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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?

The principal law was enacted in 1992 and imposed a duty to conduct tenders on the government and public entities. Prior to the enactment, this duty was only found in common law, and was more limited. The duty applies to municipalities by virtue of the Municipalities Ordinance. The primary legislation is a framework of principles with almost all of the actual rules being set out in secondary legislation, including with regard to exemptions.

Regulations that apply to government ministries and public bodies, as well as separate regulations applying to the Ministry of Defence including the army and other defence forces (hereinafter MOD), have been enacted under the principal statute. Regulations applying to municipalities have been made under the Ordinance.

Supplementary, more stringent rules apply to government ministries under internal guidelines.

A 1973 statute regarding joint contracts applies to municipalities.

Specific statutes deal with certain contracts in particular fields such as communications (e.g. the award of radio and television broadcast franchises) and infrastructure (toll roads).

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

As a rule, international treaties to which Israel is a signatory are not part of internal Israeli law unless adopted in legislation. However, in the field of procurements, international undertakings by the State are given preference in the law over local arrangements, and the law provides that regulations made under the law will apply so long as they do not contradict an undertaking by the State in an international treaty. Therefore, for instance, the General Procurement Agreement will prevail over any contradictory arrangement set out in 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?

Fundamentally, tenders are a tool for achieving the optimum economic result. The purpose of the public tender is first and foremost, to prevent government corruption and to provide an equal opportunity to the entire public to bid for the right to sell the service/product whilst maintaining the principle of equality and preventing bias and unlawful considerations. The law, regulations and the provisions of any given tender, are interpreted on the basis of these principles. In a public tender, the principle of equality takes pride of place, and usually the court will prefer the interest of preservation of public belief in the system, and will not allow deviation from the rules of the tender, particularly if it involves contradiction of the principle of equality, even if it will cause a real loss of public money in the particular case.

1.4 Are there special rules in relation to military equipment?

The military is subject to the law; however, special regulations apply to it, most of which overlap the ordinary regulations, but contain many arrangements and exemptions that are unique to the MOD, due to the special needs of the military such as confidentiality, operational urgency, and the prevalence of auxiliary conditions to receiving financial defence assistance from foreign countries, etc.

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 law imposes a tender obligation on entities of a public nature only, such as the State (the government and all of its various ministries and units), municipalities, governmental or local corporations, in which the government and/or the local authority have rights of ownership or voting or appointment of directors, and statutory corporations (corporations set up under special legislation), religious councils and health funds.

There is no authority capable of giving a pre-ruling that will be binding in future judicial proceedings. And the courts too do not, as a rule, hand down rulings in advance on issues relating to possible future realities. The opinion of the Attorney General binds all government ministries or government units to act in accordance with it, so long as a competent court has not ruled otherwise.

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

The law does not impose a tender obligation on private entities.

If a private entity conducts a tender, then pursuant to case law, the basic principles of tender laws will apply to it, but not all of the precise provisions thereof, the idea being that the person drafting

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the tender makes representations to the effect that he will act in accordance with such basic principles.

In some contracts between the State or a public entity and a private entity, there are express undertakings by the private entity to act, in certain communications-related matters, in accordance with tender laws.

2.3 Which types of contracts are covered?

In theory, tender laws apply to all kinds of transactions. There are exceptions to this rule such as agreements to create partnerships or agreements to create labour relations, despite the fact that at least in the second instance, this can't be deduced from the language of the statute. Employment by the State is subject to a special law from 1959, and to internal guidelines that have legal force, whilst employment by municipalities is subject to special regulations.

2.4 Are there threshold values for determining individual contract coverage?

The regulations provide certain minimum sums beneath which there is no duty to conduct a tender at all, or no requirement to hold a public tender but rather, only a closed tender, and the regulations also deal differently with different entities, in this regard, and the sums are higher for government companies than government ministries. The original sums prescribed in the law were: for ministries - contracts with a value of no more than NIS 25,000 are exempt, and where the value is below NIS 200,000, a closed tender will suffice; and for government companies - contracts worth up to NIS 100,000 are exempt, and companies whose annual contract turnover amounts to NIS 500,000,000 are exempt from any contract worth up to NIS 300,000 (the sums are linked to the cost of living index and at present, the sums are almost double).

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

The regulations that apply to local councils provide: "where a municipality is due to enter into a number of contracts at the same time for the same goods or works which amount to one single job, all such contracts shall be deemed, for the purpose of these regulations, to be one single contract". Neither the law nor regulations that apply to the government, public entities or the security establishment, contain any special reference to this issue, but that makes no difference. If the matter is brought before the court, it will examine whether the transaction has been artificially split into several transactions, or whether the classification of the transaction is artificial, in an attempt to evade conducting a tender, or whether there are other legitimate grounds for the structure or classification of the transaction/s.

2.6 Are there special rules for concession contracts?

There are special laws that deal with concessions or licences in certain areas, such as with respect to the distribution of natural resources, the paving of toll roads, distribution of gas and electricity, constructing light rail lines, etc. Apart from that, there is no single answer to the question of whether a tender obligation applies to deals that essentially amount to concession contracts. The Supreme Court has held, in a particular context, that there is no tender obligation in these kinds of cases, however in our assessment, both the purpose and the express language of the law will give rise to common law that will prescribe a tender obligation for the grant of concessions when an appropriate case is submitted for judgment.

3 Procedures

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

The holder of the tender has almost full discretion in designing the conditions of the tender including in the following areas:

In setting the threshold conditions and criteria, and the method in which bids are to be weighted and ranked. The price does not have to constitute a criterion, and a tender may be conducted in which the price is set in advance and the competition is based solely on the question of the quality of the bid and/or the bidder.

In setting the method of submitting bids: for instance, it is possible to set base prices for items of a tender and require that bidders offer a same fixed discount or supplement for all items, or for each item separately, or to require that the bidders set the prices of each item, or one price for the entire project, etc.

The conditions of the tender can allow a selection of several bids or of no bids at all where none is found to be suitable. Where a tender that permits negotiations is allowed, there is free choice in designing the conditions of the negotiations and of the competition between bidders, and it is possible to hold second-round best and final offers or cyclic negotiations, etc.

The above mentioned discretion is limited by the laws that apply to administrative authorities, and where the decision is utterly unreasonable, or is based on irrelevant considerations, a court may disqualify it.

Examples of mandatory requirements:

Minimum publication which must include at least several obligatory items such as details of the substance, subject and term of the contract, threshold conditions, final date for submitting bids, etc. Only part of these items is required in municipalities' tenders.

In the case of a closed tender, there are requirements regarding the minimum number of participants and the composition of the list of bidders from whom participants in the tender will be chosen.

Only in certain kinds of transactions may a tender that includes negotiations be conducted.

3.2 What are the rules on specifications?

All of the conditions of the tender must appear in the tender documents and no reliance should be placed on conditions that are not expressly set out therein, and the terms and conditions must be clearly drafted. In the event of any contradiction or lack of clarity, the court will aim to interpret the tender in such a way as to give it force, or to give the bid effect, and any doubts shall act to the detriment of the party holding the tender; however, there might be cases where lack of clarity regarding the conditions of a tender will give rise to its being cancelled.

The contract of the transaction, or at least all of its principal conditions, must be part of the tender documents.

3.3 What are the rules on excluding tenderers?

Tenderers are excluded by imposing threshold conditions in the tender documents. A threshold condition is any condition defined as such in the tender documents, or if failure of compliance with it will cause the disqualification of the bid.

The regulations prescribed a number of threshold conditions that must be included in any tender: (1) registration on any register kept by law if required for the purpose of the subject of the contract, and

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compliance with all licenses required under law; (2) if there is an official Israeli standard covering the subject of the contract within the definition of the law, compliance with the requirements of the standard; and (3) the issuance of bookkeeping certificates in accordance with the law. In addition to the above, the holder of a tender may prescribe additional threshold conditions including conditions relating to the size or financial strength or experience of the tenderer, or with respect to other matters. In 2008, an amendment was enacted, providing expressly that threshold conditions must derive from the nature or substance of the tender, and restricting the periods and volume of previous experience or turnover of production or supply prescribed in the threshold conditions, such that deviation from these restrictions is possible only if the reasons to it are expressed in the tender documents.

3.4 What are the rules on short-listing tenderers?

Where a tender which includes a negotiations stage may be held, the regulations prescribe that the tender committee is to conduct negotiations with "those bidders whose bids are most appropriate" and sets no other rules. The choice of the "most appropriate" bids must be made, of course, in accordance with the conditions and criteria in the tender, but the tender committee has vast discretion in regard to the manner this phase be conducted in, as long as the principle of equality between participants has been kept. The committee may decide on the winning bid at the end of the negotiations, or allow participants to make a final bid. The contents of the negotiations must be recorded. In MOD's tenders negotiations are to be held with all bidders whose bids passed the "compliance threshold" and with them only. The compliance threshold refers to "professional, technical and administrative compliance with the requirements of the deal for which the tender is being held, in whole or in part, which requirements or the weighting thereof shall be prescribed in advance and published in the tender documents", and there the rule is that after the negotiations stage, an opportunity will be given to submit final bids.

3.5 What are the rules on awarding the contract?

The winner of the tender is declared by the tender committee in accordance with the conditions and criteria of the tender and subject to general principles of law such as conflicts of interest etc.

Performance of the transaction is awarded to the winner of the tender, subject to execution of a contract, issue of performance guarantees or other conditions if exist in the tender's documents.

3.6 What methods are available for joint procurements?

The Law contains nothing to prevent the holding of a joint tender by several entities. There are no special rules regarding ways or methods of such, and the rules that apply to the conduct of an ordinary tender will apply here too. There is specific legislation from 1973 that relates to municipalities.

It is also possible to use the outcome of a general central tender conducted by the Accountant General and for municipalities, by the Center for Local Government, and to obtain the service or product from a vendor or service provider chosen in such tender, at the price and on the conditions on which they won the central tender, or on better conditions than those.

3.7 What are the rules on alternative bids?

The law does not prohibit a bidder from submitting a number of alternative bids and no judicial decision has made such a general prohibition. Therefore, in the absence of any other provision in the tender documents the presumption is that a bidder may file a number of bids since this does not harm the principles or purposes of tender laws. Clearly, this option is applicable in a complex tender, for instance, where certain work is required which can be performed using a number of methods, or where a product that meets more than one requirement or characteristic is required, and there are a number of alternative products. Of course, the holder of the tender itself may expressly permit or request the submission of a number of alternative bids as well.

4 Exclusions and Exemptions (including in-house arrangements)

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

The lists of exemptions in the regulations are lengthy and include transactions below a certain value, or with certain characteristics, such as work that requires special professional knowledge in certain professions or a need for particular land, or special relations of trust, such as legal counsel, or the performance of scientific or literary work or contracts with certain entities or contracts with certain professionals or where the need for a contract is so urgent that real damage will be caused by the delay involved in conducting a tender, or where conducting a tender might cause substantial harm to State security or foreign relations, or the economy or public security or to a commercial or professional secret of the ministry or contracts regarding the transfer of employees or operations or assets from the government to a corporation on the basis of a government resolution, or certain contracts with statutory corporations, contracts with single suppliers, etc.

There is also a list of types of transactions which may be implemented via a closed, non-public tender, inter alia with respect to medical equipment or on issues of insurance, advertising, public relations, research and development, etc.

In some cases, the exemption is conditional upon choosing the contracting party via certain proceedings.

The tender committee determines if the transaction in question can be exempted, but usually this is a legal question, in which case the opinion of the committee's legal counsel will be binding. With respect to government ministries, it is sometimes necessary to obtain the consent of a special exemptions committee.

Any decision is subject to judicial review if such a petition is made.

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

Tender laws impose the obligation on certain legal entities, prohibiting them from entering into contracts without a tender. Performance of the subject of a contract by a department or unit of such legal entity does not require a tender, because there is no actual contract involved. Such is the case with respect to government offices that receive services from other government offices.

With respect to contracts between separate legal entities, a tender is required, but there are exceptions, for instance, contracts between a government company and its subsidiary, or between two subsidiaries of the same government company, etc.

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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*?

Remedies are not set out in the tender legislation itself but rather in case law based on contract law and administrative law.

The trend of case law has been to expand *locus standi*.

A distinction should be drawn between attacking a decision under ongoing tender proceedings and a decision to contract without a tender. In the first instance, *locus standi* applies first and foremost to the participants in the tender, but there will be cases where non-participants may make claims regarding faults in the proceedings, if they suffered harm. For instance, where a substantial or threshold condition are changed during the tender process, which had it been known from the outset would have enabled or caused the claimant to participate in the tender. Also in the second case the petitioner must show that he himself suffered harm by the decision (to contract without a tender), by losing a real chance to participate in a tender for contract in question, and win it. The court might also grant locus standi to a "public petitioner" under rules formulated in Israeli general administrative law in this regard.

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

The remedy of enforcement, cancellation of the tender, re-examination of the bids by the committee, or compensation may be obtained, as a rule, only from a court. Nevertheless, a complaint to the State Comptroller/Ombudsman, might, sometimes, bring about a result that will benefit the applicant.

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

In 2000, the Courts of Administrative Affairs Law prescribed that that court had the jurisdiction to hear matters relating to tenders, with some exceptions, and that the Supreme Court is the court of appeals.

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

If the lawsuit covers only financial compensation, it will be subject to the procedures employed for ordinary civil claims, including with respect to times, delays, and limitations periods.

A petition to cancel the tender or its outcome or to declare the petitioner as winner or to have the committee re-examine the bids, etc. must be filed within 45 days of receipt of the decision; however that will not save a petition from dismissal for laches even if filed within such timeframe.

Under current case law, there is no unequivocal timetable for laches, and the ruling will depend on circumstances such as: the urgency of performance of the contract; what had been accomplished prior to the initial application and how much is already a fait accompli; the good faith of the parties; the alleged level of prima facie harm to the principles of tender laws; and the odds of the petition to succeed. Sometimes even a delay of only a few days will be grounds for dismissal while in other cases, a month or more will not cause dismissal for laches.

5.5 What remedies are available after contract signature?

Conclusion or signature of a contract will not of themselves prevent any remedy that could have been obtained prior to conclusion/signature. The fact of signature might add some weight to the considerations for dismissing a petition for laches, i.e., if the petitioner was not in delay, the petition usually will not be dismissed for laches merely on the basis of signature, and if the court finds that declaration of a winner contravened the law, the contract signed will be deemed void or voidable.

There is no precise definition of the timeframe after which the tender stage ends, and after which the contract stage begins, and the answer to that depends on the circumstances of each case, but it is clear that if a contract has been signed and the work has begun, it is difficult to presume that any petition to change the outcome of the tender will be upheld. In such a case, a claimant's only remedy will be an "administrative claim", which is a lawsuit for compensation by a plaintiff claiming that he should have won the tender.

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

Usually, proceedings in a petition against the outcome of a tender are complete within a few months, although sometimes the award of a judgment is delayed for a longer period. The relatively short time periods are due to the fact that proceedings take place on the basis of affidavits only, and very seldom may brief cross-examinations take place. The cases do not tend to revolve around questions of fact since the facts are usually clear from the documents. The date for filing an appeal against a judgment is 30 days, and the date for application for leave to appeal an interim ruling in the proceedings is 15 days, both proceedings might last months or even more.

In claims for financial compensation only, the proceedings usually end years later.

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

Petitions regarding tenders are a daily event and most tenders, particularly large or significant ones, reach the courts. Apart from exceptional cases, petitions are always filed by an interested party rather than by a public or other petitioner.

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

Enforcement is the leading remedy in contract law and it is also the most requested remedy in tender laws (since usually the petitioner's interest is in performing the contract). Therefore, there are no "leading examples" since obtaining a remedy of enforcement is a routine matter.

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 legislation does not deal with these issues; thus, case law is the

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only source for governing principles.

Before the submission of bids, the conditions of the tender, the contract and the very decision to conduct a tender, may all be amended. After that stage, it is possible to cancel the tender, but otherwise, the terms and conditions may not be amended, particularly not substantively. There might be changes in time periods, particularly in tenders in which negotiations can be conducted.

After selecting the winner, negotiations may be entered into with the winner, but only to improve the conditions for the holder of the tender.

After execution of the contract, we are usually in the realm of contract law. Therefore, if during the term of the contract matters arise, which require an amendment of the terms and conditions, as a rule, this will not be subject to the principles of tender law.

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

In practice, there is almost no case law on this matter, either because tender holders do not usually act in that manner, or because when they do, no-one is interested in following-up such actions, since the other bidders are already out of the picture.

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?

There are no general laws or rules and each privatisation has its own separate specific arrangements.

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

There are no separate rules for PPPs. There is case law, which provides that a claim may be made that the tender obligation does not at all apply to a contract that formulates a partnership, since it involves no transaction within the meaning of the Law.

8 Other Relevant Rules of Law

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

With regard to public tenders, the main body of law that applies is administrative law, the secondary one being contract law, whilst with private tenders, the opposite is the case.

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?

Tender laws are a relatively young and dynamic body of law, but the present principal statute was enacted in 1992 and no reform or any substantial change is expected in the near future.

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