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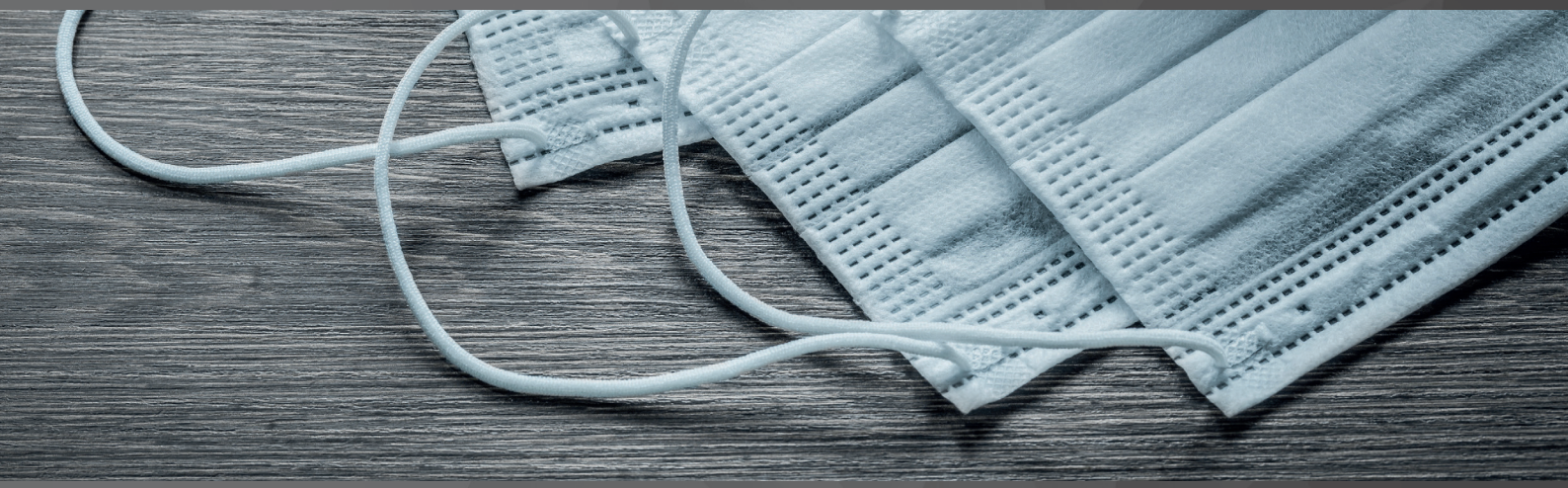

Public Procurement 2021

A practical cross-border insight into public procurement

13th Edition

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1 Relevant Legislation

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

Belgian legislation on public procurement has been codified in the Act of 17 June 2016 concerning public procurement, which entered into force on 30 June 2017. This Act contains the core of both the coordination and the codification of all existing public procurement regulations and of the transposition into Belgian law of the 2014 European Procurement Directives.

The most important Royal Decrees implementing the Act of 17 June 2016 are:

- The Royal Decree of 18 April 2017 on the award of public procurement contracts in the ordinary sectors.
- The Royal Decree of 18 June 2017 on the award of public procurement contracts in the "special sectors" (i.e. in the water, energy, transport and postal services sectors).
- The Royal Decree of 14 January 2013 determining the general rules of execution of public procurement contracts.

This regulatory framework governing public procurement is complemented by the Act of 17 June 2013 concerning the motives, the information and the legal remedies with regard to public procurement contracts and certain contracts for works, supplies and services, and concessions.

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 principles of general Belgian constitutional and administrative law apply. The constitutional principles of government transparency, equality, and non-discrimination (articles 10 and 11 of the Belgian Constitution) are the most relevant to public procurement, as well as the Act of 29 July 1991 on the formal notification of the reasons for administrative acts, which requires all administrative authorities to give factual and legal reasons for individual decisions.

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

Specific rules exist concerning the award of public procurement contracts in the "special sectors" (i.e. in the water, energy, transport and postal services sectors).

With regard to procurement rules tailor-made for defence and security markets, Directive 2009/81/EC on defence and security procurement has been implemented by the Act of 13 August 2011 on public contracts and certain contracts for works, supplies and services in the field of defence and security.

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

Please see question 1.2.

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

The Act of 17 June 2016 transposes the 2014 Directives on public procurement, which are in turn influenced by the GPA rules.

2 Application of the Law to Entities and Contracts

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

Article 2 of the Act of 17 June 2016 enumerates contracting authorities covered by the public procurement rules in the ordinary sectors. These contracting authorities are principally the "public authorities" (e.g. the State and municipalities), and the entities fulfilling the following criteria:

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

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

2.2 Which types of contracts are covered?

The public procurement rules cover contracts for pecuniary interest concluded in writing between a contractor, supplier or service provider and a public purchaser for the undertaking of works, supplies and/or services. Public works contracts cover the execution of general building and civil engineering works in conformity with the requirements specified by the public purchaser. The design of the works may also be included in the contract. Public supply contracts relate to the delivery of products. Delivery in this context includes purchase, lease, rental or hire purchase, with or without an option to buy. Public service contracts cover all the services mentioned in annex III of the Act of 17 June 2016.

2.3 Are there financial thresholds for determining individual contract coverage?

All contracts are subject to Belgian procurement legislation. As a principle, the (Belgian) publication of the announcement of the contract is required, even when the European threshold values are not met, unless the negotiated procedure without publication can be used. European publication is obligatory if the thresholds laid down by the European Commission are exceeded.

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

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

Furthermore, it is forbidden to subdivide a contract into different contracts in order to avoid the application of the European threshold values.

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

Concession contracts are contracts for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the management of services or the execution of works to one or more economic operators, the consideration for which consists either solely in the right to exploit the services or works that are the subject of the contract or in that right together with payment. The Act of 17 June 2016 on concession agreements provides further regulation for this type of contract.

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

Article 43 of the Act of 17 June 2016 provides the possibility to conclude framework agreements in the ordinary sectors. In conformity with the European Directives, more flexibility with regard to the award of framework agreements exists in the special sectors.

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

Article 58 of the Act of 17 June 2016 provides that a contract can be divided into lots. In the ordinary sectors, for contracts with a value of 139,000 euros or more, a contracting authority must provide a reason if it decides that it would not be appropriate to divide the contract into lots. Contracting authorities have the right not to award all of these lots and, if necessary, to decide that some lots will be part of one or more new contracts, which might be awarded in a different manner.

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

In general, contracting authorities must treat suppliers (in addition to contractors and service providers) in an equal, non-discriminatory and transparent way. The principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency apply especially to economic operators that are settled in the European Union.

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.

Belgian public procurement legislation previously made a distinction between the procedures of *aanbesteding/adjudication* (award to lowest regular tender) and *offerteaanvraag/appel d'offres* (award to the regular and most advantageous tender, according to the criteria mentioned in the contracting documents). Although a tender may still be awarded on the basis of price or costs alone, this terminological distinction was abandoned in the Act of 17 June 2016.

The following three types of procurement procedure are the most common:

- an open procedure, in which all interested contractors may submit tenders;
- a restricted procedure, in which only those contractors that are invited by the contracting authority may submit tenders; and
- a competitive procedure with negotiation, which allows the contracting authority to consult the economic operators of its choice and to negotiate the terms of the contract with one or more of them. In the ordinary sectors, this procedure can only be chosen in limited cases, listed in the Act of 17 June 2016.

Other types of procurement procedure, such as competitive dialogue, innovation partnership and the negotiated procedure without prior publication, also exist under Belgian law. These procedures can only be used on the basis of the conditions provided by law.

3.2 What are the minimum timescales?

The main principles can be summarised as follows:

- Tenderers have, in principle, at least 35 days to submit a tender for open procedures. For restricted procedures, there is a timescale of 30 days to submit a request to participate and 30 days to submit a tender.
- In certain cases, such as urgency, special rules on minimum timescales apply. In these cases, the time limit is reduced.

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

In accordance with the requirements of the European public procurement rules, the Royal Decree of 18 April 2017 contains

rules concerning the situations in which a contracting authority has the obligation to exclude candidates that have been convicted of offences such as participation in a criminal organisation or corruption. This Royal Decree also deals with situations in which a contracting authority has the possibility (not the obligation) to exclude candidates; for example, in cases of non-compliance with the obligations concerning the payment of social security contributions.

Concerning the short-listing of tenderers, it should be noted that the selection of the tenderers must be based exclusively on the selection criteria contained in the tender notice and on the basis of documents enumerated in the tender notice as being required for the selection. The selection criteria may refer to technical and/or professional ability and economic and financial standing.

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 must award the contract to the most economically advantageous tender. This tender may be awarded on the basis of price or costs alone. It is also possible to award the contract on the basis of both economic and quality criteria, which may include environmental or social value considerations if these have a sufficient link with the subject of the tender.

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

In principle, there is an obligation on contracting authorities to demand justification for abnormally low tenders (either the total price or unit prices). An exception applies if the value of any abnormal unit price(s) is negligible.

A contracting authority has a certain amount of discretion to decide whether a price is "abnormal", unless a specific threshold needs to be respected. This is the case for tenders in the so-called "fraud-sensitive sectors", such as construction works and cleaning services. In these award procedures, there may be an obligation to demand justification for abnormally low tenders if the total price is at least 15 per cent below the average total price submitted by the tenderers.

3.6 What are the rules on awarding the contract?

The criteria for the award of the contract should enable tenders to be compared and assessed objectively, and must be mentioned in the contract documents or in the tender notice.

The contracting authority must make a decision mentioning the reasons when selecting tenderers (especially in cases where the procedure consists of two phases; the first phase is the submission of applications for participation in the procedure) or when deciding on the award of the contract.

3.7 What are the rules on debriefing unsuccessful bidders?

Immediately after the award decision, the contracting authority notifies:

- every non-selected tenderer of the reasons for the non-selection, by distributing the relevant part of a copy of the decision mentioning the reasons;
- every tenderer with an irregular or unacceptable tender of the reasons for the exclusion of his offer, by distributing a copy of the relevant part of the reasoned decision; and
- every tenderer with an offer that, after assessment, does not constitute the most economically advantageous tender, by distributing a copy of the decision mentioning the reasons.

The notification must mention the time limit of the applicable standstill period and the recommendation to inform the contracting authority if the tenderer would choose to initiate a suspending procedure.

3.8 What methods are available for joint procurements?

In the event that two (or more) contracting authorities wish to set up the joint realisation of public works contracts, public supply contracts, or public service contracts, article 48 of the Act of 17 June 2016 provides the possibility of a joint procurement. The contracting authorities may designate one of the contracting authorities to act as their authorised representative during the award and execution of the contract.

Belgian public procurement rules also provide the possibility to make purchases using a central purchasing body, or on the basis of a framework agreement.

3.9 What are the rules on alternative/variant bids?

In principle, an economic operator must submit its best and final offer immediately.

If the specifications allow or require the formulation of variants, economic operators are permitted or obliged to state variants in their tender. The contracting authority must then make a detailed description in the specifications of what is required in order to lead to the desired result.

If the specifications do not mention the use of variant bids, stating that the contract will be awarded to the most advantageous tender, a tenderer may propose a variant bid on its own initiative, which contains alternative solutions for one or more aspects of the specifications.

Article 48 of the Royal Decree of 18 April 2017 also provides the possibility for "options" to be described in the specifications. An "option" can be defined as an accessory element that is not strictly necessary to perform the contract, and which is submitted either spontaneously or at the request of the contracting authority.

Variant bids and options can only be accepted if these have been allowed by the tender documents and meet the minimum specifications required by the contracting authority (except when the European threshold value is not met, in which case tenders can propose variant bids or options freely in their offer).

3.10 What are the rules on conflicts of interest?

Article 6, §1 of the Act of 17 June 2016 states that conflict of interest exists if a civil servant, public authority figure or any other person intervenes in the award and the performance of a public contract, in the situation where the person involved has direct or indirect financial, economic or other personal interests that may be considered to compromise their impartiality and independence with regard to the award or execution of a public contract.

This conflict of interest is presumed to exist in cases such as when the person referred to in article 6, §1 is (directly or through an intermediary) an owner, co-owner or partner in one of the candidate or tendering companies, or (directly or through an intermediary) exercises executive or management authority in one of these companies (article 6, §3 of the Act of 17 June 2016).

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

The contracting authority may hold market consultations before the start of an award procedure in order to prepare the tender procedure, and to inform companies of its plans and requirements. For this purpose, the contracting authority may, for example, obtain or receive advice from independent experts, private or public institutions or from market participants. The prior market consultations may be used in the planning and conduct of the award procedure, provided that this does not lead to a distortion of competition and does not give rise to a breach of the principles of non-discrimination and transparency (article 51 of the Act of 17 June 2016).

When a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting authority, whether in the context of article 51 or not, or has otherwise been involved in the preparation of the 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 52 of the Act of 17 June 2016).

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

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

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

In principle, the relationship between contracting authorities concerning the awarding of public contracts is subject to the same public procurement rules as the relationship between a contracting authority and a private entity.

There are, however, three general exceptions to this principle:

- The first exception concerns the award of contracts between two contracting authorities (in-house contracts), on the basis of the conditions stipulated in article 30 of the Act of 17 June 2016 and the case law of the Court of Justice.
- The second exception concerns certain types of situations in which contracting authorities together seek to ensure the performance of their public tasks, according to the conditions stipulated in article 31 of the Act of 17 June 2016 and the case law of the Court of Justice.
- The third exception concerns delegation of powers, in cases where there is a full devolution of tasks, responsibility and power of decision from one contracting authority to another, and the contracting authority becomes a substitute, exercising all the competences of the initial contracting authority.

If one of these exceptions applies, the award of the contract will not be subject to the public procurement rules.

5 Remedies

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

The Act of 17 June 2013 concerning the motives, the information and the legal remedies with regard to public procurement contracts and certain contracts for works, supplies and services and concessions, aims to ensure compliance of the Belgian legislation with the review procedures provided by Directive 2007/66. The rules of the Act of 17 June 2013 are applicable to procedures above the threshold for European publication, and are only partially applicable to some procedures under the European threshold values. In accordance with the Directive, the Act provides for various forms of (judicial) protection, and it clarifies the specific review body and the time limits in which these procedures must be introduced.

The Act contains a standstill obligation on the basis of which, within a time frame of 15 days between the notification of the award decision and the contract conclusion with the chosen tenderer, a suspending procedure of extreme urgency before the Council of State or a summary procedure before the civil courts can be introduced.

Other measures can also be requested, ranging from the suspension and annulment of decisions taken by the contracting authority, to damage claims or alternative sanctions. Normally, the suspension or annulment of the contract itself cannot be obtained, except in the cases which are exhaustively enumerated in the Act of 17 June 2013.

The possibility to obtain the ineffectiveness of the contract is also provided for in some cases.

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

The Act of 17 June 2013 also includes rules on remedies regarding concession contracts.

For other contracts, due to a lack of specific proceedings, general Belgian (procedural) law can be utilised to its full extent in order to acquire some form of restitution or compensation. Various measures can be requested, ranging from the suspension or annulment of the different decisions taken by the contracting authority, to the suspension or annulment of the contract and damage claims. These measures can often be combined, even if all of them cannot necessarily be brought before the same judge.

5.3 Before which body or bodies can remedies be sought?

Suspension or annulment procedures against a decision of a contracting authority are brought before the Council of State, unless the contracting authority is not an administrative authority within the meaning of the coordinated laws on the Council of State of 12 January 1973. In this case, the suspension or annulment actions are brought before the civil courts.

The civil courts are competent to examine claims for damages regarding the award of public procurement contracts, and in all disputes concerning the execution of these contracts.

However, civil courts are not exclusively competent to examine a claim for damages after a suspension or annulment by the Council

of State. If certain conditions are complied with, damages can be claimed before the Council of State by applicants or intervening parties after a judgment of the Council of State in which an illegality has been determined (article 11*bis* of the coordinated laws on the Council of State of 12 January 1973).

5.4 What are the limitation periods for applying for remedies?

If a decision falls under the scope of the Act of 17 June 2013, the suspending proceedings must be initiated, in principle, within a time frame of 15 days after the notification of the challenged decision. The annulment proceedings before the Council of State must be launched within a time frame of 60 days after the notification of the decision.

An action to obtain the ineffectiveness of the contract must, in principle, be initiated within 30 days after the day following the date on which the contracting authority has informed the tenderers and candidates concerned of the conclusion of the contract and, in any case, within six months after the day following the date of the conclusion of the contract.

An action for alternative sanctions must be launched within a time frame of six months.

In principle, damage claims before the civil courts must be initiated within a time frame of five years.

Damage claims before the Council of State on the basis of article 11*bis* in the coordinated laws on the Council of State of 12 January 1973 must be initiated within 60 days after the notification of the judgment of the Council of State in which the illegality has been determined.

5.5 What measures can be taken to shorten limitation periods?

Article 12 of the Act of 17 June 2013 enumerates a restricted number of cases in which no standstill period must be observed. This Act does not provide any other measures to shorten the limitation periods described in question 5.4.

5.6 What remedies are available after contract signature?

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

Third parties can nonetheless still try to obtain the annulment of the award decision before the Council of State, and/or the suspension/annulment of the contract before the civil courts. However, the suspension/annulment of the contract is only allowed in limited cases for contracts which fall under the scope of the Act of 17 June 2013 (see question 5.1).

Furthermore, damage claims can be introduced before the civil courts or before the Council of State (e.g. after an annulment of an award decision by the Council of State).

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

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

Judicial proceedings may take a few weeks (e.g. suspending proceedings of extreme urgency before the Council of State or summary proceedings before the civil courts and tribunals), or one to two years (e.g. annulment proceedings before the Council of State or damage claim before civil courts).

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

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

Nonetheless, the jurisprudence of the Council of State in particular (judgments of the civil courts and tribunals are only rarely published) is deemed a relevant source of law with respect to the enforcement of public procurement legislation.

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

No specific legislation exists in this regard.

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?

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

Before the award of the contract, Belgian legislation does not deal with changes to contract conditions. However, European and Belgian case law admit the possibility of modifications under certain conditions determined by that particular case law.

After the award of the contract, Belgian legislation provides that changes are possible in certain cases, such as the application of previously agreed-upon contract review clauses.

Very detailed rules are provided in articles 37 to 38/6 of the Royal Decree of 14 January 2013 determining the general rules of execution of public procurement contracts.

The general rules of execution also stipulate the conditions that allow contractors to apply for an extension of the time limit, or a review or revocation of the contract.

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

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

Belgian legislation does not deal specifically with this situation. However, the following principles seem to apply. After the submission of a "Best and Final Offer" (BAFO), the contracting authority may allow or request certain changes to the tender; for example, to clarify understandings reached during negotiations or to rectify a material error. However, there can be no violation of the equal treatment of the tenderers, and these changes cannot have an impact on the overall ranking of the final tenders. Furthermore, the general balance between the rights and obligations of the parties, as determined by the specifications and the BAFO, should not be altered.

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

Apart from the situations mentioned under question 6.1, a new contractor may replace the initial one as a consequence of succession, following corporate restructuring (article 38/3, 2° of the Royal Decree of 14 January 2013).

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

No specific legislation exists in this regard. Please see question 6.3.

7 Privatisations and PPPs

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

Belgian legislation does not contain specific rules regarding privatisations. If a privatisation results in the procurement of goods, works and/or services, it is, in principle, subject to the public procurement rules in the same way as any other contract.

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

There are some laws which aim to facilitate the use of public-private partnerships (PPPs), e.g. by authorising public authorities to participate in joint ventures. These laws often concern a particular matter (e.g. social housing) and may provide for subsidies.

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?

The regulatory framework implementing the 2014 European Directives (Act of 17 June 2016 and Royal Decrees – see question 1.1) entered into force on 30 June 2017. No major changes to this regulatory framework are expected in the near future.

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?

Please see question 8.1 above.

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