

The International Comparative Legal Guide to:

Public Procurement 2009

A practical insight to cross-border Public Procurement



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1 Relevant Legislation

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

As a Member State of the European Union (the “EU”), Malta is bound to ensure compliance with the provisions of the Treaty establishing the European Community (the “EC Treaty”) and secondary legislation promulgated by the European institutions. The legislative package in the field of public procurement (in particular, Directive 2004/17/EC and Directive 2004/18/EC; hereinafter together referred to as the “Public Procurement Directives”) was transposed in the Public Contracts Regulations (Legal Notice 177 of 2005, as amended) (the “Public Contracts Regulations”) and the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations (Legal Notice 178 of 2005, as amended) (the “Public Procurement Regulations”), hereinafter together referred to as the “Regulations”, issued under the Financial Administration and Audit Act (Chapter 174 of the Laws of Malta).

The Regulations prescribe the rules governing the procurement of works, supplies and services by contracting authorities and entities, the functions and powers of the Director of the Department of Contracts, the Contracts Committees and the Procurement Committees, and establish and regulate the Public Contracts Appeals Board.

Where reference is made to the Public Procurement Directives in this Chapter, kindly refer to the General Chapter on EC Public Procurement Rules for further guidance.

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

As indicated above, the Regulations aim to implement the Public Procurement Directives. Malta’s accession to the EU in 2004 entailed that Malta became a contracting party to the international agreements concluded in conformity with the EC Treaty between Member States and one or more non-Member countries (for example, the Agreement on the European Economic Area, in terms of which the European Community’s public procurement regime extends to the EEA - EFTA States).

Malta forms part of the European Community, which is a party to the Government Procurement Agreement (“GPA”). The provisions in relation to the GPA set out in the Public Procurement Directives were transposed into the Regulations.

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 general principles underlying Malta’s public procurement regime derive from the EC Treaty and the case law developed by the European Court of Justice and the Court of First Instance. These general principles include the free movement of goods, the freedom to provide services, the freedom of establishment, equal treatment, non-discrimination, proportionality, transparency and mutual recognition. These underlying principles must be observed even where the contract falls below the Community thresholds and, generally, in matters not caught by the Public Procurement Directives (for example, the award of a public service concession contract).

1.4 Are there special rules in relation to military equipment?

The Regulations do not prescribe any special rules in relation to military equipment. The Armed Forces of Malta are listed as a contracting authority for the purposes of the Regulations and are subject to the same rules as other contracting authorities. However, there are certain exemptions that may apply to the procurement of military equipment. For instance, the Regulations do not apply to public contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the legislation in force from time to time, or when the protection of Malta’s security so requires. Furthermore, pursuant to article 296 of the EC Treaty, the Maltese Government would not be precluded from taking such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material (provided that such measures do not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes).

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law and is it possible to obtain a ruling on this issue?

The Regulations apply to “contracting authorities”: essentially, the State, regional or local authorities, bodies governed by public law, and associations formed by one or several of such authorities or bodies governed by public law. The Public Procurement Regulations

also apply to public undertakings pursuing one of the activities covered by the same regulations and to certain private entities as will be discussed below. Non-exhaustive lists of contracting authorities and entities are attached as Schedules to the Regulations.

It is not possible to obtain a ruling on this issue from a local administrative or judicial authority.

2.2 Which private entities are covered by the law and is it possible to obtain a ruling on this issue?

Private entities would only be covered by the Regulations in specific circumstances. For example, the Public Procurement Regulations apply to contracting entities which, where they are not contracting authorities or public undertakings (as mentioned above), have as one of their activities any of the activities referred to in regulations 3 to 7 of the same regulations (i.e. gas, heat and electricity, water, transport services, postal services, exploration or extraction of oil, gas, coal or other solid fuels, and the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway), or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of Malta. It must also be noted that the Public Contracts Regulations contain a number of provisions specifically related to the award of contracts by public works concessionaires that are not contracting authorities and certain contracts subsidised by contracting authorities.

It is not possible to obtain a ruling on this issue from a local administrative or judicial authority.

2.3 Which types of contracts are covered?

The Public Contracts Regulations govern the award of a “public contract”, which is defined as “any contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services as defined in this regulation”. A distinction is made between public works contracts, public service contracts, public supply contracts and public works concessions (which is defined as public works contracts, except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction, or in this right together with payment), in line with the Public Procurement Directives.

The Public Procurement Regulations apply to supply, works and service contracts, as defined therein, which have a value equal to or exceeding the prescribed threshold.

The Regulations also contain specific rules in relation to design contests (which will not be further discussed in this Chapter).

2.4 Are there threshold values for determining individual contract coverage?

The Public Contracts Regulations apply irrespective of the estimated value of the contract, although the rules applicable to contracts with an estimated value (net of VAT) exceeding €47,000 are more detailed than the rules prescribed in respect of contracts with a value below this threshold. Contracts with an estimated value equal to or exceeding the Community thresholds (as per the Public Procurement Directives) must be awarded following an international tender procedure in line with the Public Procurement Directives.

The Public Procurement Regulations apply (save where they are ruled out by the exclusions concerning the pursuit of the activity in

question), to contracts which have a value excluding VAT estimated to be no less than €12,000 in the case of supply and service contracts and €5,150,000 in the case of works contracts.

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

The Regulations prescribe how the estimated value of a contract is to be calculated in accordance with the Public Procurement Directives, so as to avoid circumvention of the application of the Regulations. As a general rule, contracting authorities are not allowed to establish an estimated value of a contract with the intention of avoiding, or to adopt any mechanism, including subdivision of public contracts, the purpose of which is to circumvent the application, in part or in whole, of the Public Contracts Regulations. Similarly, the Public Procurement Regulations prescribe that contracting entities may not circumvent these regulations by splitting works projects or proposed purchases of a certain quantity of supplies and, or services, or by using special methods for calculating the estimated value of contracts.

2.6 Are there special rules for concession contracts?

Whilst public service concession contracts are excluded from the scope of application of the Public Contracts Regulations and are not subject to any special rules, public works concessions are subject to the relevant provisions transposing the Public Procurement Directives. The Public Procurement Regulations do not apply to works and service concessions awarded by contracting entities carrying out one or more of the activities covered by the same regulations, where those concessions are awarded for carrying out those activities. Although there are no special rules in relation to concessions falling outside the scope of application of the Regulations, the award thereof nevertheless remains subject to the provisions of the EC Treaty and the general principles of Community law as noted above. This means for instance that, depending on the circumstances, the public concession may have to be awarded by tender.

3 Procedures

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

As a general rule, procurement of services, supplies and works must be made by public contract after a call for tenders.

In terms of the Public Contracts Regulations, equipment, stores, works or services are procured departmentally if the estimated value of the contract does not exceed €47,000 (this type of contract will not be further discussed in this Chapter). Public contracts above the €47,000 threshold (including those equal to or above the Community value threshold) required by a contracting authority listed in Schedule 2 to the Public Contracts Regulations are issued, administered and determined by the Department of Contracts on behalf of the contracting authority, whilst public contracts required by those contracting authorities listed in Schedule 3 are issued, administered and determined by the contracting authorities.

Contracts with an estimated value exceeding €47,000 must in principle be awarded through an open or restricted procedure, at the choice of the contracting authority. In specific cases and circumstances, the “negotiated procedure” (with or without publication of a notice) may be used. The use of the restricted or negotiated procedure is subject to the approval by the Director or

Contracts or the responsible Minister, as the case may be. The “competitive dialogue” may be applied for particularly complex contract; it 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.

Contracting entities subject to the Public Procurement Regulations, may choose between the open, restricted and negotiated procedures; the negotiated procedure without a prior call for competition however may only be used in particular cases. The aforementioned procedures are defined in accordance with the Public Procurement Directives.

Tenders awarded by the open or restricted procedures with an estimated value of over €600,000 or, at the discretion of the Director of Contracts, tenders of a lower estimated value or on tenders awarded through the negotiated or competitive dialogue procedures, must be submitted in separate packages containing, essentially, the bid bond, the technical offer and the financial offer respectively, and are to be treated according to the prescribed procedure.

3.2 What are the rules on specifications?

In the case of contracts with an estimated value equal to or exceeding the Community thresholds, the contracting authorities must set out the specifications in the contract documents, in accordance with the rules deriving from the Public Procurement Directives (in principle, by reference to the prescribed technical specifications and/or performance or functional requirements).

3.3 What are the rules on excluding tenderers?

Contracts with an estimated value exceeding €47,000, may only be awarded to economic operators that are not excluded on the basis of the prescribed mandatory (e.g. conviction of participation in a criminal organisation or money laundering) or optional (e.g. declaration of bankruptcy) qualitative selection criteria, and that meet the criteria of economic and financial standing, and of professional and technical knowledge or ability as set out in the contract documents, in accordance with the relevant provisions of the Regulations.

3.4 What are the rules on short-listing tenderers?

With respect to contracts with an estimated value exceeding €47,000, tenderers or candidates in restricted and negotiated procedures with a call for competition, must be short-listed on the basis of the information given relating to the tenderers’ or candidates’ personal position (in technical and financial terms) as well as of the information and formalities necessary to determine whether the tenderer or candidate is caught by the mandatory or optional qualitative selection criteria referred to above.

3.5 What are the rules on awarding the contract?

The contract award criteria that may be used (for contracts exceeding the €47,000 threshold) are (i) the most economically advantageous tender (“MEAT”), whereby various criteria relating to the subject matter of the contract are taken into consideration (for example, price, delivery date, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, profitability, and technical

assistance), or (ii) the lowest price only. The award criteria must be set out in the relevant contract documents and where the contract is to be awarded on the basis of MEAT, the contracting authority is required to indicate all the criteria it intends to apply in the determination of the award, with the relative weighting (or, if this is not possible, in descending order of importance).

3.6 What methods are available for joint procurements?

Whilst the Public Contracts Regulations do not specifically contemplate joint procurement, the Public Procurement Regulations state that contracting entities may purchase works, supplies and, or services from or through a central purchasing body as defined in the Public Contracts Regulations (i.e. the Department of Contracts) in the acquisition of supplies and, or services intended for contracting entities or in the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities.

3.7 What are the rules on alternative bids?

Where the criterion for the award of the contract is MEAT, contracting authorities may authorise tenderers to submit “variants”, provided that this is indicated in the contract notice. In cases where tenderers are allowed to submit such alternative solutions, the contracting authority must state the minimum requirements to be met by the variants and any specific requirements for their presentation in the contract documents; only variants meeting such minimum requirements may 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?

The exclusions and exemptions set out in the Public Procurement Directives apply (as transposed in the Regulations). In respect of Malta, no decisions in terms of Article 30 of Directive 2004/17/EC have been adopted.

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 Regulations do not apply to public service contracts awarded to an entity which is a contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or administrative provision which is compatible with the EC Treaty.

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*?

Administrative review procedures are provided for in the Regulations, according to the estimated value of the contract concerned (except with regards to public contracts below a €12,000

threshold). With respect to public contracts with an estimated value above €47,000, interested parties have a right of recourse before the Public Contracts Appeals Board (the “PCAB”). In addition, a specific complaints procedure applies in the case of separate packages procedures.

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

On the basis of article 469A of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta), the Courts of Justice of Civil Jurisdiction may enquire the validity of administrative acts or declare them null, invalid or without effect in a limited number of cases, basically, where the administrative act is in violation of the Constitution, is ultra vires or is otherwise contrary to law. However, the cited article does not apply if the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal, is provided for in another law.

Maltese legislation also envisages the filing of precautionary warrants which are available to a potential plaintiff to protect his interest pending judicial proceedings. Of particular relevance in this regard is the warrant of prohibitory injunction, whose object is to obtain a court order restraining a person from doing anything whatsoever which might be prejudicial to the person suing out the warrant. Unless proceedings have already been filed, the applicant is bound to bring the action in respect of the right stated in the warrant within twenty days from the issue of the warrant.

Where contracts falling outside the scope of application of the Regulations are awarded by tender and accordingly the administrative procedures prescribed by the Regulations would not apply, the contracting authority and the aggrieved/interested party may agree to refer the matter to arbitration or otherwise resort to alternative dispute resolution.

Finally, where the matter would involve an alleged infringement of Community law, one may file a complaint with the European Commission, in which case it would be up to the European Commission to decide whether or not it would institute infringement proceedings against the Maltese government. However, this would not give the complainant a subjective remedy.

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

The Department of Contracts may provide pre-contractual remedies to candidates, tenderers and any person having or having had a particular interest in obtaining a particular public contract (whatever the value) and the Director of Contracts is empowered, amongst others, to take certain interim measures. Any interested person who feels aggrieved by a decision taken by the Director of Contracts in this respect, on a point of law, can appeal to the Court of Appeal.

Where the estimated value of the public contract exceeds €12,000 but not €47,000 and is issued by a Local Council or by an authority listed in Schedule 2, complaints must be submitted to the General Contracts Committee. As pointed out above, appeals in relation to contracts with an estimated value exceeding €47,000 and complaints in separate packages procedures are handled by the PCAB.

Any bidder who submitted a complaint and who is not satisfied with the final decision taken by the PCAB may refer the matter to the First Hall of the Civil Court. Such recourse shall not however delay the Director of Contracts or the Head of a contracting authority from implementing the PCAB’s final decision.

Contract Committees are empowered to formally investigate complaints concerning public contracts and procurements and make recommendations thereon, on the condition that such complaints are not the subject of a separate inquiry or investigation by the Director of Contracts in the exercise of his functions or else have to be heard and determined by the PCAB.

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

The letter of objection in relation to the award of a public contract exceeding €12,000 but not €47,000, must be filed by the interested economic operator within three working days from the publication of the award notice. In the event of a separate packages procedure, the complaint must reach the Department of Contracts or the contracting authority involved, as the case may be, within four working days from the date of notification of the relevant decision. In the procedure before the PCAB, a notice of objection must be filed within ten calendar days of the publication of the relevant decision at the Department of Contracts or the contracting authority involved, as the case may be.

Proceedings in terms of Article 469A of Chapter 12 of the Laws of Malta shall be filed within a period of six months from the date when the interested person becomes aware or could have become aware of such an administrative act, whichever is the earlier.

5.5 What remedies are available after contract signature?

Generally, after the award of the contract, the only remedy available to an interested party would be an action for damages before the Civil Court.

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

With regards to the procedures established by the Regulations, the process is relatively speedy; appeals and complaints would generally be determined within a two-month period. The procedure before a Maltese Court would be much lengthier and unfortunately it is not uncommon for judicial remedies to be given after a number of years.

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

Enforcement action and remedies are primarily sought by private undertakings, and in particular by unsuccessful bidders. A considerable amount of tenders awarded are contested through the available administrative procedures, possibly because these are relatively inexpensive (for example, the maximum deposit to be made by the appellant is €8,000). Instances where cases are brought before the civil courts are less frequent.

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

Some recent court cases which may be pertinent are the following:

- Avv Peter Fenech in representation of consortium IT Limited *Ericsson Microwave Systems AB v Department of Contracts* (Writ number 972/2005 GC. Decided by the First Hall of the Civil Court, 3/3/2006): The Department of Contracts disqualified the plaintiffs’ tender since the financial proposals had not been submitted in a separately sealed

envelope in terms of the Regulations. Following an objection by plaintiffs, the matter was referred to the PCAB which rejected plaintiffs' arguments and confirmed the Department's decision "on the basis of the spirit and logic of the Maltese system". The Court subsequently revoked the PCAB's decision; stating that the applicable regulations only speak of "separate packages" and not "separately sealed" packages. In view of the fact that this was a public call for tenders which was also open to foreign bidders, one could not presume that every tenderer would know the procedures generally used in Malta or established by custom. This decision was confirmed on appeal (27th June, 2008), with the Court stating that a tenderer should be expected to follow the law and not "internal" or "customary" procedures.

- Anthony Bezzina in the name, in the interest and in representation of the consortium known as Bezzina - Hydrobudowa Consortium v Director of Contracts and Chairman Malta Maritime Authority. (First Hall Civil Court, decided 12/10/2006, writ number 170/2002): this case concerned a call for applications issued by the Malta Maritime Authority (the "MMA") for the construction of a breakwater. Before the call for tenders, the MMA conducted a pre-qualification process in order to assess what the market offered. Only two applicants including the plaintiff consortium were shortlisted and the MMA decided to terminate that pre-qualification process and issue a new public call for tenders. Plaintiff alleged that it had not been informed of the termination of the pre-qualification process and that in view of this it had not submitted its application following the call for tenders. The Court concluded that the MMA's decision to discard the pre-qualification process was based on reasonable considerations. From a strictly legal point of view the MMA was therefore correct but in the light of the principle of good faith in contractual relations MMA should have formally informed the plaintiff that the process had been terminated. The remedy available to plaintiff was not the cancellation of the award, or a permanent bar on the adjudication of the applications, but if anything, "pre-contractual damages". The Court decided however that it could not award any damages since these had not been demanded. This decision has been appealed by plaintiffs but the appeal has not yet been appointed.

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?

The Regulations do not include any specific provisions on this matter, except with regards to "variation orders" made after the award of the contract. Where variation orders exceed the awarded contract value by more than five per cent, the prior approval of the Director of Contracts, or the responsible Minister, as the case may be, must be obtained.

The underlying principles to be observed when any changes are made during and after the award procedure are primarily, the principles of equal treatment, non-discrimination and transparency. For instance, changes may not alter the subject-matter of the contract or substantially change the basic parameters set out in the tender documents. Where rules on how changes may be effected are set out in the tender document, the contracting authority would need to abide by such rules which it has set for itself.

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

Given the small size of the Maltese business community, manifest irregularities in an award procedure would reach the local media, which would exert pressure to ensure greater transparency and fairness. Also, economic operators may decide to have recourse to a legal solution.

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 Regulations do not contain any special rules in relation to privatisations. Where a privatisation would entail the procurement of works, supplies or services it would be subject to the relevant provisions of the Regulations. As a general rule, compliance with the *acquis communautaire* would need to be ensured.

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

The Regulations do not contain any special rules on PPPs (or PFIs). Insofar as a PPP project is based on a public contract in terms of the Regulations, the relevant public procurement regime would apply. Even where the PPP arrangement would not be caught by the Regulations (for instance where it would amount to a public service concession), it would still be subject to the rules of the EC Treaty and the general principles of Community law, which may necessitate the award of the PPP contract by way of tender.

The European Commission put forward the competitive dialogue procedure as being designed principally to meet the specific features of the award of particularly complex contracts, and thereby certain forms of PPPs. This procedure allows the public authorities to hold discussions with the applicant economic operators in order to identify the solutions best suited to their needs. In fact, the competitive dialogue has been used in one of Malta's PPP projects for the construction and operation of a community home for the elderly.

8 Other Relevant Rules of Law

- 8.1 Are there any related bodies of law of relevance to procurement by public and other bodies?

The main pieces of relevant legislation are the Regulations. However, provisions of a generic nature on procurement by certain Maltese authorities may also be found in the special laws governing them, such as the Malta Maritime Authority Act (Chapter 352 of the Laws of Malta), the Malta Transport Authority Act (Chapter 332 of the Laws of Malta), and the Malta Travel and Tourism Services Act (Chapter 409 of the Laws of Malta). As noted above, regard should also be had for the *acquis communautaire* in this area. Naturally, the performance of the contract would be governed by applicable civil and commercial law, including, for example, the rules on contractual obligations and late payments.

Another noteworthy piece of legislation is the Administrative Justice Act (Chapter 490 of the Laws of Malta), which requires administrative tribunals (such as the PCAB) to respect and apply the principles of good administrative behaviour codified in the Act.

Furthermore, a Bill for the Freedom of Information Act was presented in Parliament, which is intended to create a right to information held by public authorities in order to promote added transparency and accountability in government.

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?

The author is not aware of any pending proposals to amend the Regulations.



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Danièle joined Mamo TCV Advocates in 2001 and specialises in EU law (in particular, the *acquis communautaire* in relation to internal market, competition and services of general economic interest), banking and financial services, and public procurement. Insofar as public procurement is concerned, Danièle formed part of the team advising the Maltese government on one of its major PPP projects and has assisted several government departments and entities in the preparation of tender documents and in adjudication procedures for the award of public contracts and service concessions.

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A D V O C A T E S

Mamo TCV Advocates evolved from the merger in 2000 of two leading Maltese law firms - Tonna Camilleri Vassallo & Co., and John Mamo & Associates. Today, the firm is one of the largest legal practices in Malta. Operating from offices in the capital, Valletta, the practice offers an impressive depth and breadth of expertise which enables the firm to handle a variety of different legal areas, and to provide, in essence, a "one-stop-shop" service to clients.

Mamo TCV Advocates operates overseas through an international network of lawyers to cover a broad range of legal areas, in particular in corporate and commercial practices, banking and finance, IP and shipping. We are also the preferred correspondents in Malta for various leading law firms based in Europe, particularly those operating from the UK.