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Public Procurement & Government Contracts

Israel

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Law and Practice

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

The following legislation regulates the procurement of government contracts in Israel:

- the Mandatory Tenders Law, 1992 (the Mandatory Tenders Law);
- the Mandatory Tenders Regulations, 1993 (the Mandatory Tenders Regulations or the Regulations);
- the Municipalities Regulations (Tenders), 1987 (the Municipalities Regulations (Tenders));
- the Contracts Law (General Part), 1973;
- the Contracts (Remedies for Breach of Contract) Law, 1970;
- the Municipal Ordinance (New Version), 1964;
- the Mandatory Tenders Regulations (Contracts of Institutions of Higher Education), 2010;
- the Mandatory Tenders Regulations (Defence Establishment Contracts), 1993;
- the Mandatory Tenders Regulations (Preference for Israeli Made Goods), 1995; and
- the Law for the Promotion of Competition and Reduction of Concentration, 2013.

Aside from the general legislation pertaining to all public contracts, sector-specific compliance is embedded in the following statutes:

- the Municipalities Regulations;
- the Mandatory Tenders Regulations (Contracts of Institutions of Higher Education), 2010;
- the Mandatory Tenders Regulations (Defence Establishment Contracts), 1993; and
- the Mandatory Tenders Regulations (Preference for Israeli Made Goods), 1995.

1.2 Entities Subject to Procurement Regulation

The application of procurement legislation to entities is rooted in two sources: tender law and municipal regulations. In section 2(a) of the Mandatory Tenders Law, a “public body” is defined as the state and any government corporation, religious council, health fund and institution of higher education.

The local authorities issued the Municipalities Regulations (Tenders), in terms of which the duty to conduct tender procedures (subject to specific circumstances) is incumbent upon all local authorities in Israel.

Entities that are not included in section 2(a) of the Mandatory Tenders Law and do not constitute local authorities are not directly required to conduct tender procedures. However, the Supreme Court has previously held that even public entities that are not directly subject to the Mandatory Tenders Regulations are bound by the general principles of public procurement, although this is not expressly stipulated in either the law or regulations.

According to section 1B(a) of the Regulations, it is preferable that a public body conduct public tenders to the extent that provision is made so that a public body shall opt to contract by way of a regular public tender, even where it is permitted under the Regulations to contract other than by way of a regular public tender. Accordingly, even a public body that is exempt from tendering should still follow this procedure.

However, pursuant to section 1B(d) of the Mandatory Tenders Regulations, if a public body elects to contract other than by way of tender, such decision shall be made in accordance with the Regulations after examining the feasibility of conducting a tender and in so far as this is justified and reasonable in the circumstances of

the case. Therefore, a public body not having to conduct a tender process would be subject to the fulfilment of certain conditions.

In this regard, section 3 of the Mandatory Tenders Regulations sets out numerous grounds on the basis of which a public authority may be exempt from tendering. These grounds are subject to factors such as the value of the contract, its subject matter or whether or not the contract requires urgent execution. Since not contracting by way of tender is subject to both statutory and subjective criteria, there is no automatic rule that exempts public bodies from the tender process.

1.3 Types of Contracts Subject to Procurement Regulation

According to section 3(1) of the Mandatory Tenders Regulations, a contract entered into by a Ministry for the execution of a transaction involving goods or land, for the execution of work or for the purchase of services, does not require tendering where the contract encompasses one of the following.

- A contract having a value not surpassing ILS50,000. However, in any consecutive period of 12 months, the Ministry may not contract with a specific party, absent a tender, pursuant to this section 3(1), for a sum totalling in excess of ILS100,000, including contracts concluded within such 12-month period as continuation contracts (as defined in section 3(4) of the Regulations) of a contract originally entered into pursuant to this section.
- A contract involving a transaction whereby conducting a tender can result in significant harm being caused to the security of the State, its foreign relations and economy, public security or a professional or trade secret of the Ministry if the value of the contract does not exceed ILS2.5 million. (Such contract

would necessitate the approval of the Attorney General or their designate.)

Likewise, according to section 34 of the Regulations, which specifically refers to government companies, a contract entered into by a government company for the execution of a transaction involving goods or land, for the execution of work or for the purchase of services, does not require tendering, if it similarly encompasses one of the following:

- a contract whose value does not exceed ILS200,000, if the counterparties thereto are companies whose annual volume of contracts is valued to be in excess of ILS1 billion or a contract whose value does not exceed ILS600,000; or
- a contract of a government company in privatisation supervision, as defined in the Government Companies Law, 1975, whose annual volume of contracts is valued to be in excess of ILS2,080,000, provided that the contract value does not exceed ILS3 million.

Falling below the financial threshold is not the only criterion that would dispense with the procurement process. In fact, there are other instances where the procurement process is not required, such as in respect of contracts entered into by the Bank of Israel involving the printing of currency or imports by the defence establishment that are funded by foreign military financing.

1.4 Openness of Regulated Contract Award Procedure

As a general rule, the Mandatory Tenders Law specifies that the tender process shall be equally open to any person (or entity), without discrimination between the participants and potential bidders. Nevertheless, it is clarified that any distinction or other pre-condition for participation in the tender, which is required due to the

nature or essence of the tender shall not be deemed as prohibited discrimination. Accordingly, in the vast majority of the tender (and pre-qualification) procedures for public procurement and government contracts, a participant or any member thereof, including interested parties in such member, directors or managers thereof, and including individuals, shall not be residents or nationals of a country which does not have diplomatic relations with the State of Israel. In addition, in some of the tenders and pre-qualification procedures for public procurement and government contracts, the participant itself must be duly incorporated in, or a resident of, the State of Israel.

1.5 Key Obligations

Firstly, it is mandatory for a public body to conduct a tender when holding a tender process and the possibility of obtaining an exemption from doing so is an exception (section 2 of the Mandatory Tenders Law). When a public body conducts a tender or makes an individual approach following a tender, it must do so in a transparent, fair, and equitable manner – given the circumstances of the case – to ensure maximum benefits are garnered for the public body (section 1A of the Mandatory Tenders Regulations). Moreover, the public body is duty-bound to act in good faith, which duty is imposed on it by virtue of case law and is also obliged to act with clean hands. In addition, the Tender Committee must act in the absence of a conflict of interest, and in the strong belief that the Tender Committee and those acting on its behalf have no connections to any of the potential bidders in the tender. With regard to some of these duties – namely, where the public body invites a bidder to participate in the clarification process – they must be done in coordination with the Tender Committee and documented in minutes maintained by the Tender Committee.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

The Mandatory Tenders Regulations mandate the prior publication of regulated contract award procedures (viz, a public tender).

- Publication – where a Ministry wishes to enter into a contract that mandates a public tender, the Tenders Committee shall publish a notice to that effect in a widely circulated newspaper, in an Arabic-language newspaper and on the website. The notice on the website shall be published in Hebrew and in Arabic. The notice shall be published a reasonable time before the deadline for the submission of bids.
- Information to be disclosed – the notice regarding the holding of a public tender shall set out, inter alia:
 - (a) the nature of the proposed contract and a description of its subject, including any option to expand the scope of the contract;
 - (b) the term of the proposed contract, including any option for extending its term;
 - (c) the preconditions, if any, for participation in the tender;
 - (d) the reasons, if any, for the rejection of a bid in a tender involving the purchase of manpower-intensive work or services;
 - (e) the time and place where additional details and the tender documents can be received, and where payment, if any, for the tender documents may be made;
 - (f) the deadline and place for submitting bids; and
 - (g) the fact that the tender is: a negotiated tender, a tender with a prequalification stage, a tender with a two-stage evaluation, a public tender with additional competitive features, a dynamic automated tender or an expedited automated tender, as applicable.

2.2 Preliminary Market Consultations by the Awarding Authority

The Tenders Committee may elect to issue a preliminary request for information which it deems necessary for the purposes of launching the contract award procedure. Such request is nonetheless subject to compliance with the following: (i) the request shall be made publicly; (ii) the receipt of information and holding of discussions with those responding to the request (“respondents”) shall be done in a fair and equitable manner; (iii) the Tenders Committee shall document any information received and discussions held with respondents; (iv) a response to a preliminary request for information shall not constitute a condition for participation in the actual tender, shall not confer on a respondent an advantage merely because they responded to the request, and shall not obligate such respondent’s inclusion in the tender or contracting with him in any other manner; and (v) the information received is subject to the mandatory disclosure regulations.

2.3 Tender Procedure for the Award of a Contract

Section 1A(a) of the Mandatory Tenders Regulations requires that public bodies hold either a tender or a specific invitation process pursuant to a central tender, as transparently as possible in the circumstances of the case and on a fair and equitable basis, ensuring maximum advantages for the public body. Moreover, subsection (b) thereto states that a public body that opts to contract other than by way of tender pursuant to the Regulations, shall conduct the procedure as closely as possible according to the principles required for holding a tender. The reason for the preference for the aforementioned procedure – as reflected in both the legislation and case law – is the necessity for good governance, the implementation of the principle of equality, and in order to ensure the greatest possible inclusion of bidders.

The Regulations set out various other types of procedures that may be utilised by the awarding authorities, including a restricted public tender or a closed tender, or the granting of an exemption from the tender procedure based on the unique requirements relevant to the particular tender process.

According to section 7(a) of the Mandatory Tenders Regulations, negotiations can be conducted as part of a tender process, only if provisions allowing these negotiations are embedded in the tender documents.

In such circumstances, section 7(c)(2) of the Regulations requires that subsequent to the Tender Committee determining the final group of bidders, it shall engage in negotiations with every bidder so as to confer on each of them a fair and equitable opportunity in so far as their bids are concerned. Primarily, the negotiations should be conducted as set out below:

- in a manner ensuring the recordal of minutes that accurately reflect the content of the negotiations;
- in the presence of the legal adviser who is a member of the Tender Committee or his or her representative; and
- without there being any contact between a member of the Tender Committee or anyone on his or her behalf and any of the bidders, except by way of documented negotiations.

Additional conditions for the negotiations are set out in subsections 7(c)(3) to (6) of the Regulations, which prescribe as follows:

- Any action done in the framework of the negotiations, including the application to the bidder, any exchange of words and documents and the contents of the negotiations, shall be recorded in minutes.

- At the conclusion of the negotiations, every bidder in the final group of bidders shall be entitled, on a date to be determined by the Tender Committee, to submit a final bid to the tender box. If a bidder does not submit an additional bid, its first bid shall be deemed the final one.
- Following the submission of the final bids, no further negotiations shall be conducted with the bidders.
- The Tender Committee shall examine all the bids, including the bidders' first bids, and shall reach a decision.

Furthermore, complex bids must be recognised from the perspective of practicality in the process of the negotiations by promoting the success of the "best and final" submission. In accordance with this approach, the tender procedure will usually comprise two separate bidding phases. In the first phase, all qualifying financial proposals are opened and assessed. The price is then raised, which, in turn, triggers the second phase, in which only the proposals that meet the higher price will be considered. In practice, this additional negotiation process may be carried out among several bidders either in an open meeting with the bidders or through an online submission.

2.4 Choice/Conditions of a Tender Procedure

The Tender Committee of the awarding authority may determine that a tender be conducted as one with a prequalification stage, as a tender with a two-stage evaluation, as a public tender with additional competitive features, as a framework tender or as a combination of such tendering mechanisms, based on the nature of the contract and subject to the fulfilment of certain conditions as prescribed in the definition for the specific type of tender earmarked in the Regulations.

2.5 Timing for Publication of Documents

The Tender Committee shall allow for perusal of the tender documents comprising, inter alia, all of the following:

- the terms of the tender, including conditions for participation in the tender;
- the text of the bid of the participant in the tender, except if the Tender Committee has decided, for reasons to be recorded, that there is no room in the circumstances of the case for including such text;
- the text of the contract, including a timetable and payment terms, as well as detailed plans relating to implementation of the contract;
- if a guarantee is required – the type of guarantee, its terms, amount and duration;
- the criteria according to which the winning bid is to be chosen;
- any document or other information required in the opinion of the Tender Committee for the fair and proper conduct of the tender and to ensure acceptance of the bid that confers maximum advantage on the Ministry, including a mandatory requirement for the receipt of any document or information relating to the qualifications, experience or ability of the bidder; and
- if it is intended to prepare an estimate of the contract value – the existence of an estimate and the significance of such estimate for the tender process.

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

No specific time limit is imposed but it is determined by law that the Tender Committee shall not consider bids that are not deposited in the tender box by the stated deadline for submission of the relevant bid.

2.7 Eligibility for Participation in a Procurement Process

As a general rule, the Mandatory Tenders Law determines that the tender shall not include a threshold condition for the participation of a bidder in the tender, unless such condition is required in view of the character or nature of the tender.

In this regard, section 2A(b) of the Mandatory Tenders Law establishes that if the tender publisher decides to specify stringent conditions for potential participants' eligibility in comparison to the conditions set out in the Schedule to the Mandatory Tenders Law, such determination must be explained within the tender documents. Among such conditions are seniority, previous experience, financial robustness and scope of production or supply.

In addition, section 6 of the Mandatory Tenders Regulations determines that the participation in a tender shall be conditional upon the following:

- registration in any registry required under law and obtaining the required permits under law for contracting purposes under the tender;
- compliance with any official Israeli Standard (if applicable);
- obtaining all required permits under the Public Entities Transactions Law, 1976 (which determines that any transaction entered into between a public entity (ie, the State of Israel, a funded body (supported by the State), a public institution and a publicly traded company in Israel) and an Israeli resident for the sale of an asset or the supply of services to the public entity, shall be conditional upon the submission to the public entity of all approvals attesting to proper bookkeeping practices on the part of such Israeli resident in accordance with the Income Tax Ordinance [New Version], 1961 and Value Added Tax Law, 1975); and

- compliance with applicable laws regarding employees' rights.

Pursuant to such section, it is also possible to mandate additional preliminary conditions for the participation in the tender, such as previous experience, scope of work, credentials, etc.

2.8 Restriction of Participation in a Procurement Process

There are various ways to limit the number of bidders participating in a procurement process including:

- by conducting a closed tender process (in accordance with section 4 of the Mandatory Tenders Regulations and pursuant to the procedure set out in section 16A thereof);
- by means of a referral from a supplier list (in accordance with section 3A of the Mandatory Tenders Regulations and pursuant to the procedure set out in section 16A thereof); and
- pursuant to a restriction made on a conditional basis that, although the tender may appear to be open to any potential body to submit a bid, there is a practical factor that distinguishes between entities that are eligible to participate in the tender and those that are not. This option may only be rendered possible in circumstances where the conditions imposed by the authority do not contradict the requirements and nature of the tender.

2.9 Evaluation Criteria

The criteria for selection of the bid that would confer maximum advantages on the tender holder are, wholly or partially:

- the price proposed or requested, as applicable;
- the quality of and any special features pertaining to the goods or the land, the work or the service proposed, and their suitability for the tender holder;

- the bidder's credibility, qualifications, experience, expertise and areas of specialisation;
- recommendations about the bidder, if required under the tender conditions, and the degree of satisfaction with the performance of previous contracts;
- the due compliance with special requirements laid down by the tender holder; and
- the bidder's conduct with respect to the preservation of employee rights, including the existence of a written negative opinion or a negative audit report in this respect by a Ministry with which the bidder contracted during the three years prior to the deadline for submission of the relevant bid.

The criteria for selection of the bid shall be determined in advance and the tender holder may not add further criteria after the tender is published.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

Pursuant to sections 17(b)(5) and 22(b) of the Regulations and by virtue of case law, the Tender Committee is obliged to include amongst the details in the tender documents each of the criteria, the secondary tests and the relative weight to be given for selection of the winning bid as well as the manner for evaluating the foregoing.

Thus, section 22(c) provides that the Tender Committee must detail in the tender documents the relative weight of each criterion and of the secondary tests to be established in fulfilment of such criterion. It must also detail the relative weight conferred on the various bids, based on the price that is proposed or requested, as applicable, as opposed to the quality scoring, and the

manner for evaluating the quantity component as opposed to the quality component.

Generally, the tender documents are published at the beginning of the tender. Upon conclusion of the tender, the unsuccessful bidders can ask the Tender Committee how the scores for all the bids were distributed, as is usually done in practice.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Under the law, the Tender Committee must notify all bidders who participated in the tender of the results of the tender. Within the ambit of announcing the results of the tender, there is no obligation on the part of the Tender Committee to give reasons for its decision. However, after receiving the results of the tender, any unsuccessful bidder may review the decision of the Tender Committee in order to understand the reasons behind its decision.

3.3 Obligation to Notify Bidders of a Contract Award Decision

According to section 21(d) of the Mandatory Tenders Regulations, every participant in a tender shall be notified of the results of the Tender Committee's final decision.

According to section 21(e) of the Mandatory Tenders Regulations: "Any participant may, within 30 days from the date of delivery of the notice, peruse the minutes of the Tender Committee, its correspondence with the bidders, the professional opinions that were prepared at its request, the position of the committee's legal adviser and the winning bid in the tender, and receive a copy of these documents".

Notwithstanding this entitlement, the provision of information may exclude parts of the decision or the bid, the perusal of which could – in the opinion of the Tender Committee – reveal a

trade or professional secret or harm the State's security, foreign relations, economy or public security. Furthermore, a legal opinion that was prepared in the framework of legal advice given to the Tender Committee, including an examination of possible alternatives to an action or decision of the Tender Committee or an assessment of the prospects and risks resulting from such decisions in future legal proceedings, will also not be disclosed.

To the extent that a bidder does not request the procurement file within 30 days, the bidder will not be barred from perusing the documents and may do so by exercising its rights in accordance with the Freedom of Information Law, 1998, by submitting an appropriate request for this.

A late decision by a bidder to exercise such right of perusal will make it more difficult to prepare the appropriate request and may cause delays in the submission thereof.

3.4 Requirement for a "Standstill Period"

The Regulations are silent as to whether notification should be made before or after the contract with the successful bidder is concluded. Nonetheless, it is inevitable that notification to an unsuccessful bidder be provided after signing the contract for award of the tender with the successful bidder, as doing so will impede any possible attack on the Tender Committee's decision.

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority's Decisions

The Court for Administrative Matters is the authority to which review applications are addressed. There is no intervening authority in this regard and, accordingly, any remedies to be granted will be awarded solely by said Court.

A judgment handed down in relation to either an administrative petition or administrative action can be appealed to the Supreme Court. Additionally, administrative proceedings are sometimes conducted in a civil court, for example, a private tender (as opposed to a public tender), a claim relating to a contract that was awarded following a tender, and certain types of financial claims against an authority.

Furthermore, tenders are often urged to be handled by district courts – for example, municipal company tenders.

4.2 Remedies Available for Breach of Procurement Legislation

For any infringement of the procurement rules, bidders may claim for damages. However, damages arising from infringement of the procurement rules – especially when the relief sought amounts to damages for loss of profits – are particularly difficult to attain. Aggrieved tenderers will have to obtain an interim order, launch an application to set aside the award and only then proceed to institute an administrative action. In the administrative petition appeal of *Ports Authority v Tzomet Engineers, Planning, Coordination and Projects Administration Ltd*, PD 59(2) 145, the judge held that expectation damages should be awarded only in cases of bad faith on behalf of the contracting authority – an element that is difficult to prove. Moreover, the courts for administrative matters have adopted – as a rule – the strict limitation in respect of damages claims as set out in the administrative petition appeal of *The Broadcasting Authority v Katimora Ltd*, Supreme Court Judgments 2007(3) 2403 (2007). This often results in the aggrieved tenderer not having an opportunity to put forward the merits of the case before it is dismissed on procedural grounds.

Furthermore, the court's decision following the completion of a review application regarding

defective conduct on the part of an authority in a tender process – either in relation to the successful bidder or in relation to actions carried out by the Tender Committee itself – may result in the cancellation of the tender procedure or in the cancellation of the winning bid and, by default, the cancellation of the contract with the successful bidder that came about by virtue of that tender procedure.

4.3 Interim Measures

There are tenders that contain provisions prohibiting the possibility of submitting claims for temporary relief. In addition, in the case of tenders in which the contract is carried out over time (such as a tender for services), even without an automatic suspension of the tender procedure, the service provider can be substituted as long as the court has accepted its claims and the applicant was announced as the second successful bidder (under the successful bidder) and named as such by the authority from the outset.

4.4 Challenging the Awarding Authority's Decisions

In accordance with the law, any bidder participating in a tender process, including a potential bidder, is entitled to apply to the court and contest the decision of the Tender Committee. This right will apply regardless of whether the application arises from a preliminary decision to make changes to the tender provisions, or from significant decisions regarding the rejection of bids, the transition from one stage to another in the tender process or a decision on a winning bid.

The ability to contest the Tender Committee's decisions will be subject to the tender provisions that relate to the applicable stage of the tender (eg, there are tenders that only allow for a decision to be challenged once the winner of the tender has been selected). In addition, the relevant tender stage will also determine the nature of the

remedies that can be applied for in appealing the Tender Committee's decision (eg, there are tenders that prohibit the submission of applications seeking temporary relief, which may have the effect of delaying or suspending the continued conduct of the tender procedure). Naturally, contesting a decision of the Tender Committee will also be subject to delays.

An aggrieved tenderer that wishes to file an administrative petition is likely to go through several stages, the first of which – to prevent the contract from being awarded and executed by the successful tenderer – is the application for an interim order. The court may grant an interim order simply to preserve the status quo during the trial, subject to the fulfilment of the following three requirements:

- the aggrieved tenderer must show an arguable cause of action against the contracting authority;
- the aggrieved tenderer must show that it is likely to suffer irreparable harm if the interim order is refused; and
- the aggrieved tenderer must convince the court that, on the balance of probabilities, the harm that it will suffer should the interim order be refused will be greater than the harm that the contracting authority would endure if the relief applied for was awarded.

4.5 Time Limits for Challenging Decisions

According to the Courts for Administrative Matters Regulations, 2000 (section 3), an administrative petition must be lodged within 45 days of the date of publication of the contracting authority's contested decision, the date on which the contested decision was presented to the petitioner, or the date when it became known to it. Notwithstanding this, even an aggrieved tenderer that lodges an administrative petition within this statutory time limit still runs the risk of its petition

being denied on the basis of “objective circumstances”, which would then mark the petition as being lodged in delay, despite the fact that the delay may have originated from circumstances over which it had no control.

4.6 Length of Proceedings

Once successfully lodged, the proceedings will be subjected to the normal duration in which a decision is generally rendered except in an instance of urgency. In the ordinary course, the duration will depend on the frequency of interim applications and decisions as well as whether or not witnesses are required. In an urgent matter, the aggrieved tenderer will have to prove the urgency prior to trying the merits of its case and, assuming its urgency plea succeeds, the court will likely expedite its decision.

As a general rule, administrative procedures are usually dealt with much more expeditiously than other civil cases as they do not involve the usual submission of pleadings, nor are the parties afforded the opportunity to cross-examine each other. Instead, examination is conducted by the court.

4.7 Annual Number of Procurement Claims

Israel is a country in which litigation proceedings are widespread. This fact, coupled with the considerable number of tenders that are conducted each year, has resulted in a large volume of procurement claims being considered or adjudicated before the relevant review body. No official public record or statistic exists in this regard, but it is probably fair to say that at least dozens of procurement claims are instituted annually.

4.8 Costs Involved in Challenging Decisions

For an administrative procedure, the costs involved would include attorneys’ fees as well as court fees – both of which are estimated to total

approximately ILS2,000. Of course, this amount does not include the cost of legal representation for filing the petition and conducting the litigation, which would largely depend upon the scope of the petition, the character and nature of the tender, the issues underlying the petition and the law firm hired to provide the services.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

According to section 8A of the Mandatory Tenders Regulations, subsection 11 thereto includes (as one of the powers of the Tender Committee) the ability to “approve a material change in the terms of a contract that was concluded pursuant to a tender”. To this extent, amending a contract without initiating a new procurement procedure generally requires the approval of the Tender Committee. Assuming that such approval is not granted and the requested amendment is material, it is probable that a new procurement procedure will need to be initiated.

Notwithstanding this, once the tender stage has been concluded and the project is in the contract stage, there are certain circumstances in which the contract can be changed or adjusted without initiating a new procurement procedure. This is especially relevant when it comes to long-term contracts that may encounter circumstances that could not have been foreseen from the outset. Naturally, the ability to amend the contract will be subject to the rules of administrative and contract law.

In addition, public authorities that are governed by their own specific pieces of legislation will not be bound by the provisions of the Mandatory Tenders Law or the Regulations. For example, as set out in the Definition section of the Regulations, a “public body” specifically excludes the

defence establishment from its ambit. Therefore, when an amendment to a concluded contract is required by an authority that is governed by specific legislation, section 8A must be read in line with the relevant applicable legislation.

5.2 Direct Contract Awards

About 30 exemptions from mandatory tendering are listed in the Regulations, with the primary exemptions being:

- a contract having a value not surpassing ILS50,000;
- a contract that needs to be entered into urgently in order to prevent substantial damage;
- a contract involving a transaction whereby conducting a tender is liable to cause significant harm to the security of the State, its foreign relations and economy, public security or a professional or trade secret of a Ministry;
- a continuation contract the terms of which are identical to or more favourable than the initial contract with the customer; or
- a contract involving a transaction with a resident of a foreign country or a transaction which is to be implemented in a foreign country.

5.3 Recent Important Court Decisions

In the past year, several significant decisions have been rendered by the Supreme Court on the subject of tender law, including:

- Administrative Appeal 7293/20 Pangea DW v Israel Airports Authority (24.1.2021) – Pangea DW filed an administrative appeal with the Supreme Court challenging the Israel Airports Authority's decision in which Omega – Institute for Modern Teaching Ltd – was declared as the successful bidder in a tender for performing COVID-19 tests at Ben Gurion Airport.

The court disqualified Omega from being awarded the tender, in light of it having failed to satisfy the threshold conditions related to the required previous experience of a bidder in the tender. The court ordered that the matter be returned to the Tender Committee for it to decide how to proceed with the tender. S. Horowitz & Co. represented Pangea DW in this appeal.

- Administrative Appeal 3597/20 4A Desalination Ltd. v the Ministries of Energy and Finance and the Water Authority (19.8.2020) – an administrative appeal was filed with the Supreme Court, relating to a tender published by the Ministries of Energy and Finance together with the Water Authority for the “Finance, Design, Construction, Operation, Maintenance and Transfer of a Sea-Water Desalination Facility” for a period of 25 years (known as Sorek B). This is the largest and most complex project of its kind in the world and its value is estimated to be ILS5–6 billion. S. Horowitz & Co. represented IDE Technologies, one of the bidders, in this appeal.

5.4 Legislative Amendments under Consideration

As far as the authors are aware, no proposals are under consideration by the legislator to change the existing legislation.

Contributed by: Eran Bezalel, Uriel Prinz, Lior Mimon and Shlomi Delgo, S. Horowitz & Co.

S. Horowitz & Co. was founded in 1921 and is one of Israel's largest firms. Many of the firm's lawyers are multilingual and have qualified and practised in locations including the USA, Eng-

land and South Africa. S. Horowitz & Co. is the only Israeli member of Lex Mundi, the leading global network of independent law firms.

AUTHORS



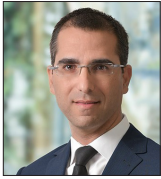
Eran Bezalel is a partner at S. Horowitz & Co. His practice spans a wide range of complex commercial disputes, including all aspects of administrative, commercial, real estate,

contractual, corporate and competition law. Eran has particular expertise in the field of complex tenders and government procurement projects, advising on major, multimillion-dollar public and private tenders of every description; especially in the fields of desalination, energy, transportation and retail. Eran has advised on a large number of ground-breaking BOT, PFI and PPP national infrastructure and construction projects in Israel. The Marker, Israel's leading financial online and print magazine, included Eran in 2014 in its shortlist of the 40 most promising people under the age of 40.



Uriel Prinz is a partner at S. Horowitz & Co. Uriel is a commercial litigator with extensive experience acting for clients on a broad range of complex corporate and

commercial cases, with a particular focus on tenders and administrative law, construction, engineering and infrastructure-related disputes, energy sector disputes, technology and telecommunication sector-related disputes, and class actions. Uriel regularly handles the full range of aspects involved in construction, projects and tender-related disputes. He has been involved in many of Israel's largest BOT, PFI and PPP tenders. He has broad experience in successfully contesting and defending clients in cost overrun disputes, EPC contractual disputes, tender and government procurement disputes, and disputes concerning a wide variety of building and design defects.



Lior Mimon has outstanding expertise and extensive experience in tenders and administrative law, as well as administrative and civil litigation and commercial law. Lior

represents and provides ongoing legal counsel to large leading government and private entities in a wide range of complex tenders and procurement procedures reaching billions of NIS, mainly in the field of energy and infrastructure, including the PPP and BOT method. Within his work, Lior provides ongoing legal counsel to tender committees, throughout all stages of the tender process, from drafting and editing the tender documents, to managing contacts with bidders, providing ongoing legal oversight and representation in court regarding the tender results.



Shlomi Delgo is a partner at the firm who advises on a broad range of corporate and commercial transactions, with a particular focus on corporate law, M&A, joint ventures, private

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