Luxembourg

Stibbe

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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 Law of 8 April 2018 (Law of 8 April 2018 on public procurements, Mémorial A, No. 243, 16 April 2018) on public procurements (the Law) implemented Directives 2014/24/EU (the Public Sector Directive) and 2014/25/EU (the Utilities Sector Directive). It repealed the Law of 20 June 2009 on public procurements.

The Law is applicable as from 20 April 2018.

The Law is divided into four main books, each governing a specific field:

a. Book 1 applies to every procurement procedure (national procedures below EU thresholds, above EU thresholds and utilities sectors);
b. Book 2 applies to procurements above EU thresholds (public sector);
c. Book 3 applies to procurements regarding utilities sectors; and
d. Book 4 governs questions of governance in public procurements.

The Grand-Ducal Regulation of 8 April 2018 (Grand-Ducal Regulation of 8 April 2018 putting the Law of 8 April 2018 on public procurements into effect (…), Mémorial A, No. 244, 16 April 2018) (the Regulation) puts the Law into effect and provides the details governing the different procurement procedures. It has the same structure as the Law and is divided into four main books, each one detailing the rules applying to the corresponding book of the Law.

The Ministry Regulation of 20 April 2018 (Ministry Regulation of 20 April 2018 instituting and providing standardised specifications for contracts on public works, Mémorial A, 24 April 2018, No. 270) provides for and standardises the special specifications for public contracts in a specific technical regulation. This new text repeals the Grand-Ducal Regulation of 24 March 2014 (Grand-Ducal Regulation of 24 March 2014 instituting and providing standardised specifications for contracts on public works, Mémorial A, 7 April 2014, No. 50, pp. 562–564), with effect from 24 April 2018, and only applies for public works procurement.

The Ministry Regulation of 31 July 2018 (Ministry Regulation of 31 July 2018 instituting and providing standardised specifications for public procurements, Mémorial A, No. 672, 10 August 2018) institutes standardised general conditions regarding general contractual stipulations and standardised special conditions for technical specifications, and applies to all public works contracts related to the building sector; it also institutes standardised special specifications for public works contracts.

The Ministry Regulation of 4 March 2019 (Ministry Regulation of 4 March 2019 instituting and providing standardised general conditions regarding general contractual stipulations and standardised special conditions for technical specifications, and applies to all public works contracts related to the building sector; it also institutes standardised special specifications for public works contracts in the metallic construction sector, Mémorial A, No. 165, 19 March 2019) institutes standardised general conditions regarding general contractual stipulations and standardised special conditions for technical specifications, and applies to all public works contracts related to the building sector; it also institutes standardised special specifications for public works contracts in the metallic construction sector.

The Ministry Regulation of 8 July 2019 (Ministry Regulation of 8 July 2019 instituting standardised special conditions for public works in the tinsmith sector, Mémorial A, No. 487, 11 July 2019) institutes standardised special conditions for public works in the tinsmith sector.

The modified Grand-Ducal Regulation of 27 August 2013 (Grand-Ducal Regulation of 27 August 2013 regarding the use of electronic means in public procurement procedures (…), Mémorial A, No. 161, 6 September 2013, p. 3,096) brings also the Law into effect by providing for conditions regarding the use of electronic means in public procurement procedures. It has been modified by the Grand-Ducal Regulation of 25 January 2019 (Grand-Ducal Regulation of 25 January 2019 (…), Mémorial A, No. 172, 21 March 2019). This Regulation has also been brought into effect by a Ministry Regulation of 2 December 2013 (Ministry Regulation of 2 December 2013 instituting the terms of use of the public procurement portal, Mémorial A, 10 December 2013, No. 214), which cites the conditions for the use of the public procurement portal. The Grand-Ducal Regulation of 27 August 2013 is also currently subject to modifications, pursuant the adoption of the Regulation. The draft of the text modifying the provisions of the Grand-Ducal Regulation of 27 August 2013 has already been submitted to the opinion of the Council of State and is currently being amended by the Government (same procedure as for the modification of the Regulation). The new provisions of the Grand-Ducal Regulation of 27 August 2013 will soon be adopted and published in order to clarify the use of electronic means in the public procurement procedures.

The Law of 16 May 2019 on electronic invoicing in public procurement, implementing Directive 2014/55/UE. The Law is applicable as from 18 April 2019, with an exception to all sub-central contracting authorities and contracting entities for which the Law will be applicable as from 18 April 2020.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The principles of general Luxembourg constitutional and administrative law apply.

The fundamental principles governing public procurement in Luxembourg are provided by Article 10 of the Law and can be summarised as follows:

a. contracting authorities shall treat economic operators equally, without discrimination and act with transparency;
b. contracting authorities ensure that, during the procurement, the issues and problems related to the environment and promoting sustainable development are considered;
c. contracting authorities shall inform the economic operators as soon as they have taken decisions about their tenders delivered under a public procurement procedure; and
d. contracting authorities may use electronic means in procurement procedures in accordance with the rules set out in the Regulation.

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

Specific rules (Book 3 of the Law) exist concerning the award of public procurement contracts in the "special sectors" (i.e. in the water, energy, transport and postal services sectors).

With regard to procurement rules tailor-made for defence and security markets, the Directive 2009/81/EC on defence and security procurement has been implemented by the Law of 26 December 2012 (Law of 26 December 2012 on public procurements in the fields of defence and security (…), Mémorial A, No. 293, 31 December 2012, p. 4,547) on public procurement in the fields of defence and security. (This Law was finally adopted following the decision of the European Commission to refer an appeal to the Court of Justice of the European Union against Luxembourg for failure to implement the Directive.)

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

The principles of general Luxembourg constitutional and administrative law apply.

As a matter of principle, the Regulation on Non-Litigious Administrative Procedure (Grand-Ducal Regulation of 8 June 1979 regarding the procedure to be followed by the governmental and local administrations, Mémorial A, No. 54, 6 July 1979, p. 1,096; doc parl 2313) ensures the right of the public to access their administrative files. Pursuant to the Law, the contracting authority shall notify its awarding decision to unsuccessful tenderers and communicate the factual and legal reasons for the rejection of their bids.

The Law of 18 January 2018 on a transparent and open administration (Law of 18 September 2018 on a transparent and open administration, Mémorial A, No. A883, 1 October 2018) allows general access to administrative documents for any natural or legal person. Some exceptions are applicable, such as with regards to secret state affairs, security or defence sectors, etc.

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

The Law transposes the 2014 Directives on public procurement, which are in turn influenced by the GPA rules.

Luxembourg is also a party to the Agreement on Government Procurement (GPA) and is thus bound by its provisions, which impose rights and obligations. Articles 62 (Book 2) and 122 (Book 3) of the Law confirm the application of the GPA. The GPA was recently amended by a protocol (Council Decision 2014/115/EU of 2 December 2013 on the conclusion of the Protocol Amending the Agreement on Government Procurement, OJEU, 7 March 2014, L68/1) negotiated by the European Commission on behalf of the Member States and was integrated into the European legal framework through a decision of the Council of 2 December 2013 (Protocol Amending the Agreement on Government Procurement, OJEU, 7 March 2014, L68/2).

2 Application of the Law to Entities and Contracts

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

Article 2 of the Law enumerates contracting authorities covered by the public procurement rules in the ordinary sectors.

These contracting authorities are principally the "public authorities" (e.g. the State and municipalities (Communes)), and the public entities fulfilling the following criteria:

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

In accordance with the European Directives, the Luxembourg legislation has a broader field of application in the special sectors. In addition to the contracting authorities mentioned in the ordinary sectors, the special sectors rules also include "public undertakings" (i.e. any undertaking over which the public authorities have a dominant influence) and some private entities (Article 87 of the Law).

2.2 Which types of contracts are covered?

The public procurement rules cover contracts 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.

Public works contracts cover public contracts having as their object one of the following:

(a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II of the Law;
(b) the execution, or both the design and execution, of a work; or
(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.

Public service contracts cover all public contracts having as their object the provision of services other than those referred to in the definition of public works contracts.

Public supply contracts cover public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations.

2.3 Are there financial thresholds for determining individual contract coverage?

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

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

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

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

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

Concessions contracts are defined by the Law of 3 July 2018 (Law of 3 July 2018 on the awarding of concessions contracts, Mémorial A, No. 560, 5 July 2018) on the awarding of concessions contracts.

Article 5, 1) of the Law of 3 July 2018 defines concessions contracts as being works or services concessions, as defined in points (a) and (b):

(a) 'works concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment; and

(b) 'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

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

Article 22 of the Law provides for the possibility to conclude framework agreements in the ordinary sectors. In conformity with the European Directives, more flexibility with regard to the award of framework agreements exists in the special sectors (Article 130 of the Law).

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

Article 11 of the Law provides that a contract can be divided into lots. Articles 2 to 7 of the Regulation provide for the rules governing the division into lots. In the ordinary sectors, contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots. For public contracts concerning the execution of several professions, trades or industries, special rules apply.

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

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

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

Luxembourg public procurement legislation previously made a distinction between the award to the lowest regular tender and the award to the regular and most advantageous tender, according to the criteria mentioned in the contracting documents. Although a tender may still be awarded on the basis of price or costs alone, this terminological distinction has been abandoned in the Law. All public contracts are awarded to the most economically advantageous tender. The most economically advantageous tender is determined:

- on the basis of the sole price;
- on the basis of the cost, using a cost-effectiveness approach, such as life-cycle costing; or
- on the basis of the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

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

- an open procedure, in which all interested contractors may submit tenders;
- a restricted procedure with or without publication, in which only those contractors that are invited by the contracting authority may submit tenders; and
- a negotiated procedure, which allows the contracting authority to consult the economic operators of its choice and to negotiate the terms of the contract with one or more of them. In the ordinary sectors, this procedure can only be chosen in limited cases listed in the Law.

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

3.2 What are the minimum timescales?

The main principles can be summarised as follows:

- Tenders have, in principle, at least 42 days to submit a tender for open procedures. For restricted procedures, there is a timescale of 27 days to submit a request to participate and 30 days to submit a tender.
- In certain cases, such as urgency, special rules on minimum timescales apply. In these cases, the time limit is reduced to a minimum of 15 days.

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

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

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

3.4 What are the rules on evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

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

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

An obligation exists for contracting authorities to demand justification for abnormally low tenders (either the total price or costs). The rules set out in the Grand-Ducal Regulation for the price analysis are applicable. In Luxembourg, if a tender is 15 per cent below the average price, the economic operator is required to produce a price analysis. If this analysis does not explain the low offer, it can be rejected.

A contracting authority has an amount of discretion to decide whether a price is "abnormal", unless a specific threshold needs to be respected. In these award procedures, an obligation may exist to demand justification for abnormally low tenders if the total price is at least 15 per cent below the average total price submitted by the tenderers.

3.6 What are the rules on awarding the contract?

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

The contracting authority must make a motivated decision when deciding on the selection of tenderers (in cases where the procedure exists of two phases; the first phase is the submission of applications for participation in the procedure), or when deciding on the award of the contract.

3.7 What are the rules on debriefing unsuccessful bidders?

Pursuant to the Law, the contracting authority shall notify its awarding decision to unsuccessful tenderers and communicate the reasons for the rejection of their bids. The contract with the successful bidder can only be signed after the expiry of a period of at least 15 days begins to run from the date of notification of the rejection of the offer to other competitors. Thus, the administrative withdrawal of the award decision (in the event of a valid objection) within this delay is possible before the signature of the contract.

3.8 What methods are available for joint procurements?

In the event that two (or more) contracting authorities wish to set up the joint realisation of public works contracts, public supply contracts, or public service contracts, Article 25 of the Law provides the possibility of a joint procurement. The contracting authorities may designate one of the contracting authorities to act as their authorised representative during the award and execution of the contract.

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

3.9 What are the rules on alternative/variant bids?

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

The Grand-Ducal Regulation provides that a contracting authority may, in the special specifications, consider different implementation/performance options for one particular or more slips of the price schedule which must then be specified, or provide for the possibility of admitting alternative technical solutions for which it sets the criteria to which they must respond. In case of alternative technical solutions, the desired result of the service must be clearly defined by the special specifications.

Unsolicited variants from the bidder are not eligible.

If variants are requested by the contracting authority, the tender schedule will provide for total prices and prices/units for each eventuality.

For public contracts under EU thresholds, it is permissible for the tenderer to make an offer for all possibilities of performance/implementation envisaged in the special specifications, or for only one of them. Its offer is valid regardless of the choice made between the basic offer and the variant(s).

Where the special specifications contain variant(s) and alternative technical solutions, the result of the tender is established by a unique ranking of all tenders received and the selection of the successful tenderer must be made in accordance with the awarding criteria specified in the special specifications.

3.10 What are the rules on conflicts of interest?

Article 13 of the Law of 8 April 2018 states that conflict of interest exists if a civil servant, public authority figure or any

other person intervenes in the award and the performance of a public contract, in the situation where the person involved has direct or indirect, financial, economic or other personal interests that may be considered to compromise their impartiality and independence with regard to the award or execution of a public contract.

Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

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

Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency (Article 26 of the Law).

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

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

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

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

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

- The first exception concerns the award of contracts between two contracting authorities (in-house contracts), on the basis of the conditions stipulated in Article 8(1) of the Law and the case law of the European Court of Justice.
- The second exception concerns certain types of situations in which contracting authorities together seek to ensure the performance of their public tasks, according to the conditions stipulated in Article 8(4) of the Law and the case law of the European Court of Justice.

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

5 Remedies

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

The Law of 10 November 2010 (Law of 10 November 2010 establishing procurement remedies, Mémorial A, No. 203, 12 November 2010; doc parl 6119; Directive 2007/66/EC) establishing procurement remedies implemented Directive 2007/66/EC (Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJEU, 20 December 2007, L335/31).

The rules of the Law of 10 November are applicable to procedures above the threshold for European publication.

The Law (applicable also under EU thresholds), as well as the Law of 10 November 2010, contains a standstill obligation on the basis of which, within a time frame of 15 days between the notification of the award decision and the contract conclusion with the chosen tenderer, a suspending procedure before the President of the Administrative Court can be introduced.

The aggrieved bidder may submit via an attorney-at-law an action for annulment before the Administrative Court. An appeal against the decision may be brought before the Administrative Court of Appeal. The Supreme Court has no jurisdiction for administrative matters.

The contentious appeal is an objective appeal, whose central issue is to decide whether the contested act is legal.

The appeal period is three months, which starts to run from the correct notification of the decision of rejection or award (with reasons for the refusal and remedies). A notification is correct if the decision was notified directly to the addressee, gives explanations on the grounds of the decision and provides information about legal remedies and delays within which they may be exercised. Without a correct notification of the decision, the delays for appealing do not run.

The procedure is of a written nature.

The Law of 21 June 1999 (Law of 21 June 1999 regarding the procedure in front of the administrative courts, Mémorial A, No. 98, 26 July 1999, p. 1,892; doc parl 4326) on administrative procedures provides fixed and compulsory periods to notify briefs.

Following the filing of the request with the clerk of the Tribunal:

a. the contracting authority shall notify its brief in answer within a three-month period;
b. the applicant shall then notify its reply within a one-month period; and
c. the contracting authority shall finally notify its reply within a one-month period.

The attorneys-at-law shall then be convened for the pleadings in the months following the last notification of the defendant's brief.

A decision from the Tribunal shall not be expected before a nine-month or one-year period from the filing of the request.

The Law of 10 November 2010 establishing procurement remedies provides more details on the remedies for contracts falling within the scope of the European Directives.

If a contracting authority is seeking damages, it must then appeal to the civil courts.

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

The Law of 10 November 2010 also includes rules on remedies regarding concession contracts and for procurements in the fields of defence and security.

For the other contracts, due to lack of specific proceedings, general Luxembourg (civil or administrative procedural) law can be applied. Various measures can be requested, ranging from the suspension or annulment of the different decisions taken by the contracting authority, to the suspension or annulment of the contract and damage claims.

These measures can often be combined, even if all of them cannot necessarily be brought before the same judge.

5.3 Before which body or bodies can remedies be sought?

Suspension or annulment procedures against a decision of a contracting authority are brought before the Administrative Courts (Administrative Court (*tribunal administratif*) and Administrative Court of Appeal (*cour administrative*)).

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

5.4 What are the limitation periods for applying for remedies?

A contract may not be concluded following the decision to award a contract before the expiry of a period of:

a. at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used; or
b. at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if other means of communication are used.

Tenderers shall be deemed to be an 'interested party' and are thereby permitted to take action if they have not yet been definitively excluded. Exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure. Candidates shall be deemed to be an interested party if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

Regarding the procedural rules, the provisions of the ordinary law governing procedures before the Administrative Courts apply. Article 11 of the Law of 21 June 1999 (Law of 21 June 1999 regarding the procedure in front of the administrative courts, op. cit. 33) provides that the stay of execution of an administrative decision during the appeal proceedings can be decreed only on the double condition that:

a. the execution of the contested decision may cause serious and definitive harm; and
b. the means invoked with the support of the appeal directed against the decision appear serious.

The demand for a stay of execution is to be presented by distinct application addressed to the Chair of the Tribunal and must meet the conditions planned for any appeal before the Administrative Courts of law.

The contracting authority or contracting entity is obliged to defer to the award decision until the notification of the President's order.

5.5 What measures can be taken to shorten limitation periods?

No provision of the laws provides for exceptions in order to shorten the standstill period.

5.6 What remedies are available after contract signature?

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

Third parties can nonetheless still try to obtain the suspension/annulment of the contract before the civil courts.

Furthermore, damage claims can be introduced before the civil courts (district court – *Tribunal d'arrondissement*).

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

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

Judicial proceedings may take a few weeks (e.g. suspending proceedings of extreme urgency before the President of the district court sitting in summary proceedings) or one to two years (e.g. annulment proceedings before the Administrative Courts or damage claim before civil courts).

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

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

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

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

No specific legislation exists in this regard.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

The Law provides that, in the event of important changes regarding prices, salaries or contract performance clauses arising between the initial tender and the completion of the contract, the contract may be:

a. cancelled:
   - upon request of the contracting authority, in the event of an act constituting *force majeure*; or
   - upon request of the successful tenderer, in the event that the date of the beginning of the performance of the works is in excess of 40 days; or in the event that the contracting authority modifies the contract to impose a variation of more than 20 per cent of the contract value;
b. adapted:
   - the Regulation provides that, in any procurement procedure, the contracting authority may stipulate a procedure for the adaptation of the contract. In the absence of such a stipulation, the common rule from the Grand-Ducal Regulation of 8 April 2018 shall apply:

- upon request of one of the parties, in the event of an unforeseen variation of the prices or salaries because of new legal rules since the bidding; or
- upon request of one of the parties, in the event of an important and unforeseen fluctuation of the prices or salaries based on official quotation; or

c. modified:

- upon request of one of the parties, in the event of an act constituting *force majeure*; or
- upon request of the successful tenderer, in the event that the date of the beginning of the performance of the works exceeds 40 days, based on the fault of the awarding authority; in the event the contracting authority modifies the contract to impose a variation of more than 20 per cent of the contract value; or in the event that the contractual delay is in excess of more than 40 days.

In any of the above-mentioned cases, the request shall in general be notified to the other party using a formal notice (registered letter) providing the reasons justifying a cancellation, an adaptation or a modification of the contract.

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

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

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

Apart from the situations mentioned under question 6.1, the Law or the Regulation do not provide for any other specific situation giving place to a post-contract signature.

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

No specific legislation exists in this regard. Please see question 6.1.

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?

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

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

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

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

The regulatory framework implementing the 2014 European Directives (Law and Regulation – see question 1.1) has entered into force on 20 April 2018. No major changes to this regulatory framework are expected in the near future.

8.2 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

Please see question 8.1 above.

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