme Court.

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

As noted above, the hierarchical recourse has to be filed within a specific time limit, which is strict. If the third party wishes, within the same time limit he can file together with the hierarchical recourse, an application for stay of the proceedings, until the delivery of the decision by the TRA.

### 5.5 What remedies are available after contract signature?

According to a specific provision in the Law, damages are the remedy available after contract signature.

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

According to the Law, the hierarchical recourse has to be examined within 30 days. Although the TRA does not deliver always their decision within this period, decisions are delivered very quickly.

Court procedures are significantly slower and if the third party chooses to bring the case before the Supreme Court, he should expect a judgment after a period of twelve to sixteen months.

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

Theoretically, every public body complies with the main principles of public procurement law or attempts to comply. In practice, there are many cases of violation of public procurement law brought before the TRA.

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

The most important and leading cases were the cases in relation to the Airports and Marinas BOT projects. Other leading cases are cases which have been based on previous cases of the Supreme Court and according to which non-compliance with an essential tender term results in the exclusion of the tenderer from the tender procedure (e.g. the Miltiades Neofytou case based on the Tamassos case).

This year the Supreme Court delivered a very important, leading decision in the appeal 6/2009 of 17/7/2009 filed by our Firm on behalf of an economic operator in relation to the Paphos Marina BOT project. The project was awarded to a third party. We filed on behalf of the economic operator successfully a hierarchical recourse before the TRA. The third party brought the case before the Supreme Court and obtained an interim order for the stay of the proceedings. The Supreme Court in the first instance granted the interim order after having taken into consideration the consent of the contracting authority, which was a party to the proceedings. We filed an appeal, claiming amongst others that the consent of the contracting authority was wrongfully taken into consideration by the first instance Court, since the contracting authority should not

have been a party in the proceedings. The Supreme Court accepted our allegations and annulled the interim injunction, deciding that the decision of the contracting authority is deemed to be absorbed by the final decision of the TRA on the same subject.

## 6 Changes During a Procedure and After a Procedure

### 6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

It is a well-established principle in Cyprus law, that anything, which occurs after the contract signature, is governed by common contract law. It is assumed that due to this principle, public procurement law does not provide for issues rising after the contract signature.

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

Purchasers and providers deal with these issues in a variety of ways. If both parties agree, there can be a variation from the contract, which at least in theory should not result in the introduction of a change which should be treated by means of a new procurement procedure. It is also common, that contract disputes lead to claims before the District Courts.

## 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 Law does not contain any rules in relation to privatisations. Privatisation is primarily a policy decision and both the present and the former Government were not in favour of privatisation.

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

There are no special rules in relation to PPPs.

## 8 Other Relevant Rules of Law

### 8.1 Are there any related bodies of law of relevance to procurement by public and other bodies, such as freedom of information or general contract law?

The most important body of legislation governing procurement procedures in Cyprus is the Law and Regulations mentioned in question 1.1 above. Another important body of law is the Law 158(I)/99, which sets out the basic principles of public administrative law. Finally yet importantly, is of course the Constitution of the Republic and the European Convention of Human Rights, the violation of the articles thereof, always results in annulment of the award decision in question.

General contract Law applies only after the completion of the public procedure, resulting in the contract signature.

## 9 The Future

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

There is currently a proposal in relation to the enactment of new legislation in relation to remedies and the functioning of the TRA in order to comply with the Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.



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## tassos papadopoulos & associates

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Tassos Papadopoulos & Associates LLC was established by the majority of partners and associates of the former Tassos Papadopoulos & Co (one of the oldest and largest law firms in Cyprus, founded by the former President of Cyprus Tassos Papadopoulos), which was dissolved in June 2007 by mutual agreement between its partners.

The firm's objective and commitment is to provide high quality, speedy response and cost-effective legal services and to meet the demands of the modern specialised legal practice with special emphasis on confidentiality.

The focus of the firm's work is in civil litigation and arbitration, banking and finance, corporate law, acquisitions, public procurement, mergers and joint ventures, the financing of major capital projects, IPOs and public listings, trade marks and patents, shipping including litigation on shipping law, aviation, taxation, company formation and administration.