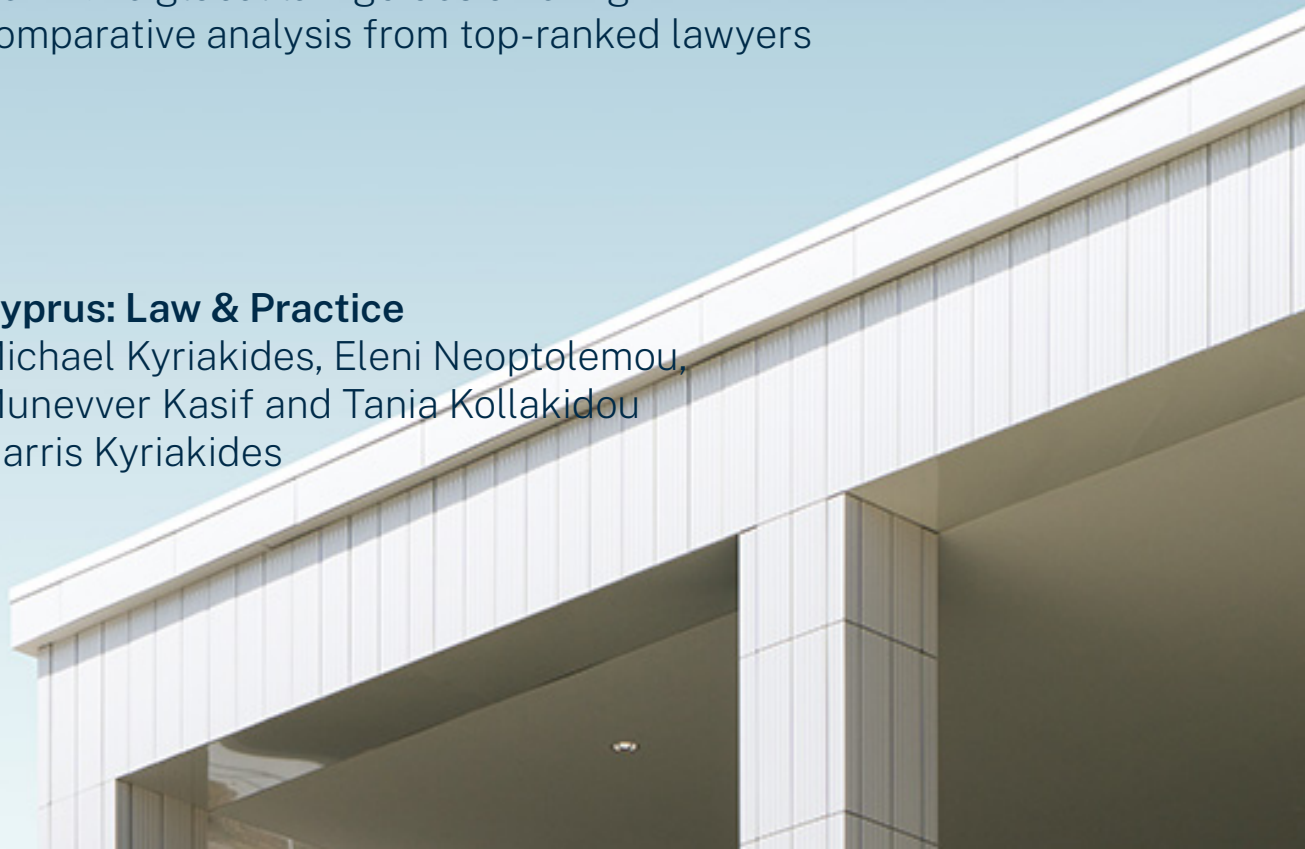

CHAMBERS GLOBAL PRACTICE GUIDES

Public Procurement 2023

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Cyprus: Law & Practice

Michael Kyriakides, Eleni Neoptolemou,
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CYPRUS

Law and Practice

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Contents

1. General p.5

- 1.1 Legislation Regulating the Procurement of Government Contracts p.5
- 1.2 Entities Subject to Procurement Regulation p.5
- 1.3 Types of Contracts Subject to Procurement Regulation p.5
- 1.4 Openness of Regulated Contract Award Procedure p.6
- 1.5 Key Obligations p.6

2. Contract Award Process p.7

- 2.1 Prior Advertisement of Regulated Contract Award Procedures p.7
- 2.2 Preliminary Market Consultations by the Awarding Authority p.7
- 2.3 Tender Procedure for the Award of a Contract p.7
- 2.4 Choice/Conditions of a Tender Procedure p.8
- 2.5 Timing for Publication of Documents p.8
- 2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders p.8
- 2.7 Eligibility for Participation in a Procurement Process p.8
- 2.8 Restriction of Participation in a Procurement Process p.9
- 2.9 Evaluation Criteria p.10

3. General Transparency Obligations p.10

- 3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology p.10
- 3.2 Obligation to Notify Interested Parties Who Have Not Been Selected p.10
- 3.3 Obligation to Notify Bidders of a Contract Award Decision p.11
- 3.4 Requirement for a "Standstill Period" p.11

4. Review Procedures p.11

- 4.1 Responsibility for Review of the Awarding Authority's Decisions p.11
- 4.2 Remedies Available for Breach of Procurement Legislation p.11
- 4.3 Interim Measures p.11
- 4.4 Challenging the Awarding Authority's Decisions p.12
- 4.5 Time Limits for Challenging Decisions p.12
- 4.6 Length of Proceedings p.12
- 4.7 Annual Number of Procurement Claims p.12
- 4.8 Costs Involved in Challenging Decisions p.12

5. Miscellaneous p.13

- 5.1 Modification of Contracts Post-award p.13
- 5.2 Direct Contract Awards p.13
- 5.3 Recent Important Court Decisions p.13
- 5.4 Legislative Amendments Under Consideration p.14

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Harris Kyriakides was established in 1976 and offers a full range of corporate and commercial legal services. The firm has a substantial transactional and corporate practice with extensive international reach and a large and diverse client base. It has consistently advised national and multinational corporations, financial insti-

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1. General

1.1 Legislation Regulating the Procurement of Government Contracts

The procurement of government contracts in Cyprus is regulated by the following legislation:

- Law 73(I)/2016, which regulates public procurement procedures;
- Law 104(I)/2010, which regulates procedures before the Tenders Review Authority (TRA);
- Law 140(I)/2016, which regulates the procurement procedures of institutions acting in the sectors of water, energy, transport and postal services, and on related issues;
- Law 11(I)/2017 on the regulation of the concession award procedures and related issues;
- Law 173(I)/2011 for the co-ordination of the procedures for concluding contracts of projects, procurements and provision of services concluded by contracting authorities (CAs) in the fields of defence and security, and related issues; and
- EU Regulation No 1370/2007 on public passenger transport services by rail and by road.

1.2 Entities Subject to Procurement Regulation

All CAs are subject to the public procurement legislation, ie, the state, any regional or local authorities, bodies governed by public law or associations formed by one or more such authorities, or one or more such bodies governed by public law. The definition of the law is rather broad, and it captures the majority of public bodies, apart from telecommunications, as well as private companies that, due to a concession agreement, enjoy exclusive rights that are usually reserved for the state or a public body.

1.3 Types of Contracts Subject to Procurement Regulation

The public procurement legislation applies to contracts for the provision of supplies, goods, services, the execution of works and for concession awards (providing exclusivity rights or special rights, otherwise reserved to public bodies).

Public procurement legislation provides different thresholds depending on the nature of procurement and the sector. The current thresholds are as follows:

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- under Law 73(I)/2016 for the central public sector, the threshold for supplies, goods and services is EUR140,000;
- under Law 73(I)/2016 for non-central public sector, the threshold for supplies, goods and services is EUR215,000;
- under Law 140(I)/2016 and Law 173(I)/2011, the threshold for supplies, goods and services is EUR431,000;
- under Law 11(I)/2017, the threshold for services is EUR5,382,000;
- under all the applicable law, the threshold for works is EUR5,382,000; and
- for social and other special services under Law 73(I)/2016, the threshold is EUR750,000, and, under Law 140(I)/2016, it is EUR1,000,000.

1.4 Openness of Regulated Contract Award Procedure

In some tenders, there might be eligibility criteria for bidders from countries participating in WTO's Government Procurement Agreement (GPA), or that have signed and ratified association agreements or bilateral agreements with the EU, for the field of public procurement.

1.5 Key Obligations

The public procurement legislation sets a few principles for all CAs to apply in any public procurement procedure, namely:

- to treat all economic operators equally and without discrimination;
- to act in a transparent and proportionate manner; and
- not to intentionally design any procedure to avoid the enforcement of the public procurement legislation, for example by splitting supplies in various tenders below the threshold, or by artificially narrowing the competition.

The above apply throughout the tender procedure, ie even through the market research phase (before even drafting the tender documents/requirements) and after the signing of a public contract.

Depending on the type of the procedure (ie open or closed tender procedure, competitive process with negotiations or competitive dialogue), a CA will usually have to:

- publish in the Official Journal of the EU and the e-procurement website (national forum of public tenders) the notice describing the tender's requirements and inviting tenderers to bid;
- review tenders and evaluate if the tenderers have the necessary legal and financial standing and fulfil all the requirements specified in the tender documents to perform the contract;
- notify the contract award decision to all tenderers;
- hold for a minimum of 15 calendar days from any action, providing the opportunity to tenderers to submit a recourse before the TRA;
- conclude the contract, after the above standstill period, provided that no recourse was filed and no interim measures were issued; and
- publish the signing of the contract in the Official Journal of the EU.

Where there is a closed tender procedure or competitive process with negotiations or competitive dialogue, the CA, after evaluating the legal and financial standing, and, depending on the tender requirements, their technical or professional abilities, invite the shortlisted and qualified tenders to submit tenders or carry out negotiations.

2. Contract Award Process

2.1 Prior Advertisement of Regulated Contract Award Procedures

Any contract regulated by the public procurement legislation needs to be published in e-procurement's [website](#). The notice describing the tender's requirements and the award of the contract are also published in the Official Journal of the EU.

Where the CA does not follow the above obligation regarding advertisement, the law provides interested parties with an extended period to challenge any decision or award of contract before the TRA, sometimes even for a period of six months.

The notice in the EU's Official Journal includes:

- information about the CA;
- details on how to access the tender documentation/requirements;
- description of the procurement and the main requirements, such as the quantity of the supplies or the nature of the works, the duration of the contract;
- the award criteria;
- briefly, any conditions of participation; and
- the type of the procedure and the relevant timeframe.

There is a standard form that it is usually completed by the CA.

2.2 Preliminary Market Consultations by the Awarding Authority

The public procurement legislation permits CAs to carry out preliminary market consultations before launching the tender, in order to get information about the market, the requirements of the products or the value of the requested products,

provided that the general principles of the legislation, as mentioned above, apply.

Where a private company assists in the drafting of the tender specifications, extra measures need to be taken to ensure that the participation of the company does not distort the competition and all tenderers/economic operators are treated equally.

2.3 Tender Procedure for the Award of a Contract

According to the public procurement legislation, there are the following types of public procurement contracts.

- Open tender procedure – the CA invites the public to tender.
- Restricted tender procedure – where there is an open invitation to apply for participation, but only the shortlisted economic operators shall be allowed to submit a tender.
- Competitive process with negotiations – the CA invites a specific number of candidates to enter negotiations for the contract, provided that they fulfil the minimum criteria set in the relevant notice. There might be a number of negotiation rounds; however, the final tender cannot be negotiated.
- Competitive dialogue – economic operators submit application to participate. The shortlist is selected according to the qualification criteria included in the relevant notice. There might be various rounds and stages; however, there will be no discussions after the submission of the final tender. The purpose of this method is usually to allow the CA to identify the potential solution or solutions suitable for its needs. The law allows for limited negotiation with the successful bidder in order to confirm financial commitments or other terms of the contract.

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- Innovation partnership – it is usually used for the development of an innovative product or works. Any economic operator might submit an application to participate, provided that it fulfils the qualification requirements of the notice. The CA might decide to set up a partnership between one or more tenderers for the development of the product. The CA might negotiate with the tenderers but not after the final bid has been submitted.
- Negotiated procedure without prior publication – used only under specific circumstances, usually after an open or restricted tender procedure where no tenders or suitable tenders were submitted, or if the services/works/supplies can only be provided by one particular economic operator.

2.4 Choice/Conditions of a Tender Procedure

The legislation permits the conduct of an open or restricted procedure at the discretion of the CA. The use of the rest of the procedures outlined in 2.3 Tender Procedure for the Award of a Contract are only available if specific requirements set out in the legislation apply.

2.5 Timing for Publication of Documents

Cyprus law requires CAs to publish the tender documentation in the e-procurement platform with unrestricted access. Where a CA does not comply with the publication requirements, there are remedies under the TRA legislation, allowing the extension of the deadline for challenging the CA's decision (for the award of the tender), on some occasions to six months.

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

As a general rule, the public procurement legislation suggests a time limit of 35 days for the

receipt of expression of interest in a tender procedure or for submitting a tender for the open tender, 30 days for the other types. In case of emergency, the deadline can be minimised to 15 days for the open tender and ten days for the restricted tender procedure.

2.7 Eligibility for Participation in a Procurement Process

According to the public procurement legislation, some of the criteria set by the CA that may be requested for the submission of a tender are as follows:

- legally required qualifications for the exercise of the professional activity;
- economic and financial status of the tenderer; and
- technical and professional competence to perform the contract.

The CA needs to ensure that the criteria are proportionate to the matter of the tender and do not restrict competition.

Furthermore, under the legislation, the CA must include criteria such as: not to have committed certain offences that would normally require their exclusion from the competition. These criteria are:

- participation in a criminal organisation;
- corruption;
- fraud;
- terrorist offences or offences linked to terrorist activities;
- money laundering or terrorist financing; and
- child labour and other forms of human trafficking.

The law also includes some discretionary exclusions, such as non-adequate performance of

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a previous public tender contract, which are almost always included in Cyprus tender documentation required by the CA:

- where the CA can demonstrate by any appropriate means a violation of applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by international environmental, social and labour law provisions;
- where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations;
- where the CA can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- where the CA has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- where a conflict of interest cannot be effectively remedied by other less intrusive measures;
- where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure cannot be remedied by other, less intrusive measures;
- where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a CA or a prior concession contract which

led to early termination of that prior contract, damages or other comparable sanctions;

- where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents; or
- where the economic operator has undertaken to unduly influence the decision-making process of the CA, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

2.8 Restriction of Participation in a Procurement Process

Under public procurement legislation, the CA shall exclude any bidder from participating if one of the following apply:

- there is a final conviction against the economic operator for participation in a criminal organisation, corruption, fraud, terrorist offences or crimes related to terrorism, money laundering, child labour or other forms of human trafficking (as explained above); or
- the economic operator has defaulted on its payment of taxes or social security contributions.

Under clause 65 of the Law, the CA might restrict the number of qualified suppliers that may be invited to participate in the contract award procedures, which for the restricted tender procedure must not be less than five candidates and for the rest of the procedures less than three. In

any event, the CA is obliged to invite a number of candidates to ensure genuine competition.

2.9 Evaluation Criteria

The CA generally awards the public tender to the tenderer with the best price-quality ratio or to the most economically advantageous bid, provided that all the criteria specified in said tender are met to the satisfaction of the CA. Its decision-making includes a cost-effectiveness approach, which is assessed based on various criteria, including, but not limited to, quality of works or services, environmental and social aspects relating to the subject of the specific public tender and other aspects such as:

- quality, technical value, aesthetic and functional features, accessibility, user-friendly, social, environmental and innovative features;
- the scheduling, qualifications and experience of the personnel performing the contract; and
- after-sales delivery and technical support, terms of delivery, process and period of delivery, or completion timeframe.

Public tenders may have a fixed price or cost. In that case, tenderers will compete solely based on quality criteria.

The CA specifies in the tender documents the significance it assigns to each condition in order to conclude on the most cost-efficient offer, unless it is specified within that it is determined solely based on price.

3. General Transparency Obligations

3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

The CA has the obligation to disclose in each individual public contract publication, within the relevant tender documents, the criteria for participation, the grounds for exclusion and any other criteria for evaluation, together with their significance, unless it is specified within that it is determined solely based on price.

Each public contract varies on the requirements and criteria to be met based on the nature and purpose of each project, as mentioned above.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

The CA must promptly notify each bidder of its choice to award a public contract, namely if their bid has been accepted or rejected, including the reasons for rejecting and who is the winning bidder. The CA shall promptly, and within 15 days after receiving a request from the interested bidders, give notice to:

- any rejected bidders, with explanations on why their tender was rejected; and
- any bidders who have submitted an approved tender, outlining the qualities and relevant advantages of the selected tender, in addition to information about the contractor or the tender agreement parties.

The disclosure of information is subject to confidentiality agreements and any corporate secrets; in such circumstances, the bidders will receive only an overview of the acceptable tender rather than the complete description.

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3.3 Obligation to Notify Bidders of a Contract Award Decision

The CA must promptly notify each bidder of their choice to award a public contract as soon as possible. The notification is usually sent electronically; however, other means are also permissible under the law. Further clarifications regarding the information and notification provided by the CA to the bidders are outlined in 3.2 Obligation to Notify Interested Parties Who Have Not Been Selected.

3.4 Requirement for a “Standstill Period”

The contract cannot be concluded by the CA before the standstill period, which begins when all the tenderers are notified of the contract award decision. The method of notification for the contract award decision will determine the duration that period will last. The standstill period under Law 104(I)/2010 is usually 15 calendar days after the notification of the final decision for the award, or ten days for any decision regarding amendment of the tender documents and the criteria set.

4. Review Procedures

4.1 Responsibility for Review of the Awarding Authority's Decisions

Under national legislation, a bidder has the option to file a recourse against the CA's decision before the Tenders Review Authority (TRA) or the Administrative Court of Cyprus. The TRA is an administrative body authorised to review procedures and its decisions can be appealed before the Administrative Court of Cyprus. Any decision of the Administrative Court can be appealed before the Supreme Court of Cyprus.

4.2 Remedies Available for Breach of Procurement Legislation

Under the public procurement legislation, any bidder or economic operator that believes that there is a breach of the procurement legislation can file for a recourse before the TRA or Administrative Court requesting for an annulment of the CA's decision or action and interim measures, including suspension of any further actions or signing of the contract. It is noted that such measures are usually issued under the TRA, but the same does not apply for the Administrative Court. Where the CA's decision is set aside, the bidder/economic operator has the right to request damages by filing a claim/lawsuit before the District Courts of Cyprus.

Furthermore, there are provisions for setting aside a signed contract, if the minimum requirements for prior publication have not been met or there is a breach of the standstill period. In that scenario, the TRA can decide whether to render the contract ineffective retrospectively or not, or even to issue a fine to the CA for violating the public procurement legislation.

Since 2019, the General Accountant's office (acting as the competent authority for public procurement) can refer to the TRA any decision or action of a CA, if it considers that the CA has violated public procurement legislation.

4.3 Interim Measures

There are interim measures available in case of filing a recourse before the TRA, as explained above, to suspend the signing of a contract or any further actions till the final decision. It is also possible to request interim measures when filing a recourse before the Administrative Court; however, in that case, the applicant must demonstrate either irreparable damages or obvious

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illegality, which under case law is not very easy to prove.

4.4 Challenging the Awarding Authority's Decisions

Any interested party who has or had an interest in receiving a specific contract, and who has suffered damage from a CA's act or decision that is presumed to have violated any provision of the applicable law, has the right to appeal to the TRA or the Administrative Court, in accordance with the relevant legislation.

4.5 Time Limits for Challenging Decisions

Under Law 104(I)/2010, a decision can be challenged before the TRA within 15 calendar days from receiving the CA's decision or within ten days if the decision is regarding the notification of the procedure, or the tender documentation.

In the case of requests for rendering a contract invalid, Law 104(I)/2010 provides that:

- recourse can be filed within 30 days from the notification of the awarding of the contract without prior publication; or
- recourse can be filed within six months from the date that the contract was signed, if it was illegally signed, ie, without prior notification, or during the standstill period, or without or prior to notifying the other candidates/economic operators.

A recourse before the Administrative Court must be filed within 75 days of the decision date or the date that the interested party was informed about the decision.

4.6 Length of Proceedings

The typical length of proceedings relating to a procurement claim before the TRA is usually

a few months. It can vary from a month up to almost a year, depending on the needs and urgency of the CA.

The typical length of proceedings before the Administrative Court of Cyprus is usually two to three years, although there are procedures to expedite this. Claims for compensation before District Courts take longer to be examined, between three and six years.

4.7 Annual Number of Procurement Claims

The yearly procurement claims to the TRA are estimated to be around forty to fifty cases.

4.8 Costs Involved in Challenging Decisions

The costs for challenging a CA's decision before the TRA are determined based on the awarded bid's amount, namely:

- EUR1 to EUR1,000,000 – EUR4,000 fee;
- EUR1,000,001 to EUR3,000,000 – EUR6,000 fee;
- EUR3,000,001 to EUR6,000,000 – EUR8,000 fee;
- EUR6,000,001 to EUR10,000,000 – EUR10,000 fee;
- EUR10,000,001 to EUR50,000,000 – EUR15,000 fee;
- EUR50,000,001 to EUR100,000,000 – EUR17,500 fee;
- EUR100,000,001 to EUR200,000,000 – EUR19,000 fee; and
- EUR200,000,001 and above – EUR20,000 fee.

If the recourse relates to an action or decision (i) made prior to the submission of the offer, (ii) to cancel a tender, (iii) that does not result in the awarding of a tender, or (iv) in any other situ-

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ation, results in an award with an unspecified monetary consideration, then the fees are set at EUR5,000.

The fees for filing a recourse before the Administrative Court of Cyprus are set at EUR138.42.

5. Miscellaneous

5.1 Modification of Contracts Post-award

In the following situations, amendments to the contracts may be made without initiating a new procurement process.

- The original contract documents expressly permit revisions.
- Additional works, services, or supplies from the tenderer that were not originally included in the initial Tender documents but were deemed necessary after the contract was awarded have been made and changing the tenderer (i) is not possible due to financial or technical constraints, and (ii) would cause a significant disruption or substantial cost duplication for the CA. It is established that any cost increase will not be greater than 50% of the original contract's value.
- The subsequent cumulative requirements are satisfied: (i) the necessity for amendments is as a result of circumstances that a diligent CA could not have foreseen, (ii) the alterations do not affect the contract's fundamental terms, and (iii) no price increase may be greater than 50% of the original contract's amount.
- The original tenderer to whom the contract was granted is replaced by a new tenderer as a result of the following: (i) it is permitted by the initial contract, (ii) a partial or total succession of the original tenderer, provided that the quality selection criteria originally estab-

lished are met, (iii) the CA itself assumes the obligations of the contractor.

5.2 Direct Contract Awards

The public procurement legislation permits direct contract awards under certain circumstances. For example, the negotiated procedure without prior publication might be selected where:

- there were no tenders or suitable tenders to a previous open tender procedure;
- the works/supplies/services can be provided only by one economic operator due to technical reasons, protection of exclusive rights or the purpose is to create or buy a unique work of art/artistic performance;
- there is extreme urgency that could not have been foreseen and the CA cannot comply with the time limits of the public procurement legislation;
- products were manufactured only for research purposes or experimentation – in this case, the contract must not include any provisions for quantity production;
- the CA needs additional deliveries from the original tenderer, which shall replace or extend the existing supplies provided, provided that changing the acquired supplies will result in disproportionate technical difficulties in operation and maintenance;
- there are particularly advantageous terms of purchase or acquisition, for example from a liquidator; and
- supplies are quoted and purchased on a commodity market.

5.3 Recent Important Court Decisions

There have been a few important decisions of the TRA in the past year. This report will only highlight the following two cases.

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Decision 28/2022

The applicant's tender was rejected, and was deemed unqualified by the CA due to non-performance of a previous public contract with the CA. The provision of the law sets out that a CA may exclude an economic operator when it is proven that they are, due to their acts or omissions, either before or during the procedure, unreliable. The law is intended to ensure that the CA proceeds with awarding contracts to reliable economic operators that can conclude the contract within the timeframe. Therefore, the inability of an economic operator to complete projects within the specified timeframe affects its credibility and may be considered as misconduct.

In this case, the applicant was a contractor on another project with the same CA and a huge delay had been recorded from what should have been the original date of completion: during the evaluation of the offers, the CA proceeded, as was its right, to investigate whether the applicant had the necessary reliability for project execution. The TRA's decision was in favour of the CA, as it had done due diligence correctly and communicated with the applicant the reasons for not considering it, as well as giving it the opportunity to bring forward evidence to the contrary, even though the first contract was not terminated.

Decision 32/2022

In this decision, the TRA, after many years of decisions to the contrary, followed the decision of ECJ C-771/19 NAMA and stated that the economic operator whose tender has been rejected has the right to review the tender of the winning bidder and raise reasons for annulment of the CA's decision both (i) to reject its tender, and (ii) to award the contract to the winning bidder. Until recently, the TRA only allowed economic operators to claim reasons for the rejection of their tenders, and not to claim any reasons for the legality of the acceptance of the winning tenderer's offer.

5.4 Legislative Amendments Under Consideration

The Public Procurement Appeal Procedures (Amendment) Act of 2022 is a proposed law aiming to balance the public interest in the promotion, execution and completion of public projects of great public interest against the right of economic operators to unrestricted access to justice after they have been excluded from a tender procedure or the award to another economic operator. The proposed law intends to add to the provisions of the basic legislation the necessary safeguards to ensure that such projects are not delayed due to arbitrary or malicious recourses that aim only to delay the entire process by issuing interim measures. It has not yet been discussed before the Cyprus Parliament.

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