

Belgium

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1.Does your legal system provide specific procedures for the award of contracts by contracting authorities?

Yes. Belgium has several specific procedures for the award of contracts by contracting authorities, which are in conformity with the relevant European legislation.

2.Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be produced?

Yes, if the object of the contract is a public contract, applicable procedures depend on the kind of goods, services and supply which are to be produced:

–**For public works/supply/services contracts the common or ordinary procedure has to be applied.**

–**For public contracts concluded in the field of four specific sectors – water, energy (gas and electricity) transports and postal systems – a less stringent procedure exists.**

–Specific procedures are established for contracts related to the military market. For example, since 2001 the “rule of industrial compensations” (*compensations industrielles/nijverheidscompensatie*) has been created for military supply contracts and military service contracts: since the (highly technical) requirements of military contracts do not always permit Belgian candidates to compete, foreign candidates will be required to involve Belgian subcontractors.

If the object of the contract is a concession of a public service, or a national concession, then a specific procedure has to be applied, regardless of the kind of goods, services etc. which are to be produced.

3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be produced (thresholds) and if so, what are the thresholds?

Both procedures and procedural regulations depend on the value with regard to the required advertising.

Most intended contracts are brought to the knowledge of potential contractors by way of publication in the Annexures of the Moniteur Belge/Belgisch Staatsblad, the Bulletin des adjudications / Bulletin des Aanbestedingen (www.ejustice.just.fgov.be/cgi_bul/bul.pl). However, there is an additional obligation to publish the notice of the public contract at the European level if the value of the intended contract reaches the European thresholds of advertising (updated details may be found on http://ec.europa.eu/internal_market/publicprocurement/index_en.htm).

4. In what way does the contracting authority have to inform the market about the intended procurement?

The intended procurement has to be published in the Annexures of the Moniteur Belge/Belgisch Staatsblad, the Bulletin des adjudications / Bulletin des Aanbestedingen (www.ejustice.just.fgov.be/cgi_bul/bul.pl). If the intended public contract reaches European thresholds, calls for tenders have to be published in the Annexures of the Official Journal of the European Union (see question 3).

European publication must be prior to domestic publication.

5. Does a potential bidder who is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?

Participation in tendering procedures is open to a natural or legal person or a public body or to a group of these persons or bodies which offers services, supplies or performance of works on the market.

6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?

Yes, a group of persons or bodies is allowed to bid (See question 5).

However, the legislation always uses the term “a contractor”.

There is a possibility for the contracting authority to split the intended contract in several lots and allow by this way several bidders (especially middle sized companies) to submit their offer for the contract. The public contract will be considered as a whole, but it will be performed in several lots.

7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from

abroad?

For public supply / services contracts it is possible to submit a tender directly from abroad, as far as the tender is established inside the European Union.

If the tender is established outside the European Union, the candidate can submit a tender for the contract only if there is an international treaty of agreement between Belgium and the country of the candidate's establishment.

The Belgian legislator allows public authorities to open the tender to all candidates, without consideration of their nationality / country of establishment, by an express mention in the notice of the tender.

For public work contracts, only accredited contractors can participate in the award procedure.

In the European context, if the contractor has been accredited, but not in Belgium, he can be a candidate if the accreditation procedure in his original State is equivalent to that in Belgium.

If the candidate is established outside the European Union, the accreditation is possible if an arrangement exists between Belgium and the candidate's country of origin.

8.If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?

No other requirements than those mentioned in question 7 are established for foreign bidders.

9.Is a multinational bidding consortium allowed to submit a bid?

Yes, it is. Indeed Belgian legislation provides for a very large definition of persons who can submit a bid and "a group of persons or bodies" is allowed to do it (See questions 5 and 6).

10.In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?

Tenders must consult specifications in the public contract notice in order to know the language in which they have to submit their offers.

Either the language to use in the offer is specified in the public contract notice or it has to be the language in which the notice is written.

The use of language in the public contract notice depends on the issuing authority: Flemish, Walloon and German Regions respectively use Dutch, French and German. Brussels Region uses both French and Dutch.

The candidate must be aware of the complexity of the legislation in Belgium on languages.

The offer has to be submitted in a written form and sent by mail under a separately closed and sealed cover.

Eventually, specifications in the public contract notice provide the form to be used for the submission.

11.Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?

Normally, deadlines are specified in the published notice of the public contract.

The legislator only provides minimum deadlines to be respected, which

are different for the open procedure (in which any interested undertaker may submit a tender) and for the restricted procedure (in which interested undertaker must pre-qualify to take part).

For the open procedure the deadline for the receipt of offers cannot be less than 52 working days (to be counted from the date of the sending of the notice of the public contract).

For the restricted procedure, there are two distinct phases: the selection phase and the award phase. During the selection phase (starting with the publication of the notice of the public contract) candidates apply for their participation in the award phase. The minimum deadline for the submission of the candidature is 37 working days. During the award phase (starting with the sending of a notification to selected candidates) bidders would have a minimum of 40 working days to send their offer.

The minimum deadlines may be reduced for the urgent cases under very strict conditions.

For the negotiated procedure, no minimum deadlines are prescribed by the legislator. It is up to the contracting authority to fix deadlines.

12.Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?

No reimbursement of costs for preparing the bid is provided by the legislator.

Legislation only allows for the unfairly rejected candidate to claim damages in which he may include costs for preparing the bid. Furthermore, in the procedure of award to the lowest bidder, the latter can claim 10% of his proposed price as damages should he not be selected by the public authority.

13.Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?

A first selection criterion set by law is the requirement to be either established inside the European Union, or established in a non European Union country which has an international agreement with Belgium with respect to participation in the public market.

A second selection criterion is established especially for public work contracts: bidders have to be accredited (See question 7).

Selection criteria are established for contracts which reach the European thresholds: participation is impossible for contractors who were convicted for the following offences :

- Participation in a criminal organization
 - Corruption
 - Fraud
 - Money laundering

For all other public contracts, authorities are allowed to exclude candidates who are in the following situations:

- Bankruptcy
- Non-payment of contributions to the National Health Insurance System
- Non-payment of taxes
- Gross professional negligence
- False declarations linked to capacity of the candidate to perform the intended contract

Furthermore, according to administrative jurisprudence and guidelines, public authorities must apply financial selection criteria. They must indicate in their notices of public market the minimum financial profile required to be allowed to bid.

Public authorities may also specify technical criteria (specific technical

qualifications, a certain experience, use of technical equipment...).

In order to promote social integration, all types of public markets below European thresholds may be reserved to protected workshops or to socially orientated companies.

14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?

Yes, such legal protection is provided.

First of all, for all public contracts, legislation provides for motivated refusal decisions to be sent to evicted bidders "once the decision is adopted". In order to suspend the conclusion of the intended contract, urgent procedures may be brought before the Administrative Court (*Conseil d'Etat / Raad van State*) or before the judiciary judge (if the contracting public authority is not under the jurisdiction of the Administrative Court).

In case of public contracts reaching the European thresholds, the public contract may not be concluded during a period of 15 working days following the day of the communication of the decision. During this period of time the evicted bidder has a possibility to start the said urgent proceedings in order to protest against the award of the contract to the concurrent. Pending the end of such proceedings, the conclusion of the public contract is suspended.

15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?

Yes, European thresholds are taken into account. Primary legal protection is more elaborated for public contracts reaching European thresholds (see question 14).

16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g., through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?

Even though primary legal protection is provided, it is also possible to start proceedings before the Administrative Court (*Conseil d'Etat / Raad van State*) in order to nullify the contract, provided that the public authority is under the jurisdiction of this court. The evicted bidder has to demonstrate his interest to act as well as the irregularity of the public contract.

It is also possible to start proceedings before the judiciary judge for damages. In this case, the evicted bidder logically has to demonstrate the fault (the irregularity of the public contract), damage and causal link between the fault and the damage.

Whereas the nullification of the contract in itself will not necessarily (and in practice, rarely) benefit the evicted bidder, it will establish the proof of the fault of the public authority before the judiciary judge during proceedings for damages.

17. Can your office

–give legal advice to foreign clients concern in the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?

–represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?

–Please name a contact person within your office for questions of public procurement law!

–No. It is mostly in the hands of specialized consultants.

–Yes, as the case may be with the help of counsels specialized in acting before the Conseil d'Etat / Raad van State.

– Johan LAMBERS, Didier RAES, Laurence VERMEIREN,
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