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# The International Comparative Legal Guide to: Public Procurement 2012

A practical cross-border insight into  
public procurement

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# Malta



Dr. Franco B. Vassallo



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### 1 Relevant Legislation

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

The main legislative documents governing public procurement in Malta are the Public Procurement Regulations (Legal Notice 296 of 2010), which replaced the Public Contracts Regulations (Legal Notice 177 of 2005, as amended) with effect from 1st June 2010, and the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations (Legal Notice 178 of 2005, as amended), hereinafter together referred to as the “Regulations”, both issued under the Financial Administration and Audit Act (Chapter 174 of the Laws of Malta). The Regulations prescribe (*inter alia*) the substantive and procedural rules governing the procurement of works, supplies and services by contracting authorities and entities, the functions and powers of the Director and the Department of Contracts, the Contracts Committees, the Procurement Committees and the Departmental Adjudication Boards, and establish and regulate the Public Contracts Review Board (formerly known as the Public Contracts Appeals Board).

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

Provisions of a generic nature on the procurement by local councils and certain Maltese authorities may be found in the special laws governing them, such as the Local Councils (Tendering) Regulations (Legal Notice 255 of 2009), the Authority for Transport in Malta Act (Chapter 499 of the Laws of Malta) and the Malta Travel and Tourism Services Act (Chapter 409 of the Laws of Malta).

The performance of a public 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 formalises and codifies the principles of good administrative behaviour to be observed by administrative tribunals such as the Review Board.

The Freedom of Information Act (Chapter 496 of the Laws of Malta), which is intended to create a right to information held by public authorities in order to promote added transparency and accountability in government, may also prove pertinent, but it is not as yet fully in force. Until this happens, the sections in the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of

Malta) regarding “privileged documents” may be relevant in this regard.

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

As a Member State of the European Union (the “EU”), Malta is bound to ensure compliance with the provisions of the Treaty on the Functioning of the European Union (the “TFEU”) and secondary legislation promulgated by the European institutions, including 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”). Malta’s accession to the EU in 2004 entailed that it became a contracting party to the international agreements concluded between the Member States and one or more third countries (for example, the Agreement on the European Economic Area, in terms of which the EU’s public procurement regime extends to the EEA – EFTA States).

The EU is a party to the Government Procurement Agreement (“GPA”); accordingly, the provisions in relation to the GPA set out in the Public Procurement Directives were transposed into the Regulations.

*Where reference is made to the Public Procurement Directives in this chapter, kindly refer to Chapter 1 on EU Public Procurement Rules for further guidance.*

#### 1.4 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 TFEU and relevant case law developed by the European Court of Justice and the Court of First Instance, including the following: the free movement of goods; the freedom to provide services; the freedom of establishment; equal treatment; non-discrimination; proportionality; transparency; and mutual recognition. Of relevance are also long-established tenets of administrative law, such as reasonableness, fairness and respect for the “rules of natural justice”. These underlying principles must be observed in the application and interpretation of local procurement legislation, and are relevant 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).

### 1.5 Are there special rules in relation to defence procurement or any other area?

Contracting authorities operating in the field of defence (including the Armed Forces of Malta) are generally subject to the same rules as other contracting authorities. However, there are certain exemptions that may apply to defence-related procurement, including 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 346 of the TFEU, 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 internal 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 (as purchasers)?

The Public Procurement Regulations apply to “contracting authorities”; i.e., 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 of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations apply to “contracting entities”, which are contracting authorities and public undertakings that pursue one of the activities covered by 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), as well as other entities whose activities include any of the said activities, or any combination thereof, and that operate on the basis of special or exclusive rights granted by a competent authority of Malta.

Non-exhaustive lists of contracting authorities and entities are attached as Schedules to the respective Regulations.

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

The scope of application of the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations extends to entities other than contracting authorities or public undertakings, as mentioned under question 2.1 above. Furthermore, the Public Procurement Regulations contain specific provisions related to the award of contracts by public works concessionaires that are not contracting authorities and certain subsidised public works contracts that are issued by an authority that is not a contracting authority.

### 2.3 Which types of contracts are covered?

The Public Procurement 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 (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 of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations apply to supply, works and service contracts, as defined therein, which have a value equal to or exceeding the prescribed thresholds.

### 2.4 Are there financial thresholds for determining individual contract coverage?

The Public Procurement Regulations apply irrespective of the estimated value of the contract, although the rules applicable to contracts with an estimated value (net of VAT) exceeding €120,000 are generally more detailed and onerous than the rules prescribed in respect of contracts with a value below this threshold. Contracts with an estimated value equal to or exceeding the EU thresholds (as per the Public Procurement Directives) must be awarded following an international tender procedure in line with the Public Procurement Directives, as implemented in Malta. The current EU thresholds are: €4,845,000 for public works contracts and public works concession contracts; and €125,000 or €193,000 for public supply and service contracts (depending on the contracting authority awarding them and the services concerned).

The Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations only concern the award of contracts which have a value, excluding VAT, estimated to be no less than €412,000 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, 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 the sub-division of public contracts, the purpose of which is to circumvent the application of, in part or in whole, the Public Procurement Regulations. Similarly, the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors 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 and, if so, how are such contracts defined?

Whilst public service concession contracts are excluded from the scope of application of the Public Procurement Regulations and are not subject to any special rules, public works concessions are subject to the relevant provisions transposing the Public Procurement Directives. However, contracting authorities are given the option to subject particular decisions taken by them to the

review procedure set forth in Parts XII and XIII of the Public Procurement Regulations, which they may subject to any amendments as may be stipulated in the call for competition preceding a restricted or negotiated procedure or in the call for tenders.

The Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors 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 TFEU and the general principles of EU law. This means, for instance, that, depending on the circumstances, the public concession may have to be awarded by tender.

### 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.

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

In terms of the Public Procurement Regulations, equipment, stores, works or services are procured **departmentally** if the estimated value of the contract does not exceed €120,000 (this type of contract will not be discussed further in this chapter).

Public contracts above the €120,000 value threshold (including those equal to or above the EU value thresholds) required by a contracting authority listed in Schedule 2 to the Public Procurement Regulations are issued, administered and determined by the Department of Contracts on behalf of the contracting authority, whilst public contracts required by contracting authorities listed in Schedule 3 are issued, administered and determined by those contracting authorities themselves.

Contracts with an estimated value exceeding €120,000 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 the publication of a notice) may be used. The use of the restricted or negotiated procedure is subject to the approval by the Director of Contracts or the responsible Minister, as the case may be. The **“competitive dialogue”** may be applied for a 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 of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations, may choose between the open, restricted and negotiated procedures; the negotiated procedure without a prior call for competition may only be used in particular cases though.

Tenders awarded through the open or restricted procedures with an estimated value of over €2,000,000 (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 tender offers submitted must be handled according to the provisions regarding the “separate packages procedure”.

#### 3.2 What are the minimum timescales?

Regulation 41 of the Public Procurement Regulations sets minimum time-limits in the case of public contracts above the €120,000 value threshold. In case of open procedures and in the case of awards of public works concession, the minimum time-limit for receipt of tenders is fifty-two days from the date of sending of the contract notice. In the case of negotiated procedures with the publication of a contract notice and the competitive dialogue, the minimum time-limit for receipt of requests to participate shall be thirty-seven days from the date of the contract notice whilst in the case of restricted procedures, the minimum time-limit for receipt of tenders is forty days from the date of invitation. Time-limits may be shortened to not less than twenty-two days where a previous “information notice” has been issued. Where tenderers are given unrestricted and full direct access by electronic means, the time limits may be reduced further.

Apart from the minimum requirements set by Regulation 41, in setting time limits contracting authorities shall take account of the complexity of the contract and the time required to draw up tenders.

There are no minimum timescales governing the actual evaluation and award of the tenders, though calls for tenders would indicate tentative time-frames which contracting authorities try to abide by.

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

Contracts with an estimated value exceeding €120,000 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 minimum suitability criteria of economic and financial standing, and of professional and technical knowledge or ability as requested in the contract documents, in accordance with the relevant provisions of the Regulations.

In restricted and negotiated procedures with a call for competition for the award of such contracts, candidates must be short-listed on the basis of the information given in relation to the candidates’ personal position (in technical and financial terms), as well as of the information and formalities necessary to determine whether the candidate is caught by the mandatory or optional qualitative selection criteria referred to above. Where the contracting authority exercises the option to conduct a procedure in successive stages, in particular in the case of a competitive dialogue or negotiated procedure with the publication of a contract notice, the pre-determined award criteria (referred to under question 3.4 below) must be applied in order to reduce the number of tenders or solutions to be discussed.

The Public Procurement Regulations specifically state, in relation to contracts whose estimated value is equal to or exceeds the EU thresholds, that the minimum number of suitable candidates in the restricted procedure must be five, and three in the negotiated procedure with publication of a contract notice and the competitive dialogue procedure. In any event the number of candidates invited must be sufficient to ensure genuine competition.

#### 3.4 What are the rules on evaluation of tenders?

The manner of evaluation of tenders will depend on the contract

award criteria that are used. These are either (i) the most economically advantageous offer (“MEAT”), whereby various criteria relating to the subject matter of the contract are taken into consideration (e.g., price, delivery date, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, profitability, and technical assistance), or (ii) the lowest price offered compliant with the tender specifications. 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). In the open procedure, the individual tenders are then assessed by an evaluation committee, which would generally include technical people with specialist knowledge, in the light of the requirements of the tender documents and the criteria indicated. In the case of the “separate package procedure”, the evaluation is three-tiered, in the sense that the administrative, technical and financial offers are opened in turn with an evaluation at each stage, such that finally only the financial offers of tenderers who have been found to be administratively and technically compliant will be assessed and compared.

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

At the conclusion of the process of evaluation as described in question 3.4 and, depending on the contract award criteria chosen, the evaluation committee provides the contracting authority with a report indicating the preferred bidder, who is then informed of the choice.

### 3.6 What are the rules on debriefing unsuccessful bidders?

In the case of contracts not exceeding €120,000, there is an obligation on contracting authorities to publish the evaluation results on a notice board, but there is no specific requirement to inform unsuccessful bidders (although in practice authorities do generally inform the bidders whether they have been successful or not, through email, fax or by post). In the case of contracts exceeding €120,000, the Regulations require that unsuccessful bidders be informed of the decision. Such bidders may request to be informed of the decision for the rejection of their bid.

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

It is the Director of Contracts’ function to issue calls for tenders and to award period contracts for the provision of equipment, stores, works or services which are of a common use to contracting authorities listed under Schedule 2 of the Public Procurement Regulations, and to periodically notify Heads of Departments of the prices and conditions applicable for, and the procedure to be followed in, the procurement of such equipment, stores, works or services, where these are obtained directly from the contractor.

The Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations offer contracting entities the possibility to purchase works, supplies and/or services from or through a central purchasing body, namely the Department of Contracts.

### 3.8 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 were 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 principles established by the European Court of Justice regarding “in-house” administrative arrangements apply (in particular, the *Teckal* case). The Public Procurement Regulations expressly provide that they do not apply to 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 law, regulation or administrative provision which is compatible with the TFEU. Specific exclusions regarding the award of contracts to “affiliated undertakings” and to contracting entities are also laid down in the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations.

## 5 Remedies and Enforcement

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

Administrative review procedures are provided for in the Regulations, according to the estimated value of the contract concerned. As regards public contracts with a value exceeding €12,000, but not exceeding €120,000, the Regulations envisage a “right of recourse” whereby any tenderer or candidate concerned has the right to make a “complaint” to the Public Contracts Review Board (the “Review Board”). The Regulations also establish that any tenderer or candidate concerned, or any person, who has or has had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract or a cancellation of a call for tender, may file a notice of objection with the Review Board following notification of the proposed award decision. In both cases, the term “candidate concerned” is defined as a candidate who has not yet received information from a contracting authority about the rejection of his application before the notification of the contract award decision to the tenderer concerned; whilst “tenderers concerned” means tenderers who have not yet been definitely excluded (an exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by the Review Board or can no longer be subject to a review procedure).

A special complaints procedure applies in the case of separate

packages procedures, which allows affected tenderers and any person having or having had an interest in obtaining a particular public contract to file a complaint for review by the Review Board at each stage of the adjudication process.

Decisions of the Review Board are subject to appeal.

### 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, this jurisdiction is exercised 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.

If a person involved in tender proceedings alleges a breach of fundamental human rights, including the right to non-discrimination, a constitutional application may potentially be filed before the Civil Courts in their Constitutional jurisdiction. However, the courts have the discretion to reject such an application if “ordinary” remedies are available.

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 [in a definitive manner] 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 EU 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 as such give the complainant a subjective remedy.

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

The Department of Contracts is responsible for the provision of pre-contractual remedies to candidates and tenderers and any person having or having had an interest in obtaining a particular contract in relation to all public contracts having a value of less than €120,000. Any interested person who feels aggrieved by a decision taken by the Director of Contracts in this regard may appeal on a point of law to the Court of Appeal (Inferior Jurisdiction).

The Review Board is responsible for addressing:

- (i) pre-contractual concerns raised by candidates and any person who has or has had an interest in obtaining a particular public contract in relation to public contracts exceeding €120,000;
- (ii) complaints raised in relation to public contracts with a value exceeding €12,000;

- (iii) complaints raised by tenderers or candidates concerned relating to a contract award decision or a cancellation of a contract; and
- (iv) complaints raised by any person having or having had an interest in obtaining a public service concession contract when recourse to the Review Board is so specified in the call for tender.

A person who feels aggrieved by a decision taken by the Review Board may refer the matter to the Court of Appeal (Inferior Jurisdiction).

### 5.4 What are the limitation periods for applying for remedies/enforcement?

As regards public contracts with a value exceeding €12,000 (but not exceeding €120,000), the letter of objection together with a deposit must be filed with the contracting authority within five working days from the publication of the notice. Appeals from an eventual decision by the Review Board should be filed within sixty days.

A notice of objection by any tenderer or candidate concerned, or any person, who has or has had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken (including a proposed award in obtaining a contract or a cancellation of a call for tender), must be accompanied by the prescribed deposit and filed with the Review Board within ten calendar days following the date on which the contracting authority has by fax or other electronic means sent its proposed award decision. Appeals from an eventual decision by the Review Board should be filed within twenty days.

In a separate packages procedure, the complaint (accompanied by the prescribed deposit) by the affected tenderer and any person having or having had an interest in obtaining a particular public contract must reach the Review Board within ten calendar days from the date of notification of the decision.

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?

In its review, and unless otherwise specified in this regulation, the Review Board is required to consider a contract to be “ineffective” (the term “ineffectiveness” is defined in the Public Procurement Regulations as “a contract awarded illegally or when the contracting procedure was not followed correctly”), and to declare the contract as null from the date of the decision by the Review Board:

- (i) if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/18/EC; or
- (ii) in the case of an infringement of Regulation 85(1) of the Public Procurement Regulations concerning the Review Board’s responsibility for addressing pre-contractual concerns and complaints (referred to under question 5.3 above); or when a contracting authority, notwithstanding an appeal lodged before the Review Board, concludes the contract before a final decision is given, so long as this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of the Public Procurement Regulations, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract.

The Review Board may, after having taken into account all the relevant factors including the seriousness of the infringement and the behaviour of the contracting authority, in addition to a declaration of nullity mentioned above, impose fines on the contracting authority to the amount of 1% of the tender value but not exceeding €1,000.

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

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

The administrative review process contemplated in the Regulations is relatively speedy; complaints and objections would generally be determined within a two-month period. A procedure before a Maltese court would be 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 actions and remedies are primarily taken or 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. 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 relevant court judgments of recent years were the following:

- (a) *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* (Court of Appeal writ number 170/2002). This case concerned a “pre-qualification process”, which preceded tender proceedings. The contracting authority had decided to discard this process and had not informed the plaintiff consortium, which had participated in the said procedure. The court concluded that the contracting authority’s decision to discard the pre-qualification process was based on reasonable considerations and there was no legal obligation to inform participants. However, in the light of the principle of good faith in contractual relations, the contracting authority should have formally informed the plaintiff that the process had been terminated. The Court of Appeal rejected plaintiff’s claims on totally different grounds – namely that the tender had not been filed in the name of the consortium (which had not been set up at the time) and therefore only the individual members of the consortium had the *locus standi* to proceed.
- (b) *Avv. Peter Fenech v Dipartiment tal-Kuntratti* (Court of Appeal, 27th June 2008). This case regarded the requirement under the “three-package procedure” that an offer is presented in 3 separate packages which must be sealed. The applicable regulation was unclear in that it did not clarify whether the packages should be separately sealed or not. The offer submitted by the plaintiff consisted of three separate packages which, though not individually sealed, were submitted together in a sealed box. The offer was disqualified since the Department of Contracts took the position that the regulations implied that the packages must

be sealed individually. The Court of Appeal rejected this argument, stating that a tenderer should not be penalised for a rule which is not clear and publicised. This judgment is also often quoted to support the principle that contracting authorities should be more flexible in evaluating tenders and should avoid penalising tenderers for relatively minor procedural shortcomings.

- (c) *Dr John L. Gauci v Director of Contracts* (First Hall of the Civil Court, 18th July 2008). The plaintiff applied for a warrant of prohibitory injunction to stop the Department of Contracts from awarding a tender in view of alleged infringements in the call and award. In particular, it was claimed that the conditions of the tender had been considerably changed following the award of the tender. The court recognised that the plaintiff company had a *prima facie* right to contest the tender proceedings but concluded that a precautionary injunction is an extraordinary measure which may only be granted if the rights of plaintiff will be “irremediably prejudiced”. In this particular case, the plaintiff company could file an action for damages and therefore there was no impellent reason for issuing the injunction.

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

Apart from mitigation measures envisaged in the Regulations themselves (for instance, anti-avoidance rules regarding the calculation of the value of a contract), tender documents and contract conditions generally include specific clauses stating that certain actions, such as approaching the evaluation committee members during the evaluation period, will lead to disqualification.

## 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) pre-contract signature? If not, what are the underlying principles governing these issues?

The Regulations do not include any general provisions on this matter, except with regards to “variation orders” made after the award of the contract (and certain special rules e.g. regarding the competitive dialogue procedure). Where variation orders exceed the awarded contract value by more than 5%, 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 changes are made during and after the award procedure are, primarily, the principles of equal treatment, non-discrimination and transparency. Such principles would imply 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 To what extent are changes permitted post-contract signature?

Although there are no specific rules in this regard, in practice changes may be allowed in case of *force majeure*, or any

developments which had not been envisaged at the moment of signing. Such changes would be difficult to justify if they substantially change the contract. If economic operators become aware of any changes (e.g. through the local media) and feel that such changes are unlawful, they may decide to institute procedures to have the tender procedure cancelled or to claim damages. There is at least one such case pending before the First Hall of the Civil Court where the plaintiffs, all of whom were unsuccessful tenderers in the award of a public concession contract, are seeking cancellation of the award, damages and a fresh tender proceedings following an allegedly unlawful change in contract terms.

## 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 by a contracting authority or entity, it would be subject to the relevant provisions of the Regulations. As a general rule, compliance with EU law (including, the State aid rules) would need to be ensured in such cases.



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Franco was one of the founding partners of the firm. He has been practising law in Malta since 1984. For a five-year period he was board director and acting Chairman of Enemalta Corporation, Malta's sole electricity provider and then sole distributor and provider of fuel. Franco was lead lawyer in a 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 procedures for the award of public contracts and service concessions. He also heads the firm's litigation department in cases brought before the Public Contracts Review Board on behalf of private clients.

### 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 entails a public service concession), it would nevertheless be subject to the rules of the TFEU and the general principles of EU law, which may necessitate the award of the PPP contract by way of a competitive procedure.

## 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?

In view of the relatively recent entry into force of the Regulations, no imminent material changes to the Regulations are expected for the time-being.



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Mamo TCV Advocates is a tier one law firm and one of the largest legal practices in Malta. The firm is active in all areas of corporate and commercial law. In the field of public procurement, MamoTCV advises contracting authorities, bidders or other interested parties on all aspects of public procurement. The firm has been involved in the drafting and review of tender documents, has advised and assisted government entities in the conduct of award procedures for several public contracts and concessions as well as a local PPP contract and represents clients in appeals procedures before the Public Contracts Review Board. The firm is also the preferred correspondent in Malta for various leading law firms based in Europe, particularly those operating from the UK.

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