

## Public Procurement in Cyprus: A General Guide to Foreign Entities Seeking to Tender in Cyprus

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Cyprus is a member of the European Union (EU). It acceded to the European Union on 1<sup>st</sup> May 2004.

Since its accession, as is incumbent on all member states, Cyprus has complied with the EU public procurement directives and has enacted legislation on public procurement.

In accordance with Directive 2014/2016, Cyprus has enacted the Regulation of Procedures for the Award of Public Contracts and for Related Matters Law of 2016 (Law 73(I)/2016).

This is the basic legislation governing the procedure for the procurement of public contracts. This law is based on EU Directive 2014/24 as amended.

Additionally, and also in accordance with Directive 2014/16, Cyprus has enacted the Regulation of Procedures for the Award of Public Contracts by Authorities Acting in the Water, Energy, Transport and Postal Services Sectors and for Related Matters Law of 2016 (Law 140(I)/2016), which is based on the EU Directive 2014/25 as amended.

The 'effective remedy' process for any tenderer that believes that it has been the victim of injustice in a public procurement process is the Recourse Procedure in the field of Public Contracts Law (Law 104(I)/2010) (the Remedies Law). It regulates remedies and the functioning of the Tenders Review Authority. This law was enacted in compliance with Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC.

The above laws represent the basic legal framework for the public procurement process in Cyprus.

They are supported by subsidiary legislation, namely, in the case of Central government, the applicable regulations are the General Regulations for the Award of Public Supply Contracts, Public Works Contracts and Public Service Contracts (Regulatory Administrative Act (RAA) 2001/2007). These regulations regulate procedural matters and provide for the establishment



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and the operation of the appropriate technical and administrative evaluation bodies and organs for the public tender process.

The above RAA of 2007 sets out the rules and the procedures that must be followed in respect of:

- the formulation of a tender;
- the content of the tender document;
- the form of communication of the tender process;
- the submission of the tender;
- the technical and financial evaluation of the tender; and
- the award of the tender.

Other RAAs regulate the public procurement procedures to be followed by awarding bodies in the wider public sector, which encompasses the public law bodies such as the Electricity Authority of Cyprus, the Cyprus Stock Exchange, the University of Cyprus and others, including municipalities, regional development boards and the like.

### **Qualifying Threshold Values**

Each tender process, being for the supply of goods or services or financial facilities, is governed by threshold values.

The threshold values are reviewed in line with the reviews made by the EU Commission in accordance with Directive 2014/24/EU.

Currently the thresholds are as follows:

- Central government contracts: services and supply contracts of minimum €144,000 and works contracts of minimum €500,000.
- Public sector (local or rural authorities and the public law organisations): services and supply contracts of minimum €221,000 and works contracts of minimum €500,000.
- Contracting authorities of the central government or the public sector in general, acting in the public utility fields: services and supply contracts of minimum €443,000 and works contracts of minimum €500,000.
- Concession contracts: services contracts of minimum €5,548,000 and works contracts of minimum €500,000.
- Contracts in the defence and security fields: services and supply contracts of minimum €443,000 and works contracts of minimum €5,548,000.

The threshold values are significant as they determine the recourse procedure that applies to the tender process.

## Remedies in Public Procurement Procedures

For those tenders with values equal to or above the above thresholds, the recourse procedure to be followed may be either the Tenders Review Authority or the Administrative Court.

In the case of tender processes falling under the threshold values, the only recourse procedure open to tenderers is the Administrative Court.

The above is significant as the Tenders Review Committee provides a much more effective remedy than a recourse to the Administrative Court.

The most significant difference is the injunctive relief that is available to a tenderer that feels that it has suffered injustice. The injunctive relief has the effect of suspending the procurement process until the application of the tenderer is reviewed. A review process typically takes between four and six months.

In the case of a recourse to the Tenders Review Authority, the injunctive relief is issued at the time that it is applied for and the burden of proof is on the awarding authority to show why the injunction should not continue. The application for an injunction is returnable within five days and the decision as to whether the injunction will remain in place is issued within five working days from the filing of the recourse.

In the case of a recourse to the Administrative Court the remedy that is realistically available to a party cannot truthfully be described as effective.

An injunction will only be granted by the Administrative Court in the rarest of cases – where there is a flagrant and apparent violation of law.

A recourse before the Administrative Court also takes much longer than a recourse before the Tenders Review Authority; the time varies between six months and one year.

## Time Limits for the Filing of Applications for Relief

Applications before the Tenders Review Authority must be filed within **fifteen days** of the tenderer becoming aware that it has been the victim of injustice or of an unlawful act or decision by the awarding entity.

Recourses before the Supreme Court may be filed within 75 days of the tenderer being notified of any act or omission that constitutes a breach of the law and causes injustice to the tenderer.

## **The General Principles to be followed in Public Procurement Procedures – the guiding principles for awarding authorities and tenderers**

### **Awarding Authorities**

Awarding Authorities must comply with the three basic principles in each step of the tender process:

- Transparency;
- Equal Treatment of Tenderers;
- Proportionality.

The above principles must be complied with in each step of the tender process by all public sector awarding authorities.

It should be noted that, even if a contract does not fall within the above threshold values, the thresholds and a recourse to the Tenders Review Authority is not available, the above mentioned principles governing public procurement procedures as well as the legislation and subsidiary legislation all need to be complied with as a recourse to the Administrative Court is available to a tenderer who has suffered injustice.

The Awarding Authorities must take care to formulate tender documents in a fair and transparent manner and avoid inequality or bias both in the formulation of tender documents and in the evaluation of tenders.

It should be noted that a recourse is theoretically possible and represents an important available option to a tenderer as soon as the tender document is issued. If a tenderer feels that the tender document as issued contains inequality or bias with respect to the technical or financial criteria or with respect to the tender conditions, then it must file a recourse against the said inequality or bias contained in the tender documents. It is not permissible for a tenderer to submit a tender (thereby taking part in the tender process) and at the same time allege inequality or bias in the said tender process.

### **Tendering Entities (Economic Operators)**

Tenderers must ensure that they are fully conversant with the law and the contents and requirements of the tender document.

Each tender process has a period for the submission of questions by tenderers relating to the requirements of the tender and for the submission of requests for clarifications of submitted tenders by the authority that has issued the tender.

Tenderers must ensure that their questions and requests for clarifications to the authority issuing the tender and its own responses to requests for clarification are clearly drafted so that no misunderstandings can occur.

### **Common Issues Leading to Disqualification**

Experience shows that there are certain areas where tenderers must take particular care in order to avoid disqualification.

The requirement for equal treatment of tenderers extends to the evaluation of tenders. A non-compliant tender or a tender containing a material non-conformity in terms of the financial or technical capability and capacity of a tenderer, must be disqualified.

A tender once submitted may not be amended so as to rectify a non-conformity.

Tenderers should be aware that tenders are evaluated with care and the compliance with the terms of the tender, the requirements for transparency, equal treatment of tenderers and proportionality are strictly adhered to.

Where a tenderer wishes to rely upon **supporting entities**, it must ensure that it does so in strict accordance with the terms contained in the tender documents both with respect to the aspects of the eventual contract that may be performed by the supporting entity as well as to what documentation and undertakings must be provided by the supporting entity as provided for in the tender documents.

Similarly, the **documentation evidencing the financial and technical capability and capacity of a tenderer** must be provided in strict accordance with the requirements of the tender documents. If they are not, a tender will be disqualified. Such requirement extends samples and to type test certificates of goods or materials to be provided, certification of a tenderers experience, ISO certificates, bank references, parent company undertakings or guarantees, powers of attorney, registration certificates, licenses, board of directors' decisions required under the tender documents.

Tenderers must also take care to ensure that any **tender (bid) bonds and performance bonds** are provided in strict accordance with the requirements of the tender.

It is essential for a tenderer to ensure that it clarifies all areas of doubt within the time allowed in the tender documents so that it is certain that it has submitted a compliant tender. There is no rule against asking as many questions and as often as a tenderer requires in order to obtain the necessary clarity.

The **form and method of submission of the tender** must also be in strict accordance with the terms and the time limits contained in the tender documents.

In the case of **Electronic Tender Processes**, tenderers must be aware that the E-Procurement portal of the Accountant General's Department of the Ministry of Finance, which is the entity that receives E-Tenders, often experiences **difficulties, delays, date jams and even crashes with respect to the uploading of electronic tenders**. Tenderers are therefore advised to ensure that they commence uploading process in good time so as to ensure that they are in a position to comply with the time limit for the submission of their tender.