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# Public Procurement 2023

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## **Bulgaria: Law & Practice**

Anton Krustev, Dimitar Tabakov and Krasimir Avramov  
Djingov, Gouginski, Kyutchukov & Velichkov LP



# BULGARIA



## Law and Practice

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Djingov, Gouginski, Kyutchukov & Velichkov LP has been one of Bulgaria's leading full-service law firms for almost 30 years, providing service and advice to primarily international corporate clients. The firm currently employs 60 lawyers, including 18 partners, and maintains offices in Sofia and Berlin. The public procurement & EU funding practice group provides full-scope assistance to clients in matters related to public procurement law, concessions law, and European structural and investment funds law. The team has advised ERG Insaat Ticaret

ve Sanayi, SSB Sauerwein & Schaefer Bau and Copenhagen Airports as one of the bidders for the Sofia Airport concession; General Electric International, Alstom Transport, Chariot Motors and Consortium Chariot Motors/Higer Bus Company Limited, Honeywell, Solar Turbines, and many others in relation to numerous public procurement procedures and European structural investment funds aspects of tenders; and Lockheed Martin, Northrop Grumman, and Patria Land in relation to tenders in the defence sector.

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## BULGARIA LAW AND PRACTICE

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## 1. General

### 1.1 Legislation Regulating the Procurement of Government Contracts

In the Republic of Bulgaria, as a member state of the European Union (EU), public procurement is regulated by EU law and national (implementing) legislation. Domestically, the procurement of public contracts is mainly governed by the following.

- Public procurement legislation:
  - (a) Public Procurement Act (PPA), Promulgated, State Gazette (SG) No 13/16 February 2016, effective 15 April 2016, as subsequently amended and supplemented.
  - (b) Regulations for Application of the Public Procurement Act, adopted by Council of Ministers Decree No 73/5 April 2016, Promulgated, SG No 28/8 April 2016, effective 15 April 2016.
- Concession legislation:
  - (a) Concessions Act, Promulgated, SG No 96/1 December 2017, effective 1 January 2018.
  - (b) Subsurface Resources Act, Promulgated, SG No 23/12 March 1999.
  - (c) Water Act, Promulgated, SG No 67/27 July 1999, effective 28 January 2000.

### 1.2 Entities Subject to Procurement Regulation

Public procurement regulation applies to contracting authorities. The contracting authorities are the entities responsible for the entire process of preparation and execution of the public procurement procedure. They are one of the parties to the public procurement contract along with the appointed contractor. The Bulgarian PPA does not provide a legal definition of the term “contracting authority”, but rather the contracting authorities are exhaustively listed by groups

in the PPA. They are divided into public and sector contracting authorities as the first group is covered by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; and the latter by Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. The applicable rules for each of the two groups are set out in separate parts of the PPA.

By way of example, some of the public contracting authorities as per the Bulgarian PPA include:

- the President;
- the Chairperson of the National Assembly;
- the Prime Minister;
- the government ministers;
- the Ombudsman of the Republic of Bulgaria;
- the Governor of the Bulgarian National Bank;
- the President of the Constitutional Court;
- the administrative heads of the judicial authorities and the prosecution offices which manage independent budgets;
- the regional governors;
- the mayors;
- the chairpersons of state agencies and of state commissions; and
- the executive directors of executive agencies.

Please note that the examples of public contracting authorities do not exhaust the list provided for in the PPA.

The sector contracting authorities are contracting authorities that carry out activities related to natural gas and heat energy, electricity, water supply, transport and postal services, and exploitation of a geographical area.

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The PPA also recognises the so-called ad hoc contracting authority. These entities are neither public nor sector contracting authorities, but in certain cases, if the conditions are met, they can be treated as a contracting authority and therefore the provisions of the PPA apply to them. Such instances include contracts for works or services above certain money thresholds, specified in the PPA, when those activities are funded by more than 50% public financing. In those cases, the entity which awards the public procurement contract acts as an ad hoc contracting authority.

### 1.3 Types of Contracts Subject to Procurement Regulation

The PPA provides for a legal definition of the term “public procurement contract” according to which a public procurement contract is a contract for pecuniary interest concluded in writing according to the procedure established by the PPA between one or more contracting authorities and one or more contractors, suppliers or service providers and having as its object works, the supply of products or the provision of services.

As per the definition, the object of the public procurement contracts may be one of the following:

- works – seen as the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function;
- supply of products, performed through purchase, leasing, rental or hire-purchase, with or without the option to buy, as well as all preliminary operations as shall be necessary for the actual utilisation of the products, such as installation or siting operations, testing of machinery and plant, etc; or
- provision of services.

However, the PPA's provisions do not apply to all contracts related to the above objects and awarded by public or sector contracting authorities. There are some exceptions, which can be classified in three groups:

- general exceptions, which apply to all contracting authorities – both public and/or sector;
- exceptions applicable to public contracting authorities; and
- exceptions applicable to sector contracting authorities.

The lists of exclusions in the relevant provisions of the PPA are exhaustive. If there are no exceptions present, then the contracting authority must apply the procedures listed in the PPA when awarding a public procurement contract. The application of a particular procedure is dependent on (i) the type of contracting authority, (ii) the object of the public procurement contract, and (iii) the estimated value of the public procurement, in that order. The procedures for awarding a public procurement contract are determined based on which of the regimes applies to the specific combination of those three factors. The PPA presents the contracting authority with four different options in terms of award of public procurement contracts.

- The contracting authorities shall choose from up to eleven types of procurement procedures, derived from EU law and specified in the Bulgarian PPA.
- The contracting authorities shall apply specific national procedures for awarding public procurement contracts such as “public contest” and “direct negotiations”.
- Where the estimated value of the public procurement contract is low (below certain thresholds, established in the PPA), the

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contracting authorities shall apply “collection of offers by advertisement” and “sending of invitations to certain persons”.

- Where the estimated value of the public procurement contract is lower than the estimated values, the contracting authorities are allowed to award the public procurement contract directly to certain persons.

Notwithstanding the above differentiation based on the estimated values of the procurement, the contracting authorities shall have the right to award a particular public procurement according to a procedure applicable to greater estimated values, and, in this case, they shall be obliged to apply all rules valid for the procedure chosen thereby.

## 1.4 Openness of Regulated Contract Award Procedure

Public procurement procedures are generally open to any entities to take part in – both domestic and foreign (EU and non-EU based). The Bulgarian PPA uses the term “economic operator”, which includes in itself the candidates, participants and contractors, and is defined in the Additional provisions of the PPA as “*any natural or legal person or entity, or a combination of any such persons and/or entities, which offers the execution of works and/or a work, the supply of products or the provision of services on the market.*” Evidently, there are no national restrictions for economic operators to take part in public procurement procedures.

However, the Republic of Bulgaria is a member state of the EU and, as such, any restrictions implemented at EU level shall apply: for example, the restrictions in Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the

situation in Ukraine. The provisions of this EU Regulation apply directly in Bulgarian territory without the need for any intermediate national legislative act.

According to Regulation EU 2022/576, as of 9 April 2022 it is prohibited to award new and after 10 October 2022 to continue the execution of already awarded public procurement contracts, including those falling under some of the exceptions, with persons referred to in the Regulation, namely:

- (a) Russian nationals or natural or legal persons, entities or bodies established in Russia;
- (b) legal persons, entities or bodies where more than 50% of the ownership, directly or indirectly, is held by an entity referred to in point (a); or
- (c) natural or legal persons, entities or bodies acting on behalf or at the direction of an entity referred to in point (a) or (b).

The prohibition shall also apply to subcontractors, suppliers or entities whose capacity is used in accordance with the PPA where their participation in the performance of the contract is more than 10% of its value.

Exceptions are allowed under the conditions of the Regulation. Contracting authorities have an obligation to comply with the Regulation at all stages of the process of award, conclusion and performance of public procurement contracts.

## 1.5 Key Obligations

The key obligations of contracting authorities are closely linked to the fundamental principles of procurement law, proclaimed in the Bulgarian PPA and adopted from EU procurement legislation. Contracting authorities are under the



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obligation to manage the public procurement process in accordance with the principles of the Treaty on the Functioning of the European Union (TFEU) and in particular the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and the principle of mutual recognition, as well as with the principles deriving therefrom:

- equal treatment and non-discrimination;
- free competition;
- proportionality; and
- publicity and transparency.

When awarding public procurements, contracting authorities shall not have the right to narrow competition by including any conditions or requirements unduly favouring or restricting the participation of business entities in the public procurements and such as do not take into account the subject matter, value, complexity, quantity or extent of the public procurement.

## 2. Contract Award Process

### 2.1 Prior Advertisement of Regulated Contract Award Procedures

When awarding public procurements, Contracting Authorities shall issue a decision for the opening of the procedure. This decision is the administrative act that marks the beginning of the public procurement procedure under the PPA. It must contain certain requisites and is subject to appeal. Pursuant to the PPA, the decision shall approve the notice announcing the opening of the procedure. In case of procedures without prior notice this decision approves the invitation to tender. The decision shall also approve the tender documentation accompanying the notice or invitation, where applicable.

The contracting authorities are under the obligation to send the decisions for opening of the procedure along with the notices to be published in the [Public Procurement Register](#) (PPR), maintained by the Public Procurement Agency. Depending on the estimated value of the procurement the notices are sent as follows:

- for publication in the PPR – where the estimated value is up to certain thresholds set in the PPA, eg BGN10 million for works or BGN270,000 for supply of products or services; and
- for publication in the PPR and in the Official Journal of the EU – where the estimated value of the procurement is equal to or higher than the thresholds discussed in the previous bullet point.

Any contracting authority that fails to send in good time the information subject to publication in the PPR or in the Official Journal of the EU is subject to sanctions (fines of up to BGN1,000).

### 2.2 Preliminary Market Consultations by the Awarding Authority

Preliminary market consultations are generally admissible by the Bulgarian PPA. For instance, the contracting authority may determine the estimated value of the public procurement as a result of market research or consultations which have been carried out. When preparing a public procurement award, the contracting authority may conduct market consultations, seeking advice from independent experts or authorities or from market participants, as long as this preliminary research does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency. In any case, the contracting authority shall take steps set out in the PPA to ensure that the persons involved in the market

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consultations and/or in the preparation of the procedure are not given an advantage over the rest of the candidates or participants.

In case the undertaken measures cannot ensure compliance with the principle of equal treatment, the candidate or participant who was involved in the market consultations and/or in the preparation of the procurement award shall be excluded from the procedure if the said candidate or participant is unable to prove that the participation thereof does not result in a violation of the said principle.

### 2.3 Tender Procedure for the Award of a Contract

At present, there are 13 types of tender procedures set out in the PPA at the disposal of the contracting authorities. These procedures have numerous clauses as they are exhaustively listed in the PPA.

#### Open Procedure

The “open procedure” is a procedure where all interested economic operators may submit a tender, by the act of which they become participants in the procedure. This procedure entails a publication with the term by the end of which interested economic operators must submit their offers. Alongside their tender the participants must provide documents evidencing that there are no grounds for exclusion present and that they meet the selection criteria set out in the tender documentation. This is a one-stage procedure where the contracting authority assesses the offers of the participants and their financial and technical qualifications.

The “open procedure” is used by both public and sector contracting authorities.

#### Restricted Procedure

In a “restricted procedure” interested economic operators may submit a request to participate in the procedure provided that they do so in the announced term for submission. Such entities become candidates in the procedure. The candidates provide the contracting authority with the necessary documents regarding the absence of grounds for exclusion and compliance with the selection criteria. This is a two-stage procedure where only those candidates chosen by the contracting authority after the conduct of pre-selection may be invited to submit tenders. The minimum number of candidates is five. In cases where the contracting authority uses the option to reduce the number of candidates in the procedure, the minimum number of candidates to be invited to tender may not be less than three.

The “restricted procedure” is used by both public and sector contracting authorities. It is applicable in all fields, including for awarding procurement contracts in the fields of defence and security.

#### Competitive Procedure With Negotiation

Similar to the “restricted procedure”, the “competitive procedure with negotiation” is a two-stage procedure where any interested economic operators may submit a request to take part in the procedure and their request will be part of the pre-selection undertaken by the contracting authority. However, unlike the “restricted procedure”, the “competitive procedure with negotiation” allows for negotiations to take place between the contracting authority and the shortlisted candidates to whom invitations have been sent. The tender offers of the selected candidates serve as a basis to initiate negotiations with them. The minimum number of candidates to be sent invitations is three.

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The negotiations may take place in successive stages in order to reduce the number of candidates to be considered by applying the award criteria and the tender assessment indicators specified in the prior advertisement or in the invitation to confirm interest. Where the contracting authority intends to do so, it shall indicate this beforehand in the prior advertisement or in the invitation.

The “competitive procedure with negotiation” is used by public contracting authorities.

### **Negotiated Procedure With Prior Call for Competition**

This is a two-stage procedure in which any interested economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority. Only those candidates, invited by the contracting authority following its assessment of the information provided, may submit initial tenders, which will serve as a basis for the negotiations. The number of invited candidates must be sufficient to ensure genuine competition.

“The negotiated procedure with prior call for competition” is used by sector contracting authorities.

### **Negotiated Procedure With Publication of a Contract Notice**

In negotiated procedures with publication of a contract notice, contracting authorities/entities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements they have set in the contract notice, the contract documents and supporting documents, if any, and to seek out the best tender. Most of the rules regarding the “competitive procedure with negotiation” reviewed

above, apply here as well. Where the Contracting Authority uses the option to reduce the number of candidates participating in the procedure, the minimum number of candidates to receive an invitation to tender may not be less than three.

This is a two-stage procedure used by public and sector contracting authorities and is applicable for public procurement awards in the fields of defence and security.

### **Competitive Dialogue**

“Competitive dialogue” is a three-stage procedure including pre-selection of candidates, dialogue stage and, lastly, evaluation of the tenders. In the dialogue stage the contracting authority conducts a dialogue with the candidates admitted after pre-selection in order to identify one or more proposed solutions that meet its requirements and then invites the candidates who have proposed them to submit final tenders. The purpose of this stage is to provide an opportunity to discuss issues which for objective reasons cannot be resolved at the opening of the procedure. The minimum number of candidates to be invited to take part in this procedure is three in order to guarantee genuine competition.

This procedure can be described as a combination of a restricted procedure and a negotiated procedure. It is used by both public and sector contracting authorities and is applicable in all fields including for awarding procurement contracts in the fields of defence and security.

### **Innovation Partnership**

An “innovation partnership” is a procedure in which the contracting authority negotiates with selected candidates who have successfully passed the pre-selection process in order to establish a partnership with one or more partners to carry out a specific research and devel-

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opment activity. The PPA defines “research and development” as all activities which cover fundamental research, applied research and experimental development. The innovation partnership contract shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authority and the candidate/s. The minimum number of candidates in the procedure is three.

This procedure is used by both public and sector contracting authorities.

### **Negotiated Procedure Without Prior Publication**

This is a one-stage procedure where the contracting authority conducts negotiations with one or more persons in order to determine the clauses of the public procurement contract. It may be used by the contracting authority in limited cases where there has been an unsuccessful open or restricted procedure, which was terminated due to the fact that no tenders or requests to participate were submitted or all the tenders or requests to participate submitted by participants were inappropriate.

This procedure is used by public contracting authorities.

### **Negotiated Procedure Without Prior Call for Competition**

This is a one-stage procedure where the contracting authority conducts negotiations with one or more participants in order to determine the clauses of the public procurement contract. Similar to the negotiated procedure without prior publication, this procedure may be used by the contracting authority in limited cases. Apart from

those applicable to the negotiated procedure without prior publication, this procedure may be applied also when:

- the procurement is purely for the purpose of research, experimentation, study or development; the procurements awarded do not include quantity production to establish commercial viability or to recover research and development costs; or
- it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices; in this case, the persons offering products at prices lower than market prices shall be invited to participate in the negotiations.

This procedure is used by sector contracting authorities.

### **Negotiated Procedure Without Publication of a Contract Notice**

This is a one-stage procedure, used by public and sector contracting authorities when awarding contracts to participants in the field of defence and security. In this procedure the contracting authority conducts negotiations with one or more persons. It is applicable in strictly and exhaustively specified cases in the PPA.

### **Design Contest**

A “design competition” is a procedure in which the contracting authority acquires a plan or design selected by an independent jury on the basis of a contest with or without awards, mainly in the fields of town and country planning, architecture, engineering or data processing. Depending to the number of stages in which it is held, the design competition may be open or restricted.

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This procedure is at the disposal of both public and sector contracting authorities.

## Public Contest

“Public contest” and “direct negotiations” are so-called “national” procedures. They are respective analogues to the open procedure and the restricted procedure. The same principles and rules apply to them as well. Both national procedures are applied when awarding contracts with low estimated value – within the margins specified in the PPA. Any interested economic operator may submit an offer within the time limit announced in the public notice of the contracting authority.

This procedure is at the disposal of both public and sector contracting authorities.

## Direct Negotiations

In “direct negotiations” the contracting authority chooses particular persons with whom to negotiate the award of a public procurement contract. This procedure may be used in exceptional cases, strictly defined in an exhaustive list in the PPA: for instance, where an urgent award of the procurement is necessary due to exceptional circumstances and the lawful time limits cannot objectively be complied with; where a prior procurement has been terminated because of lack of tenders and the initial conditions of the tender are not substantially altered; or where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than usual.

## 2.4 Choice/Conditions of a Tender Procedure

The PPA proclaims free choice of procedure, but within the limits set out in its provisions. Public contracting authorities are free to choose

between an open and restricted procedure while sector contracting authorities may freely choose among an open and restricted procedure, a negotiated procedure with prior call for competition and a competitive dialogue. Apart from that, for the use of the other procedures the necessary conditions must be met as they are stipulated by the provisions of the PPA.

## 2.5 Timing for Publication of Documents

As a general rule, the tender documentation shall be made publicly available as of the day of the publication of the contract notice or the day of invitation for the participation in the particular procedure. This is to guarantee that all interested economic operators would be aware of the requirements set out in the tender documentation with which they must comply.

## 2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The usual minimal time limit for receipt of expression of interest or submission of tenders is 30 days. However, there are some cases where the PPA allows this term to be shortened. In rare occasions it can be reduced to 15 or even ten days, provided that the contracting authority has made prior notice and other conditions stipulated in the PPA have been met.

Regarding “public contest” procedures, the minimum time limit to receive a submission of tender is 20 days, and it can be reduced to ten days.

## 2.7 Eligibility for Participation in a Procurement Process

As previously stated in 1.4 Openness of Regulated Contract Award Procedure, any economic operator may take part in public procurement procedures in Bulgaria as long as it complies with the requirements set out in the PPA and

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the tender documentation. Those requirements are set to determine whether the candidate/participant is suitable to perform the contract. The PPA establishes grounds for exclusion which must not be present in respect to the particular candidate as well as selection criteria which the candidate/participant must declare that it meets. Those selection criteria must later be evidenced, provided that the candidate/participant's tender has been selected by the contracting authority.

The selection criteria are specific to each particular procedure, but they can be generally described as requirements with respect to the economic and financial standing of the candidate/participant and technical and professional requirements. To illustrate, the contracting authority might request, for example, successful candidates/participants to have completed similar works/services to the one, subject of the current award procedure, in the last three to five years.

## 2.8 Restriction of Participation in a Procurement Process

The PPA stipulates that the selection of the candidates/participants during the procurement procedure must be based on non-discriminatory criteria to ensure genuine competition. On some occasions, provided that all the prerequisites of the applicable provisions of the PPA are in place, the contracting authority may limit the number of candidates to a minimum of five in a restricted procedure and to a minimum of three in a competitive procedure with negotiation, a competitive dialogue and an innovation partnership. Nevertheless, the number of candidates must be sufficient to ensure genuine competition.

## 2.9 Evaluation Criteria

The PPA establishes that public procurement awards shall be based on the most economi-

cally advantageous tender, which shall be identified on the basis of one of the following award criteria:

- the lowest price;
- level of costs, taking into account cost effectiveness, including life-cycle costing; or
- best price-quality ratio, which shall be assessed on the basis of the price or level of costs, as well as indicators including qualitative, environmental and/or social aspects related to the subject matter of the public procurement.

## 3. General Transparency Obligations

### 3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

The PPA requires contracting authorities to make public the tender documentation so that it is available to all interested economic operators. The tender documentation includes, among others, the criteria for evaluation of the tenders. Therefore, the evaluation methodology, which would be used by the contracting authority to determine the contractor, is transparent and is explicitly stated beforehand. This requirement for publicity goes hand in hand with the right of any interested economic operator to file an appeal against the decision for opening the public procurement procedure.

### 3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

In open procedures, where any interested party is able to freely submit a tender, the evaluation and ranking of tenders as well as the reasoning thereto is set out in the contract award decision. In restricted procedures, candidates indicate their interest to take part in the procedure and

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are subject to a pre-selection process. The contracting authority shall publish the pre-selection decision in the PPR and thus notifies all candidates who have indicated interest. This pre-selection decision is subject to appeal.

### 3.3 Obligation to Notify Bidders of a Contract Award Decision

The PPA requires that bidders are notified of the contract award decision within three days of its issuing. The bidders are notified via automatically generated message from the Centralised Automated Information System “Electronic Public Procurement” (CAIS EPP) sent to their personal profiles in CAIS EPP. The contract award decision is sent as an attachment to the message. The contract award decision is considered duly served as of its arrival in the bidder’s personal profile, which is verified by means of an electronic time stamp issued by the CAIS EPP platform. Furthermore, the PPA requires that these decisions be made publicly available via the PPR, so that anyone may become acquainted with the reasoning behind the decision.

### 3.4 Requirement for a “Standstill Period”

The Bulgarian PPA is consistent with the EU legislation concerning the requirement for a “standstill period”. The PPA stipulates that the public procurement contract shall not be concluded before the expiry of a period of 14 days from the notification to interested candidates and/or participants of the award decision of the contracting authority. The contract shall be concluded no later than one month after the entry into effect of the award decision or, in case of interim measures, one month of the ruling whereby anticipatory enforcement of the said decision has been granted. The PPA establishes an exception to this rule and provides an explicit list of cases where the standstill period may be ignored and

the award contract signed, before the 14 days have elapsed.

## 4. Review Procedures

### 4.1 Responsibility for Review of the Awarding Authority’s Decisions

Under the provisions of the Bulgarian PPA, specific decisions of the contracting authority are subject to appeal before the Commission on Protection of Competition (CPC). The decisions are outlined explicitly in the provisions of the PPA. The applicable law establishes some exceptions where lodging an appeal against the decisions of the contracting authority is not permissible.

The CPC acts as a first instance administrative jurisdiction which in general has the authority to set aside the decision in whole or in parts, to declare the decision null and void or to leave the appeal without consideration should it find the contracting authority’s decision valid. In its decision the CPC may issue mandatory instructions to the contracting authority.

The decisions of the CPC are in turn subject to appeal before the Supreme Administrative Court (SAC), which performs the role of a cassation court and is the second and final instance of control. The SAC determines the legality of the CPC’s decision and not the decision of the contracting authority itself.

### 4.2 Remedies Available for Breach of Procurement Legislation

Any interested party may claim damages for breach of procurement legislation by the contracting authority in relation to public procurement procedure and/or award of public procurement contract. In order to be held liable under

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the PPA, the following cumulative prerequisites must be met:

- violations in the conduct of a procedure and the conclusion of a public procurement contract, objectified in an unlawful act, action or omission of an administrative body or official, a revoked act or an established unlawful action of the contracting authority of the contract;
- damage occurred in the legal sphere of the claimant from such an act, action or omission; and
- direct and immediate causal link between the damage and the violation/the concluded contract.

In any event, in the absence of any of the elements of the factual composition described above, liability cannot be incurred under the above procedure.

Additionally, the PPA establishes administrative penal provisions with respective fines and monetary sanctions for breach of its provisions. The written statements establishing infringements of the PPA shall be drawn up by officials of the Public Financial Inspection Agency within six months from the day on which the infringer was detected by authorities of the agency upon the conduct of a financial inspection or verification but not later than three years after the commission of any such infringement. The penalty decrees shall be issued by the Minister of Finance or by officials empowered thereby.

### 4.3 Interim Measures

The general rule under the PPA is that an appeal lodged against any decision, action or omission of the contracting authority, except for an appeal against the award decision designating a contractor, shall not suspend the public pro-

urement award procedure unless suspension of the procedure has been requested as an interim measure.

A request for the imposition of an interim measure shall be made simultaneously with the lodging of the appeal. Where the interim measure – suspension of the procedure – has been requested by the appellant, the public procurement award procedure shall be suspended as of the notification of the contracting authority by the CPC of the procedure interim measures procedure instituted until the entry into effect of either:

- the ruling whereby the request for an interim measure is left without consideration; or
- the decision on the appeal if the interim measure has been imposed by CPC.

It is important to note that in cases where the public procurement is divided into lots, an appeal against a decision, action or omission of the contracting authority, including against the award decision designating a contractor, shall not suspend the public procurement award procedure for the lots which are not included in the subject of appeal.

With respect to appeals lodged against the contracting authority's award decisions, the rule is that such appeals suspend the procedure until final resolution on the appeal. However, the contracting authority may request that the CPC allow anticipatory enforcement of the award decision as an interim measure. This request must be motivated and substantiated by evidence.

### 4.4 Challenging the Awarding Authority's Decisions

The PPA permits the appeal of decisions of the contracting authorities. Any decision of the con-



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tracting authority in the procedures listed below may be subject to appeal:

- public procurement award, including on the basis of a framework agreement, a dynamic purchasing system or qualification systems;
- conclusion of a framework agreement;
- setting up a dynamic purchasing system or establishment of qualification systems; and
- design contest.

On the contrary, some decisions explicitly stated in the PPA may not be reviewed by the CPC:

- the designation of a contractor of the public procurement by reopening of competition, where the total value of the procurements awarded under the framework agreement by the contracting entity concerned is less than:
  - (a) BGN270,000 for works; or
  - (b) BGN70,000 for supplies and services, including the services specified in Annex 2 of the PPA; and
- any decisions commencing a procedure in the part regarding the reasons for the indivisibility of the subject matter of the procurement into lots.

The subject matter of the appeals lodged before the CPC is as to the legality of the decisions of the contracting authority, including as to the presence of discriminatory economic, technical or qualification requirements in the contract notice, the documents or in any other document related to the procedure. In addition to the above, any actions or omissions of the contracting authority whereby the access to, or participation of persons in, the procedure is impeded shall also be subject to review.

Depending on whether an appeal is brought against a decision (and accordingly its type),

action or omissions of the contracting authority, the following persons shall have the right to appeal – all interested parties, participants and candidates concerned.

- “Interested party” shall be any person who or that has or has had an interest in obtaining a particular public procurement and who or that has been or risks being harmed by an alleged infringement.
- “Participant concerned” shall be a participant that has not been definitively excluded from a procedure. An exclusion shall be definitive where the participant has been notified of the decision whereby the said participant has been excluded and the said decision has entered into effect. A participant concerned shall furthermore be any participant that has been ranked but not selected as a contractor.
- “Candidate concerned” shall be a candidate that has not been definitively excluded from participation at the stage of pre-selection because the said candidate has not been notified of the exclusion or the review procedure for the decision whereby the said candidate has been excluded has not been closed.

## 4.5 Time Limits for Challenging Decisions

The time limit for lodging an appeal against the decisions of the contracting authority is ten days. The exact moment from which this term starts running depends on the type of decision which would be challenged by the appellant. For instance, it may start from the expiration of a lawfully established term, from the moment of publication of the decision or from the moment of receipt of notice of the issuance of the decision and a copy of the decision.

The ten-day term is applicable both to appeals against the contracting authority’s decisions as

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well as to its actions or omissions. The term shall start from the notification of the relevant action; or, if the person is not notified, as well as in the event of omission, within ten days from the date of expiry of the time limit for the performance of the relevant action.

## 4.6 Length of Proceedings

The procedure before the CPC is initiated within three days of receipt of the appeal, followed by a review of the case file. The term for completion of the review and issuance of a decision by the CPC is one month from the initiation procedure when the public procurement's estimated value is in the higher range of the PPA thresholds (the EU procurement procedures). In all remaining cases the term is shorter – 15 days from the initiation of the procedure. The decision of the CPC, together with its reasoning, shall be drawn up and announced publicly not later than seven days after the last open hearing in which the case has been declared resolved. The above discussed terms are instructive and in practice the length of the proceedings is between two and three months.

The cassation procedure before the SAC takes between six months and a year to complete. The hearing of the cassation appeal case before the SAC shall be scheduled within a period that may not exceed four months after the receipt of the appeal at the court. The cassation proceedings usually include one or two open court hearings and then the court has a non-binding term of one month to announce its decision on the matter.

## 4.7 Annual Number of Procurement Claims

On the CPC's website, there is publicly available information regarding the number of procedures initiated before the CPC, which can be obtained via refined searches using the platform's search

engine. Based on the data provided by the searches, there have been a total of 778 procedures under the PPA initiated before the CPC from 1 January 2022 to 31 December 2022. This marks a slight decline in numbers compared to the previous year, when a total of 897 procedures under the PPA were initiated before the CPC.

## 4.8 Costs Involved in Challenging Decisions

For procedures initiated before the CPC with respect to appeals under the PPA, a state fee is due. It is calculated in accordance with the estimated value of the public procurement or of the lot respectively, as follows:

- for public procurement awards with estimated value of up to BGN1 million the state fee amounts to BGN850;
- for public procurement awards with estimated value ranging from BGN1 million to BGN5 million, the state fee is BGN1,700; and
- for public procurement awards with estimated value exceeding BGN5 million, the state fee amounts to BGN4,500.

For cassation appeal of the CPC's decisions before the SAC, the same state fee amounts apply.

With regards to attorney's fees for representation of the appellant or the contracting authority before the CPC and the SAC, respectively, there are lawfully established minimum amounts based on the estimated value of the procurement, which are set out in Ordinance No 1 of 9 July 2004 on the minimum amounts of lawyers' fees, Promulgated, SG No 64/23 July 2004 as subsequently amended and supplemented.

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## 5. Miscellaneous

### 5.1 Modification of Contracts Post-award

The PPA allows the modification of public procurement contracts post-award. The conditions for such modifications are strict and are listed explicitly and exhaustively in the PPA. Public procurement contracts and framework agreements may be modified where:

- the modifications have been provided for in the procurement documentation and in the contract in clear, precise and unequivocal clauses, including price revision clauses or options; the scope and nature of possible modifications or options as well as the conditions under which they may be used must not result in an alteration of the subject matter of the procurement of the framework agreement;
- provision of additional supplies, services or works has become necessary due to unforeseen circumstances, and the said supplies, services or works were not included in the initial public procurement, in case a change of contractor:
  - (a) cannot be made for economic or technical reasons, including requirements of interchangeability or interoperability with existing equipment, services or facilities procured under the initial procurement, and
  - (b) would cause significant inconvenience related to the maintenance, operation and servicing or duplication of costs for the contracting authority;
- owing to circumstances which the contracting authority exercising due care could not have foreseen, a need for modification has arisen and this does not entail a change to the subject matter of the contract or framework agreement;
- the contractor has to be replaced by a new contractor, if the possibility for a replacement is provided for in the procurement documents and in the contract in clear, precise and unequivocal clauses concerning the arising of specific conditions;
- the contractor has to be replaced by a new contractor, where there is universal or partial succession in title for the initial contractor, including upon transformation of the initial contractor through merger by acquisition, merger by the formation of a new company or division, or through change of the legal form thereof, as well as where the said contractor is being wound up or is under pending insolvency proceedings, and the following conditions are simultaneously fulfilled:
  - (a) the grounds for exclusion from the procedure do not apply to the new contractor and the said contractor fulfils the selection criteria as initially established, and
  - (b) the change of the contractor does not entail other substantial modifications to the public procurement contract or the framework agreement and is not aimed at circumventing the PPA;
- the terms established above regarding the replacement of a contractor also apply to any member of the contractor when it is a consortium which is not a legal person; and
- modifications which are not substantial have to be made.

A modification of a public procurement contract or of a framework agreement shall be considered to be substantial where the said modification renders the contract or the framework agreement materially different in character from the one initially concluded.

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## 5.2 Direct Contract Awards

The direct award of contracts is typically used when the procurement's estimated value is below certain thresholds stated in the public procurement legislation. The PPA allows direct award of public procurement contracts in some cases as long as the estimated value of the procurement is less than:

- BGN50,000 for works;
- BGN70,000 for services under Annex 2 to the PPA; or
- BGN30,000 for supplies and services other than those under Annex 2 to the PPA.

In the case of procurement of services or supplies, mentioned above, the contracting authority may make evidence of the expenditure by means of primary payment documents only, without the need to conclude a written contract with the contractor.

## 5.3 Recent Important Court Decisions

Some of the more important decisions in recent case law of the SAC are as follows.

- Decision No 10644 of 23 November 2022 of SAC in administrative case No 5589/2022, where it was ruled that the requirement that the expert involved in the execution of the construction be appointed under an employment contract, at the stage of submission of a tender, is restrictive of the right of economic operators to prove their capacity to perform the contract by using the capacity of third parties. In a similar context is Decision No 805 of 25 January 2023 of SAC in administrative case No 7365/2022. These decisions are of importance because in previous SAC decisions it was not acceptable for economic operators to use the capacity of third par-

ties to prove their capability to perform the procurement contract.

- Decision No 1041 of 31 January 2023 of SAC in administrative case No 10877/2022, where it was ruled that the provision of a European Single Procurement Document (ESPD) containing different circumstances from those specified in the notice of award of the public contract constitutes a violation of the mandatory provision of the PPA and always constitutes a material breach of the rules for the opening of a procurement procedure. In its previous court decisions, SAC has not addressed the discrepancies between the ESPD and the notice of award of the public contract or other relevant documents of the documentation of the procurement procedure. This means that contracting authorities must pay strict attention not to allow any differences between the documentation and the platform of the PPR when preparing the public procurement tender.

## 5.4 Legislative Amendments Under Consideration

Some of the most recent changes in the PPA concern the inflation rise in Bulgaria, which has led to a drastic increase in the prices of a number of services, products and activities. In this regard, a mechanism for amending the prices of public procurement contracts in case of inflation was introduced in a new statutory provision of the PPA. The Council of Ministers adopted a methodology outlining the rules and regulations under which these amendments of the price as a result of inflation should be executed.

A draft bill was recently submitted with proposed changes to the PPA. In essence, the proposed amendments aim to refine the concept of "engineering" in construction works and to break the dependency of the designer and construction

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supervision on the construction company that was awarded the public procurement contract. There is a proposition to regulate the compulsory holding of design, supervision and construction tenders for non-engineering works, while introducing additional obligations for contractors of engineering projects. Given that the 48th National Assembly had only been in session for just under four months before it was dismissed, the amendments could not be passed. The debate on the issue remains ongoing and the draft bill will most probably be reviewed by the next National Assembly.

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