Chapter 5

Belgium

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I. INTRODUCTION

§ 5:1 International obligations

The Agreement on Government Procurement was signed in Marrakech on 15 April 1994 and entered into force on 1 January 1996.[1] The Agreement was approved in Belgium by the Act of 23 December 1994.[2]

The Belgian legislation is the result of the transposition of European Community (EC) Directives on public procurement (see text, below), which are, in turn, influenced by the Agreement on Government Procurement rules.

§ 5:2 European Union obligations

The Treaty on the Functioning of the European Union (TFEU) contains general rules that apply, in principle, to all public procurement measures and all types of government contracts, such as prohibitions on discrimination and other trade restrictive measures,[1] the equal treatment principle, the obligation of transparency, free competition, and as proportionality. The European legal framework on public procurement consists of the following Directives:[2]

1. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC;[3]
2. Directive 2014/25/EU of the European Parliament and of the

[Section 5:1]

[1]The text of the agreement includes an agreed set of minimum standards implementing the principles of openness, transparency and non-discrimination in procurement procedures.

[2]Published in the *Belgian Official Journal* (*Staatsblad / Moniteur belge*) of 23 January 1997.

[Section 5:2]

[1]Article 34 of the Treaty on the Functioning of the European Union on free movement of goods, article 56 of the Treaty on the Functioning of the European Union on freedom to provide services, and article 49 of the Treaty on the Functioning of the European Union on freedom of establishment.

[2]All of the Directives have been transposed into Belgian public procurement law, which therefore corresponds, to a large extent, with European procurement law.

[3]*Official Journal* 2014, L 94, p. 65, to be transposed into Belgian law by 18 April 2016; The current Belgian legislation is a transposition of the previous Directive 2004/18/EC (& full title). The Directive 2004/18/EC will be referred to as the "Classic

Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC;[4]

3. Directive 2014/23/EC of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts;[5]
4. Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC (the "Defense Procurement Directive");[6]
5. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts;[7] and
6. Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[8] (together with Directive 89/665/EC, "the Remedies Directives").[9]

§ 5:3 National obligations

Constitution

The principles of general Belgian constitutional and administrative law apply. Most relevant to public procurement are the constitutional principles of government transparency and equality and non-discrimination (articles 10 and 11 of the Constitution).

Competences in Federal State of Belgium

The Special Act of 8 August 1980 for the reform of institutions, as

Sectors Directive."

[4]*Official Journal* 2014, L 94, p. 243, to be transposed into Belgian law by 18 April 2016. The current Belgian legislation is a transposition of the previous Directive 2004/17/EC (& full title). The Directive 2004/17/EC will be referred to as the "Special Sectors Directive."

[5]*Official Journal* 2014, L 94, p. 1, to be transposed into Belgian law by 18 April 2016.

[6]*Official Journal* 2009, L 216, p. 76.

[7]*Official Journal* 1989, L 395, p. 33.

[8]*Official Journal* 1992; L 76, p. 14.

[9]Substantially amended by 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 with regard to improving the effectiveness of review procedures concerning the award of public contracts (*Official Journal* 2007, L335).

modified by the Special Act of 8 August 1988,[1] sets out the framework for Belgian federal structures. Article 6, section 1, VI, 4th paragraph, of the Special Act provides that the federal authority remains (predominantly) competent for public procurement rules.

Legislation Relating to Public Procurement

Belgian legislation on public procurement has been codified in the Act of 15 June 2006 concerning the award of public procurement contracts for works, supplies and services.[2] The Act implements the former Classic and Special Sectors Directives. Due to the adoption of Directives 2014/24/UE and 2014/25/UE, two new Acts have been adopted in 2016 to implement the European Directives in Belgian legislation:

1. The Act of 17 June 2016 concerning the public procurement contracts;[3] and
2. The Act of 17 June 2016 concerning the concession contracts.[4]

However, the two Acts are not yet applicable. They will enter into force as soon as the necessary Royal Decrees are adopted, which might happen in 2017. The national legislation related to public procurement is, therefore, still the Act of 15 June 2006 and its implementing Royal Decrees. The most important Royal Decrees are:

1. The Royal Decree of 15 July 2011 on the award of public procurement contracts in the classic sectors[5] (the "Royal Decree Classic Sectors");[6]
2. The Royal Decree of 16 July 2012 on the award of public procurement contracts in the special sectors[7] (the Royal Decree Special Sectors");[8]
3. The Royal Decree of 14 January 2013 on the general conditions

[Section 5:3]

[1]*Staatsblad / Moniteur belge*, 15 August 1980.

[2]*Staatsblad / Moniteur belge*, 15 February 2007, as modified by Act of 15 May 2014 (*Staatsblad / Moniteur belge*, 28 May 2014). Services concessions do not fall under the Act. The Act and its implementing Royal Decrees entered into force on 1 July 2013.

[3]*Staatsblad / Moniteur belge*, 14 July 2016.

[4]*Staatsblad / Moniteur belge*, 14 July 2016.

[5]The Royal Decree replaces the Royal Decree of 8 January 1996 concerning the award of public procurement contracts for works, supplies, and services and for the concessions for public works in the classic sectors (*Staatsblad / Moniteur belge*, 26 January 1996).

[6]*Staatsblad / Moniteur belge*, 9 August 2011.

[7]The Royal Decree replaces the Royal Decree of 10 January 1996 concerning the award of public procurement contracts in the special sectors (*Staatsblad / Moniteur belge*, 26 January 1996).

[8]*Staatsblad / Moniteur belge*, 11 February 2013.

for the execution of public procurement contracts and of public works concessions (the "Royal Decree on Execution Rules");[9] and

4. The Royal Decree of 24 June 2013 on the competition in the framework of the European Union of certain contracts for works, supplies and services in the sectors of water, energy, transport and postal services.[10]

The Act of 17 June 2013 on the motivation, information and remedies on public procurement contracts and certain contracts for works, supplies and services (the "Legal Protection Act")[11] contains the rules on requirements which the decisions of the contracting authorities have to meet, as well as the standstill obligation and the available remedies. The Legal Protection Act has been adopted in order to transpose Directive 2007/66/EC. To a large extent it copies the provisions mentioned in Book II *bis* of the Act of 24 December 1993, as inserted by the Legal Protection Act, without changing their content, with a view of not delaying the overall reform of the public procurement legislation.[12] The Legal Protection Act will undergo major changes in 2017 in order to adapt to the new legislation.

Furthermore, the Act of 13 August 2011 on public contracts and certain contracts for works, supplies, and services in the field of defence and security (the "Defence Procurement Act"), a transposition of the Defence Procurement Directive, governs defence and security procurement.[13]

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[9]*Staatsblad / Moniteur belge*, 14 February 2013, as modified by Royal Decree of 22 May 2014 (Belgisch Staatsblad / Moniteur belge, 30 May 2014). The Royal Decree replaces the Royal Decree of 26 September 1996 and its Annexes containing the general execution conditions for the execution of public procurement contracts for the undertaking of works, supplies, and services and for concession of public works (*Staatsblad / Moniteur belge*, 18 October 1996).

[10]*Staatblad / Moniteur belge*, 27 June 2013. This Decree as well as the Royal Decrees on Classic and Special Sectors and the Decree on Execution rules have been modified on some points by Royal Decree of 7 February 2014 (Staatsblad / Moniteur belge, 21 February 2014).

[11]*Staatblad / Moniteur belge*, 21 June 2013. It replaces the Act of 23 December 2009 inserting a new book on motivation, information, and remedies in the Act of 24 December 1993 on public procurement contracts and some contracts for works, supplies, and services, which was executed by a Royal Decree of 10 February 2010 modifying certain royal decrees in execution of the Act of 24 December 1993 on public procurement contracts and some contracts for works, supplies, and services. This Royal Decree of 10 February 2010 also is abrogated.

[12]As will be seen below, some minor changes nevertheless have been implemented.

[13]*Staatsblad / Moniteur belge*, 1 December 2012, as modified by Act of 15 May 2014. Article 17, section 2, of the Act of 15 June 2006 excludes contracts relating to defense and security from its scope. The regulation (already in force) will not be dealt with in the chapter.

II. PROCEDURES FOR AWARD OF PUBLIC PROCUREMENT CONTRACTS IN CLASSIC SECTORS

§ 5:4 Application of laws and regulations

Scope of Act of 15 June 2006

Ratione Personae. Article 2, 1°-3°, of the Act of 15 June 2006 enumerates the contracting entities covered by procurement rules in the classic and special sectors. These are public authorities[1] and bodies governed by public law for the classic sector.

Public undertakings and certain private entities[2] on the basis of special or exclusive rights also may fall under procurement legislation if they award contracts relating to activities in the special sectors. More details on the scope *ratione personae* of the Act of 15 June 2006 can be found in the Classic and Special Sectors Directives,[3] as Belgian legislation is an exact transposition of these Directives on the point.

Ratione Materiae. All contracts for pecuniary interest conclude in writing between a contractor, a supplier, or service provider and a public purchaser for the undertaking of works, supplies, and services are subject to Belgian procurement legislation (regardless of the European thresholds).[4]

§ 5:5 Transparency of procurement proceedings

Article 5 of the Act of 15 June 2006 explicitly provides that contractors, suppliers, and service providers are to be treated in an equal, non-discriminatory, and transparent way. Transparency is (together with equal treatment) one of the overarching principles governing public procurement.[1]

The principle of transparency, as imposed on the contracting entity, requires that every potential candidate benefit from an appropriate degree of transparency during all phases of the procedure in order to make the market accessible to competition. However, the principle of transparency is more than the obligation to publish contract award

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[Section 5:4]

[1]The encompasses the state, regions, communities, provinces, municipalities, and associations formed by one or more of these entities.

[2]Belgian legislation does not contain special rules on privatisation. If privatisations give rise to a procurement of goods, works and services, they are in principle subject to the procurement rules as apply to any other contract.

[3]Classic Sectors Directive, article 1.9; Special Sectors Directive, article 2.

[4]Classic and Special Sectors Directives, article 1.2 (a)–(d). Public service contracts cover all services mentioned in Annex II of the Act of 15 June 2006. The Annex is identical to Annex II of the Classic Sectors Directive.

[Section 5:5]

[1]Case C-87/94, [1996] ECR 1996 I-02043.

procedures. It must be seen as a leeway throughout the whole award procedure in all of its aspects. Transparency has its limits, since it must be reconciled with the need to protect confidential information.[2]

§ 5:6 Sources of publication of procurement opportunities

Belgium has one official channel for public procurement contracts, namely, the e-Notification[1] (see https://enot.publicprocurement.be).[2] All Belgian public procurement notices can be found on the electronic tool. Since 1 January 2011, the *Belgian Public Tender Bulletin* (*Bulletin der aanbestedingen / Bulletin des adjudications*) has merged with e-Notifications, meaning that public contract notices published on e-Notifications count as official publication in the *Bulletin der aanbestedingen / Bulletin des adjudications*. Publications dated before 1 January 2011 still can be found in the *Bulletin der aanbestedingen / Bulletin des adjudications* (the e-Notifications site also contains a link to these notices published before 1 January 2011).

The e-Procurement service has concluded agreements with the Flemish authority and the Brussels-Capital Region. They publish directly on e-Notification. They also have concluded agreements with the Walloon Region and private partners, who provide e-Notifications with their contract notices.

The Walloon Region and the French Community have developed their own tool, informatisation des avis de marché (IAM), which provides support in drawing up public procurement notices. These notices are sent to e-Notification. E-notification also provides for the possibility to publish the procurement opportunity in the *Official Journal of the European Union*, if required.

§ 5:7 Procurement notice requirements for contracts

In General. A contract with a value equal to or exceeding the European thresholds (*infra*) must be announced in the *Official Journal* and in the *Bulletin der aanbestedingen / Bulletin des adjudications*. A contract with a value below the European thresholds must be published in the *Bulletin der aanbestedingen / Bulletin des adjudications*.[1]

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[2]The Act of 15 June 2006 provides explicitly in article 11 that no confidential information submitted by candidates or tenders in the framework of the award procedure or the execution the contract is to be disclosed in any way.

[Section 5:6]

[1]The application also allows e-Tendering.

[2]The website provides English manuals explaining in detail what must be done for publishing a procurement opportunity.

[Section 5:7]

[1]Royal Decree Classic Sectors, article 29.

The announcement in the *Bulletin der aanbestedingen / Bulletin des adjudications* may have no other content than the one that is being announced in the *Official Journal*. The announcement in the *Bulletin der aanbestedingen / Bulletin des adjudications* may not be published before the date of sending the announcement to the Bureau for Publications of the EU.

Only the publications in the *Official Journal* and the *Bulletin der aanbestedingen / Bulletin des adjudications* count as official publications. Correction or completion of the official publication by the contracting authority must be done by means of the announcement of a new publication or by means of a message of correction according to a template annexed to the Royal Decree Classic Sectors. The contracting authority is required to be able to deliver the proof of the sending of the announcement.

European Publication Thresholds. The European thresholds, above which a publication is required in the *Official Journal* (and the *Bulletin der aanbestedingen / Bulletin des adjudications*), are €5.225.000 for work contracts, €209.000 for supply contracts and service contracts, as indicated in Annexe II, A of the Act of 15 June 2006, and €135.000 for supply contracts and service contracts awarded by centralised authorities.[2]

Regardless of the contracting authority, a threshold of €209.000 always applies to research and development services and certain telecommunications services, namely, television and radio broadcast services, interconnection services, and integrated telecommunications services. If the above-mentioned works, homogeneous supplies, or services are divided into lots, the contracting authority may derogate from the rules on European publication for those lots in accordance with article 9.5(a) of the Classic Sectors Directive.[3]

Contracts with Estimated Value Equal to or Exceeding European Thresholds. All contracts with an estimated value equal to or exceeding the above mentioned thresholds are subject to the European publication rules.[4] The European publication prior to the award procedure consists of a prior information notice and a contract notice. Articles 34-38 of the Royal Decree Classic Sectors describe the European publication procedure. These articles are a literal transposition of the articles 35, sections 1-3, of the Classic Sectors Directive.

[2]Royal Decree Classic Sectors, article 32, as updated by the Ministerial Decree of 22 December 2015, modifying the European publication thresholds in multiple royal decrees executing the Act of 15 June 2006 (*Staatsblad / Moniteur belge*, 29 December 2015) and being a transposition of article 7 of the Classic Sectors Directive. It is forbidden to split contracts that are to be considered as one works, supply, or service contract and that are valued above the threshold values for the purpose of obtaining contracts that are below those values. It also is forbidden to aggregate contracts in order to avoid the application of the European threshold values.

[3]Royal Decree Classic Sectors, article 33.

[4]Royal Decree Classic Sectors, article 34.

Contracts with Estimated Value below European Thresholds. All contracts with an estimated value below[5] the European thresholds[6] to be awarded by means of adjudication, quote request, negotiated procedure with publication, simplified negotiated procedure with publication, or competitive dialogue must be announced, according to Annex 7 of the Royal Decree Classic Sectors. The contract notice must contain at least the following information:

1. Name, address, and type of the contracting authority;
2. Type of contract, the object and its description; the NUTS-code and the main categories of the main contract according to the CPV-code;
3. Required information and documents concerning right to participate; the qualitative selection criteria and the thereto required information and documents (if applicable the information and documents the contracting authority can consult electronically;
4. If applicable, cost of the contract documents and mode of payment thereof;
5. Award procedure chosen; and
6. Final date and, if applicable, the final hour for receipt of the requests to participate or for receipt of the tenders.

When a direct and full access to the documents exists (through internet) and information on the above-mentioned points 3, 4, and 5, only the information on the contracting authority, the type of contract and the date(s) of receipt is required. In the case of a restricted procedure or a negotiated procedure with publication, the announcement may concern a list of selected candidates or the organisation of a qualification system. Both systems are exclusively meant for awarding similar contracts.

In both cases, the award procedure is chosen at the latest upon the moment of inviting the selected candidates to submit an offer. For drawing up a list of selected candidates, the contracting authority publishes the announcement according to the model in Annex 9 of the Royal Decree Classic Sectors. The publication must contain at least the information of the above mentioned points 1-3 and 6, above. The list is valid for maximum three years from the date of the selection decision.

For organising a qualification system, the contracting authority publishes the announcement according to the model in Annex 10 of the Royal Decree Classic Sectors. The publication contains at least the data of the above-mentioned points 1 and 2.

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[5] Royal Decree Classic Sectors, article 39-41.

[6] The Belgian publication rules also are applicable to contracts on services as meant in Annex II, B of the Act of 15 June 2006 if their estimated value is equal to or exceeds the applicable European thresholds (article 39 of the Royal Decree Classic Sectors).

The announcement is published every year. The interested contractors, suppliers or service providers can request at any time to be part of the system of qualification organised by the contracting authority. Such an inclusion of a new candidate is subject to a new publication. The management of such a qualification system is subject to rules and criteria, which are outlined in article 41, section 3, paragraph 3, of the Royal Decree Classic Sectors.

§ 5:8 Supplier and contractor prequalification procedures

In General

The Royal Decree Classic Sectors distinguishes between criteria relating to the right to participate to award procedures[1] and criteria relating to a qualitative selection.[2]

Right to Participate for Candidates and Tenderers

In order to participate, the potential candidate must prove his professional honesty, his solvency, and his reliability. He may not have been subject to a conviction by final judgment for reasons of participation in a criminal organisation, corruption, fraud and/or money laundering. There furthermore must be a total absence of reasons pointing at a solvency and/or reliability problem, and of misrepresentation in supplying the contract authority with the required information.[3]

Finally, the candidate may not have been involved in any way (directly or indirectly) in the development and/or preparation of the contract, if such involvement leads to an advantage that could distort normal competition.[4] Proof of the must be furnished in accordance with article 45, section 3, of the Classic Sectors Directive (extract from criminal record,[5] certificate of the National Office of Social Security,[6] and certificate proving the tenderer met his professional obligations[7]).

§ 5:9 Supplier and contractor prequalification procedures—Qualitative selection

Economic and Financial Standing. Participants may be excluded because they lack financial and economic standing. In accordance

[Section 5:8]

[1]Royal Decree Classic Sectors, articles 61-66.

[2]Royal Decree Classic Sectors, articles 67-79.

[3]Act of 15 June 2006, article 20; Royal Decree Classic Sectors, article 61.

[4]Royal Decree Classic Sectors, article 64.

[5]Royal Decree Classic Sectors, article 61.

[6]Royal Decree Classic Sectors, article 62.

[7]Royal Decree Classic Sectors, article 63.

with article 47 of the Classic Sectors Directive, article 67 of the Royal Decree Classic Sectors requires a number of references to prove the financial and economic standing of the candidate or tenderer, such as bank statements, presentation of balance sheets, and a statement of the undertaking's overall turnover or other documents, if allowed by the contracting authority.

Technical and Professional Ability. If the contract concerns works, supplies for which installation works are required or services, the contracting authority may assess the technical or professional ability of the candidates/tenderers based on their know-how, efficiency, experience, and reliability. He may require legal persons to provide in their request to participate or in their tender the names and professional qualifications of the persons which will have to execute in the contract.[1]

Articles 69-72 of the Royal Decree Classic Sectors enumerate certain evidence of professional or technical ability the contracting authority may demand as means of proof of standing.[2] These articles transpose article 48, section 2, of the Classic Sectors Directive, providing the means of evidence of the economic operators' technical abilities.

For contracts that do not require a prior European notice, the contracting authority may mention the appropriate references without being bound by the restrictions of articles 68-72 of the Royal Decree Classic Sectors. Articles 75-76 of the Royal Decree Classic Sectors provide the possibility for the contracting authority to require other proofs of professional suitability, such as proof of membership of trade register or, in the case of foreign candidates, proof of authorization or membership required in the country of origin.[3] In accordance with article 48, section 3, of the Classic Sectors Directive, an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities.

§ 5:10 Rules concerning description of goods or construction

Articles 7 and 8 of the Royal Decree Classic Sectors provide specific rules for technical specifications of works, materials, supplies, and services. Technical specifications[1] determine precisely the object of the contract, allow interested undertakings to assess whether they have

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[Section 5:9]

[1]Royal Decree Classic Sectors, article 68.

[2]This may include statement of tools, plants, and technical equipment available, education and professional qualifications of the contract, or indication of the environmental management measures that the contractor will be able to apply when performing the contract.

[3]Classic Sectors Directive, article 46.

[Section 5:10]

[1]Royal Decree Classic Sectors, article 2, section 1, 12° (identical to the definition

to submit a tender and grant the authorities the technical parameters to assess the various submitted offers.

Specifications may be set out by reference to national standards giving effect to European standards,[2] European technical approvals and other European-level standards, international standards, common technical specifications or, where these do not exist, certain national-level standards ("listed types of specifications"). Every reference to any standard must be accompanied with "or equivalent."[3] Alternatively, performance or functional requirements may be used as a means of description.[4]

A combination of these two methods may be used for different characteristics of the works, supplies, or services.[5] Since the rules are an exact transposition of article 23 and Annex VI of the Classic Sectors Directive, reference is made to the Directive for further details.

Variants and Options

Variants. In accordance with the Classic Sectors Directive, a variant[6] is defined as an alternative way of conception or design that is submitted upon request of the contracting authority or upon initiative of the tenderer.[7] A variant may offer certain additional features relating to design or execution that are not included in the standard requirements. It might offer a different approach by proposing for instance a different technical solution for a construction project.

In the event of a mandatory variant, the contracting authority describes in its contract documents the object, nature, and scope of the basic design and of one or more variants. Tenderers are required to submit a tender for both the basic design and for each variant. In the event of a facultative variant, the contracting authority describes in its contract documents the object, nature and scope of multiple variants, of which one can be qualified as the basic design. Tenderers can submit a tender for one or more variants. The contracting authority may require to submit a tender for the basic design. Both mandatory and facultative variants are allowed in all award procedures.

Free variants can be freely submitted by the tenderers. In the case

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provided in the Classic Sectors Directive).

[2]A standard is "a technical specification approved by a recognized standardizing body for repeated or continuous application, compliance with which is not compulsory, made available to the general public and which falls into one of the following categories: international standards, European standards or national standards" (article 2, section 1, 13°, of Royal Decree Classic Sectors and Annex VI of the Classic Sectors Directive).

[3]Royal Decree Classic Sectors, article 7, section 2, a).

[4]Royal Decree Classic Sectors, article 7, section 2, b).

[5]Royal Decree Classic Sectors, article 7, section 2, c).

[6]Royal Decree Classic Sectors, article 9.

[7]Royal Decree Classic Sectors, article 2, section 1, 10°.

of contracts requiring a prior European notice, the contracting authority mentions in the announcement of the contract whether it allows the submission of the variant and, if so, in the contract documents the minimal requirements it must meet. They are not allowed in the adjudication procedure. Variants may be submitted by means of a separate tender or a separate section within the tender (to be determined in the contract documents).

Options. An option[8] is an additional element that is not strictly necessary for the execution of the contract. It is submitted upon request of the contracting authority or upon initiative of the tenderer.[9] It can be submitted either spontaneously or at the request of the contracting party.

§ 5:11 Rules on price setting

As a general principle, public contracts are to be awarded on a flat-rate basis. The flat-rate basis, however, does not restrict the possibility to review prices in the light of certain economical/social circumstances.[1]

In some cases, a derogation from the principle of the award on a flat-rate basis is possible, i.e. in exceptional circumstances (a very complicated mission or a mission involving new technical elements, whereby not all performance conditions or obligations can be determined yet) and in extraordinary and unforeseeable circumstances (urgent mission of which the nature and performance conditions are difficult to describe).[2]

In the cases referred to in article 6, section 2, of the Act of 15 June 2006, price fixing happens through reimbursement, or provisional prices followed by standard prices (as soon as the conditions of the mission are fully known), or partly by reimbursement and partly by means of standard prices. The contracting authority may choose one of the following[3] price fixing methods:

1. Global pricing[4] — Standard price covering all performances of the contract or covering every post of the contract (the tenderer is required to determine his tender price according to his own calculations and estimates, taking into account the content and scale of the contract);

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[8]Royal Decree Classic Sectors, article 10.

[9]Royal Decree Classic Sectors, article 2, section 1, 11°.

[Section 5:11]

[1]Act of 15 June 2006, article 6, section 1.

[2]Act of 15 June 2006, article 6, section 2.

[3]Royal Decree Classic Sectors, article 13.

[4]Royal Decree Classic Sectors, article 2, section 1, 4°.

2. Pricing list[5] — Single prices for the different posts are fixed and quantities (as far as the is determined per post) are likely or are expressed within a fork[6];
3. Reimbursement[7] — The price of the executed performances is determined after examination of the demanded prices on the basis of what is determined in the contract documents on cost components, cost calculation and volume of the increase to be applied on those costs; and
4. Mixed contract[8] — Price fixing happens by means of different above-mentioned methods.[9]

The Royal Decree Classic Sectors sets out in detail which costs, charges, taxes, performances and other components fall under the unity and total prices.[10] In application of article 6, section 1, of the Act of 15 June 2006, the contract documents provide for a price review on the basis of the price evolution of the hourly wages of the personnel and the social charges and the nature of the mission, one or more relevant elements, such as prices of material, price of commodities, exchange rates or other.[11]

The review is based on objective and controllable parameters and uses the appropriate weighting coefficient. If it is difficult to compose such a price review formula reflecting the real cost structure, the contracting authority may use the health index, the index of the consumption prices or another appropriate index. The review may foresee in a fixed, non-reviewable factor to be determined by the contracting authority in function of the particularities of the contract. A price review is not compulsory for missions with an estimated value below €120.000 or when the initial execution period is less than 120 working days or 180 calendar days.

Anti-Corruption Considerations

Please refer to § 5:8 relating to the right to participate for candidates and tenderers.[12]

[5]Royal Decree Classic Sectors, article 2, section 1, 5°.

[6]The posts are set off on the basis of the quantities that have been effectively ordered and performed.

[7]Royal Decree Classic Sectors, article 2, section 1, 6°.

[8]Royal Decree Classic Sectors, article 2, section 1, 7°.

[9]For flat-rate posts, the tenderer is required to determine his tender price according to his own calculations and estimates, taking into account the content and scale of the project.

[10]Royal Decree Classic Sectors, articles 14-19.

[11]Royal Decree Classic Sectors, article 20, section 1.

[12]Act of 15 June 2006, article 20.

§ 5:12 Methods of procurement and conditions for use

Methods of Procurement

In General. Belgian public procurement legislation distinguishes between four types of procurement procedures on the basis of different kinds of selection criteria. These are referred to as:

1. Adjudication (*aanbesteding* / *adjudication*);
2. Quote request (*offerteaanvraag* / *appel d'offres*);
3. Negotiated procedure (*onderhandelingsprocedure* / *procédure négociée*); and
4. Competitive dialogue (*concurrentiedialoog* / *dialogue compétitif*).

Another classification is being made on the basis of access to the market, i.e., open and restricted procedures. Before initiating an award procedure, the contracting authority may always examine the market with a view of drawing up the contract documents and contract specifications (if it has no distorting effect on competition).[1]

Adjudication and Quote Request. According to article 23 of the Act of 15 June 2006, public contracts are in principle awarded through an open or restricted procedure,[2] either by means of adjudication either by means of quote request.[3] One can, therefore, distinguish open or restricted adjudication procedures and open or restricted quote request procedures.

In the case of an adjudication the contract must be awarded to the tenderer that has submitted the lowest regular tender (the price is the only criterion). In the case of a quote request, the contract must be granted to the regular and economically most advantageous tender, according to the criteria (which must be) mentioned in the contracting documents.

The contracting authority has the free choice between both procedures. Both procedures may be awarded by means of an open or restricted procedure. In an open procedure all interested contractors may submit tenders. In a restricted procedure, only those contractors so invited by the contracting authority may submit tenders.

Negotiated Procedure. The negotiated procedure[4] allows the contracting authority to consult the economic operators of its choice and to negotiate the terms of contract with one or more of them. The procedure, both with a notice and without a notice can only be chosen in limited cases, as enumerated in article 26 of the Act of 15 June 2006.

[Section 5:12]

[1] Royal Decree Classic Sectors, article 5.

[2] Classic Sectors Directive, article 28.

[3] Act of 15 June 2006, articles 23-25; Royal Decree Classic Sectors, articles 80-104.

[4] Act of 15 June 2006, article 26; Royal Decree Classic Sectors, articles 105-110.

The negotiated procedure without publication only can be used in specific cases laid down in article 26, section 1 of the Act of 15 June 2006, which is a transposition of article 31 of the Classic Sectors Directive. Article 31 provides an overview of these specific cases. Moreover, the procedure can be used only if the estimated expenditure (value-added tax, VAT, excluded) of the public works, supplies, or services does not exceed certain thresholds:

1. €209.000 for the contracts having as their object services of financial institutions relating to insurance, banking and investment services as well as research & development (categories 6 and 8 of Annex II, A of the Act of 15 June 2006) and services referred to in Annex II, B of the Act of 15 June 2006 (transport, hotels and restaurants, and legal services);
2. €85.000 for all other contracts;
3. €30.000 for each lot of which the estimated contract value does not reach the European thresholds in article 32 of the Royal Decree Classic Sectors, on the condition that the aggregated amount of these lots does not exceed 20 per cent of the estimated contract value; and
4. €8.500 for contracts that are being concluded by means of an accepted invoice.[5]

The negotiated procedure with publication is confined to exceptional cases, as enumerated in article 26, section 2, of the Act of 15 June 2006, which is a transposition of article 30, section 1, of the Classic Sectors Directive. For an overview of theses, please refer to the article 30. Moreover, the procedure can be used only if the estimated expenditure (VAT excluded) of the public works is below €600.000 and the estimated expenditure for supplies or services is below the applicable European thresholds (€209.000).[6]

Legal services relating to litigation that are restricted to advice and representation before courts and other authorities of dispute settlement as well as to dispute prevention, also are to be awarded by means of the negotiated procedure with publication.[7]

Belgian procurement legislation also provides a simplified variant of the negotiated procedure with publication, called the simplified negotiated procedure with publication.[8] The procedure is comparable to the open procedure. However, it contains only one phase: right to participate to the procedure, qualitative selection and examination of

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[5]Royal Decree Classic Sectors, article 105, as amended by the Ministerial Decree of 18 December 2013 modifying the European publication thresholds in three Royal Decrees executing the Act of 15 June 2006 (*Staatsblad / Moniteur belge*, 23 December 2013).

[6]Royal Decree Classic Sectors article 105, section 2.

[7]Royal Decree Classic Sectors, article 146.

[8]Royal Decree Classic Sectors, article 2, section 1, 3°.

the content of the tenders. The procedure has been introduced as a measure of administrative simplification. The simplified procedure only may be used for contracts with an estimated value below the European publication thresholds, subject to the restriction in article 105, section 2, 1°, of the Royal Decree Classic Sectors.[9]

Competitive Dialogue. The contracting authority may use the competitive dialogue[10] in the case of particularly complex[11] contracts. The procedure is meant to allow a public entity knowing what outcome it wants to achieve in awarding a public contract but not knowing how best to achieve it, to discuss, in confidence, possible solutions in the dialogue phase of the tender process with short listed bidders before calling for final bids.

Particular Procedures

The contracting authority also may proceed to the works contest.[12] The specific Belgian procedure, which does not find its direct legal basis in the public procurement Directives, applies to work contracts for both the design and the execution of public works. The contract is awarded on the basis of advice by the jury.

Another procurement procedure is the design contest.[13] The procedure enables the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan, design or a designer selected by a jury after being put out to competition with or without the award of prices.

The contracting authority may use a so-called promotion mission of works[14] The promotion mission aims not only at contracting out works, but also at their financing or every thereto related provision of services. One entity is responsible for both the performance of a contract and its pre-financing. The contract is awarded by means of a public-private cooperation, whereby the promoter is being compensated by means of rent, possibility with option to purchase or future transfer of property, emphyteusis, or the payment of annuities.

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[9] Article 105 provides that, in case of open or restricted procedures not having led to a request to participate or tender or a suitable request to participate or tender, the negotiated procedure without publication only may be used for works contracts not reaching a threshold of €600.000.

[10] Act of 15 June 2006, article 27, and Royal Decree Classic Sectors, articles 111-114, transposing article 29 of the Classic Sectors Directive.

[11] The meaning of "particularly complex" can be found in recital 31 of the Classic Sectors Directive.

[12] Royal Decree Classic Sectors, article 139.

[13] Act of 15 June 2006, article 33, and Royal Decree Classic Sectors, articles 140-145, transposing articles 66 *et seq*. of the Classic Sectors Directive into Belgian law. The Directive's articles provide detailed information on the procedure.

[14] Act of 15 June 2006, article 28; Royal Decree Classic Sectors, articles 115-124.

Public Works Concession

The public works concession[15] is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in the right together with payment.

Concession contracts are treated differently under the Belgian legislation in comparison to public work contracts. During the award procedure, the contracting authority can choose the procurement procedure and he can always choose the negotiated procedure. As noted, service concessions are excluded from the public procurement rules.

Modalities under the Act of 15 June 2006

Dynamic Purchasing Systems. In order to set up a dynamic purchasing system,[16] contracting authorities must follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under the system.

All the tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system.

Electronic Auctions. In open, restricted, or negotiated procedures as well as in the case of framework agreement or agreements awarded by means of dynamic purchasing systems, if these procedures lead to irregular or unacceptable tenders, the contracting authorities may decide that the award of a public contract will be preceded by an electronic auction,[17] provided that the contract specifications can be established with precision and that the price is the only award criterion).

Articles 130-135 of the Royal Decree Classic Sectors explain in detail the mechanism of the electronic auction. These articles are a literal transposition of article 54 of the Classic Sectors Directive.

Framework Agreements. Framework Agreements[18] are arrangements whereby a purchaser and a provider establish the terms on which purchases may or will be made over a period of time. Their basic rationale is to allow the parties to establish the terms of (future) transactions in advance of specific orders, leading to more rapid procedures and reduced costs when it comes to actually placing an order.

Belgian and European procurement legislation foresee that

[15] Act of 15 June 2006, article 34; Royal Decree Classic Sectors, articles 147-157.

[16] Act of 15 June 2006, article 29; Royal Decree Classic Sectors, articles 125-129. A definition may be found in article 3.13 of the Act of 15 June 2006, transposing article 1.6 of the Classic Sectors Directive. Further details can be found in article 33 of the Classic Sectors Directive.

[17] Act of 15 June 2006, article 30; Royal Decree Classic Sectors. articles 130-135.

[18] Act of 15 June 2006, article 32; Royal Decree Classic Sectors, articles 136-138.

framework agreements may be concluded with a single as well as with several economic operators, so-called single-supplier or multi-supplier frameworks. Further details can be found in article 32 of the Classic Sectors Directive, of which the Belgian legislation is a transposition.

§ 5:13 Solicitation and submission of tenders or proposals

Solicitation of Tenders and Proposals

In General. In order to obtain tenders in the adjudication or quote request procedures, the contracting authority may choose the open or the restricted procedure. In the open procedure, any interested candidate may submit an offer. There is no separate request to participate needed.

However, in the restricted procedure, only a limited number of candidates may submit an offer. Before they can do so, they have to send a request to participate to the contracting authority, on the basis of which the authority sends an invitation to a number of candidates to submit a tender (i.e., two-phase-procedure).

Open and Restricted Procedure—Time Limits for Request to Participate and Tender Submission. As noted, under the open procedure any interested firm may tender on a contract. Normally, interested firms contact the contracting authority to request the contract documents (such as detailed specifications and contract terms). These documents need to be sent to the firms within six days of receipt of the request.[1] As an alternative, a contracting authority may offer unrestricted and full direct access to the documents by electronic means.[2]

The Royal Decree Classic Sectors sets out minimum time limits for firms to submit requests to participate in case of restricted procedures and to submit tenders in case of open and restricted procedures.[3]

Under the restricted procedure, candidates have 37 days to submit a request to participate in order to receive an invitation to submit a tender, starting from the date of despatch of the contract notice to the Bureau of Publications of the EU. If the European threshold values are not met, the minimum timescale is 15 days (i.e., the first phase of the restricted procedure).

If the European thresholds values are met, tenderers have, in principle, at least 52 days to submit a tender for open procedures and 40 days for restricted procedures starting from the date of despatch of

[Section 5:13]

[1] Royal Decree Classic Sectors, article 43.

[2] Royal Decree Classic Sectors, article 43.

[3] The time limits to submit tenders do not include the day of mailing of the invitation and the final day of submission (article 72bis of the Act of 15 June 2006).

the contract notice to the Bureau of Publications of the EU.[4] If the European threshold values are not met, the minimum timescale is 36 days for open procedures and 15 days for restricted procedures from the date of despatch of the contract notice.[5] These time limits can be prolonged or shortened.

Article 42 Royal Decree Classic Sectors contains specific provisions under which the period to submit a tender may be longer, i.e. when the documents are not supplied to tenderers in time or when a visit to the site or on-the-spot inspection of documents is needed. When the European thresholds are met, the period for submitting tenders and requests to participate may be shortened in certain cases as laid down in article 38, sections 4-6, of the Classic Sectors Directive.[6]

If the European thresholds are not met, the period for submission of requests to participate and for tender submission (for open and restricted procedures) may be shortened to minimum of 10 days, in case of urgency making it impossible to respect the minimum period of 15 days or announcement of the contract by electronic means (as determined by the Federal Public Service for Personnel and Organisation (*Personeel en Organisatie / SPF Personnel et Organisation*).[7]

Number of Firms Invited under Restricted Procedure. The number of selected candidates in all cases must be sufficient to ensure genuine competition. In any case a minimum number of five candidates must be invited to submit a tender.[8]

If a European publication is mandatory, the contracting authority indicates in the announcement of the contract the minimum and, where appropriate, the maximum number of candidates. Therefore, the contracting authority is not required to predict a precise number in advance.

It merely must indicate the minimum number of candidates it wants to select.[9] The contracting authority may shortlist in function of objective and non-discriminatory criteria that must be indicated in the contract documents, such as technical and/or professional ability and economic and financial standing. Economic operators who did not request to participate or candidates who do not have the required capabilities are excluded.

Invitation to Submit Tender—Content. The contracting authori-

[4]Royal Decree Classic Sectors, article 46.

[5]Royal Decree Classic Sectors, article 48.

[6]Transposed by articles 46 and 47, section 2, of the Royal Decree Classic Sectors.

[7]Royal Decree Classic Sectors, article 48, for open procedures; Royal Decree Classic Sectors, article 49, for restricted procedures. The same possibility exists for negotiated procedures with publication.

[8]Royal Decree Classic Sectors, article 58, section 3.

[9]Royal Decree Classic Sectors, article 58, section 2.

ties invite simultaneously and in writing the selected candidates to submit their tender. Certain listed information must be sent with each invitation, in accordance with article 40, sections 2-5 of the Classic Sectors Directive.[10]

Submission of Requests for Participation and Tender. Every request to participate is submitted individually and in writing or by telephone.[11] Article 52, section 1, of the Royal Decree of 15 July 2011 sets out a number of requirements electronic means used for submission of requests to participate or tenders need to meet (the designated electronic means). These requirements are in accordance with Annex X of the Classic Sectors Directive.

Where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time limit set for their receipt. Tenders are to be submitted in written form. The tender is signed by the person or persons authorised to bind the tendering entity. This applies for all participants, if the tenders are submitted by a combination without legal personality (with the obligation to choose the participant which will represent the combination towards the contracting authority).

A candidate may submit no more than one request to participate per contract or per list of selected candidates. Similarly, a tenderer can submit no more than one tender per contract, except in case of possible variants and in case of competitive dialogue. In the case of lots, the tenderer can submit one tender for one, multiple or all lots. He submits a separate offer for every lot, unless the contract documents allow multiple tenders to be bundled in one document.[12]

Under the restricted procedure, only the selected candidates may submit an offer. However, the contract documents may allow that the tender is submitted by a combination with legal personality consisting of a selected person and one or more non-selected persons. Nonetheless, this may be restricted or prohibited by the contract documents.[13]

§ 5:14 Tenders—Content and signature

In General

If the contract documents contain a form for drawing up the tender and completing the summary survey or the inventory, the tenderer uses the form. If he does not use the form, he is fully responsible for

[10] Transposed by article 50 of the Royal Decree Classic Sectors.

[11] Royal Decree Classic Sectors, article 51.

[12] Royal Decree Classic Sectors, article 54.

[13] Royal Decree Classic Sectors, article 55.

conformity with the form of the documents he uses.[1] The tender must contain the following:

1. Full identity of the tenderer (name, profession, nationality, residence, and, in the case of a legal person, corporate name, legal form, registered office, and company registration number (each member of a combination without legal personality must give full identity);
2. Total amount of the tender with the price supplement; the price reduction or correction for part of the tender or the whole tender (if applicable) and every other price data;
3. Number and name of the account with a financial institution on which the payment of the contract must be done;
4. As to subcontracting, information on which part of the contract may be subject to subcontracting and which subcontractors are proposed;
5. If required by the contract documents, the origin of the products to be supplied and the materials to be processed having their origin outside the EU with mention, per country of origin, of the value exclusive customs duties they represent in the tender[2]; and
6. In the case of tenders for multiple lots, the order of preference for the lots.[3]

Prices are in Euros. The total tender amount also must be written in full, as well as for the unit prices (if required by the contract documents).[4] In tenders for multiple lots, the tenderer may offer price reductions in case of adjudication, or improvement propositions in case of quote request, if these certain lots would be awarded to him (on condition that the contract documents do not prohibit it). If applicable, the order of preference for award of these lots must be mentioned by the tenderer submitting multiple tenders.[5]

The tenderer signs the tender and the possible summary survey or inventory as well as the other Annexes to the tender. The same goes for possible price supplements, price reductions or corrections as well any kind of change to the essential conditions of the contract concerning prices, time limits and technical specifications.[6] If a proxy signs, he clearly mentions the constituent parties of the power of attorney.

If the tender is submitted by a combination without legal personal-

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[Section 5:14]

[1] Royal Decree Classic Sectors, article 80.

[2] If products or materials are to be processed or finished in the European Union, only the value of these commodities need be mentioned.

[3] Royal Decree Classic Sectors, article 81.

[4] Royal Decree Classic Sectors, article 88.

[5] Royal Decree Classic Sectors, article 89.

[6] Royal Decree Classic Sectors, article 82.

ity, every participant to the combination signs the tender. If a summary survey is annexed to the contract documents of a works contract or an inventory is annexed to the contract documents of a supplies contract, the tenderer completes the survey / inventory and does the required calculations. If necessary, he corrects the summary survey / inventory and adds to the tender a note justifying these corrections.[7]

Period of Effectiveness of Tenders

The tenders are bound by their tender (as, possibly, corrected by the contracting authority) during a period of 90 days,[8] starting from the final date of receipt. The contact documents may foresee a different period.

Before expiration of the 90-day period, the contracting authority may request the tenderers for a voluntary prolongation, without prejudice to the provisions applicable if the tenderer refuses to accept the request in case of an adjudication or quote request.

Interpretation of Errors and Missing Elements in Contract

Subject to other provisions in the contract documents, the following order of preference must be followed for interpretation of contradictions in the contract documents:

1. The plans;
2. The tender specifications; and
3. The summary survey or the inventory.[9]

If the plans are contradictory, the tenderer can use the interpretation most favourable to him. Errors or missing elements affecting the price calculation or making the comparison of tenders impossible must be reported immediately and in writing to the contracting authority. The must be done in any case at the latest 10 days before the date of the opening session.

The contracting authority judges whether the errors or missing elements are important enough to adjourn the opening session and, if necessary, to proceed to a modification of the other contract documents. Contract documents may make the applicable to supplies and service contracts.[10] After the opening session, the tenderer no longer has the right to invoke errors or missing elements in the summary survey or the inventory as delivered by the contracting authority. Furthermore, the tenderer no longer can invoke formal defects, errors, or missing elements in his tender.[11]

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[7] Royal Decree Classic Sectors, articles 83 and 84.

[8] Royal Decree Classic Sectors, article 57.

[9] Royal Decree Classic Sectors, article 85.

[10] Royal Decree Classic Sectors, article 85.

[11] Royal Decree Classic Sectors, article 87.

§ 5:15 Submission of tenders

Tenders are to be submitted in paper in a sealed envelope, mentioning the date of the opening session, the number of the tender specifications or the object of the mission and, possibly, the numbers of the lots. It is to be sent by postal service or deposited by a carrier.[1]

If the tender is sent by postal service, the sealed envelope is put in a second sealed envelope clearly indicating "tender." All the tenders must be sent to the address mentioned in the contract documents. The carrier submits the tender to the person that is designated by the contracting authority to accept the tender, or he deposits it in the designated tender box.

Every tender must reach the president of the session before he declares the session opened. Late tenders will not be opened, without exception. Nonetheless, a late tender is accepted as far as the contracting authority has not yet concluded the contract and if the tender is sent at the latest four days before the date of the opening session by registered post.

§ 5:16 Modification and withdrawal of tenders

In order to modify or to withdraw a tender that has already been sent or submitted, the tenderer must draw up a declaration in writing that must be signed.[1] He must mention in detail the object and scope of the modifications. The withdrawal cannot be subject to conditions.

The declaration of modification must be sent in the same way as the offer has been sent. If the contract documents contain any form with a view of submitting modifications to the tender or withdrawing the tender, the tenderer must complete the form. If he chooses to use his own documents, he bears full responsibility for conformity with the form annexed to the contract documents. Modified and withdrawn tenders need to be submitted in the same way as the original tender.

A withdrawal also can be done by telefax or electronic means that do not correspond to the requirements in article 52, section 1, of the Royal Decree Classic Sectors if it reaches the president of the opening session, before he opens the session, and It is confirmed by means of registered letter sent at the latest the day before the opening session. A tenderer may indicate in a new regularly submitted tender which non electronically submitted Annexes of the concerned tender he wishes to maintain.

[Section 5:15]

[1] Royal Decree Classic Sectors, article 90.

[Section 5:16]

[1] Royal Decree Classic Sectors, article 91.

III. EVALUATION OF TENDERS AND PROPOSALS

§ 5:17 Opening of tenders and proposals

The session for the opening of the tenders takes place in the room and on the date and hour as laid down in the contract documents. The president is in charge, assisted by one or more assessors. Before allowing the interested parties to enter the indicated room, the president of the session already places there the received tenders that have not been submitted by electronic means.

As soon as the room is accessible to the public, the submitted tenders are given to the president. In case of a restricted procedure, only the tenderers or their representatives are allowed in the room. The president opens the session. After the opening, all received tenders are being assessed.

The president reads aloud the name or the corporate name of the tenderers, their residence of registered office, and withdrawals. In the case of adjudication, the president acts in the same way for the total tender amounts, VAT included, and for the variants, compulsory options, reductions and supplements. If the adjudications concern a large number of lots, the proclamation of the prices may be replaced by another way of presentation at the session.

Finally, the president or an assessor signs (or stamps) the tenders page per page, including the Annexes he deems to be important, as well as the documents aimed at modifying or withdrawing the tender. If the tenders are drawn up by electronic means, an electronic signature is put on every page of the tender (except if the electronic means used by the contracting authority can guarantee the integrity of the documents after accessing them).[1]

The president draws up a report of the data, which he has read aloud, of the incidents during the session, and of the remarks that every person present at the session wishes to see incorporated in the report. It is signed immediately by the president, and tenderers requesting in writing a copy of the report will receive one as soon as possible.[2] In certain cases, an extra opening session may take place.[3] All known tenderers and tenderers present at the first opening session are invited simultaneously and in writing. Such a second opening session takes place if:

1. Tenders, modifications or withdrawals are late, but can be taken into account, since they are sent by registered post at the latest four days before the opening session and as far as the contracting authority has not yet concluded the contract; or

[Section 5:17]

[1] Royal Decree Classic Sectors, article 92.

[2] Royal Decree Classic Sectors, article 93.

[3] Royal Decree Classic Sectors, article 94.

2. Technical problems arise during the first session concerning the opening and the access to the tenders drawn up with electronic means (unless a copy is opened without those difficulties).

§ 5:18 Examination, evaluation, and comparison of tenders and proposals

The contracting authority examines the regularity of the tenders of the selected tenderers who meet the conditions relating to the right to participate and the qualitative selection. The examination concerns the formal as well as the material regularity.[1] A tender is formally irregular, and therefore null and void, if it derogates from the substantial formal requirements relating to:

1. The method of communication, exchange and registration of information in terms of confidentiality[2];
2. The written character of the tender and it being signed by the authorized persons[3];
3. The use of electronic means for submission of the tender[4];
4. The number of tenders to be submitted[5];
5. The requirement that only selected tenderers may submit an offer under the restricted procedure and the negotiated procedure[6];
6. Form, method, and signature of the tender[7]; and
7. The tender submission.[8]

Furthermore, the contracting authority may consider a tender to be formally irregular if it does not meet other formal requirements. A tender is materially irregular, and therefore null and void, if it derogates from essential provisions of the contract documents concerning prices, time limits and technical specifications or in case of abnormal prices.

A contracting authority may consider a tender to be materially irregular if it does not meet the requirements relating to technical specifications and norms and variants, options and lots, summary survey and inventory, interpretation, errors and missing elements, and price estimate and lots or it implies any form of reservation or contains parts that do not correspond with reality.

[Section 5:18]

[1] Royal Decree Classic Sectors, article 95.

[2] Royal Decree Classic Sectors, article 6.

[3] Royal Decree Classic Sectors, article 51, section 2.

[4] Royal Decree Classic Sectors, article 52.

[5] Royal Decree Classic Sectors, article 54, section 2.

[6] Royal Decree Classic Sectors, article 55.

[7] Royal Decree Classic Sectors, articles 80 and 82.

[8] Royal Decree Classic Sectors, articles 90 and 91.

§ 5:19 Request for clarification and correction of tender

The contracting authority corrects the calculation errors and the purely material errors in the tenders, without being responsible for errors it did not discover.[1] In order to correct errors, the contracting authority enquires the real intention of the tenderer, by examining the tender and comparing it with the other tenders and with the market prices, or by asking it to the tenderer itself.

If the tenderer does not answer or if the answer is not acceptable, the contracting authority corrects the errors according to its own findings. If the is not possible, it may decide that the unit prices are applicable or it may refuse the tender as being irregular. The contracting authority corrects the tenders in function of the calculation and purely material errors in the contract documents.

In the case of adjudication and quote request, the contracting authority reviews the modifications the made by the tenderer to one or more posts of the summary survey or the inventory. If necessary, it corrects these changes according to its own calculations and modifies the surveys or inventories Annexed to the tenders. If the tenderer has not mentioned a price for a random post of the survey or the inventory, the contracting authority may refuse the tender as being irregular or may keep the tender and complement the missing element with its own formula.[2]

After correction of the calculation mistakes and purely material mistakes (if any) in the tenders, the contracting authority proceeds to the price investigation.[3] All submitted offers must be made subject to a price investigation, whereby the candidates need to provide the contracting authority with all necessary information.

If the contracting authority is of the opinion that a price offered in a tender (not in the event of a negotiated procedure) is abnormally high or abnormally low in relation to the contract to be performed, it requests the tenderer, by means of a registered letter, to provide it in writing with the necessary justification within 12 calendar days (unless a longer period is foreseen). It is the tenderer who must prove he sent the justification.[4]

If a works contract awarded by means of adjudication leads to the submission of at least four tenders by the selected tenderers, every tender with a total tender amount being lower than 15 per cent under the average amount, is to be considered as a tender of which the presumably abnormally low tender amount requires an investigation by

[Section 5:19]

[1] Royal Decree Classic Sectors, article 96.

[2] Royal Decree Classic Sectors, articles 97 and 98.

[3] Royal Decree Classic Sectors, article 21.

[4] Classic Sectors Directive, article 55.

the contracting authority.[5] If an investigation by the contracting authority is needed, the contracting authority will motivate in the award decision that the total tender amount does not have an abnormal character. As an alternative he may request the tenderer to provide him with a justification. The tender is considered irregular, if the justification is not satisfactory, or if no justification is given with the required time-limit (i.e., 12 calendar days).

The contract documents can make the provision applicable in case of quote request and services or supplies contracts. If it is decided that the tender for a works contract is rejected, the contracting authority must communicate the decision within 15 days after closing the procedure to the "Commission for Contractors Recognition."[6] It furthermore communicates to the Commission the names of those tenderers who have not provided the required justification within the required time-limit.[7]

§ 5:20 Evaluation criteria in adjudication and quote request procedures

In General

As noted, the award may be based on the lowest price or on the economically most advantageous character of the tender (once the regularity of the tenders has been acknowledged).

Adjudication

The only criterion is the lowest price.[1] In the case of mandatory or facultative variants, the tenderer with the lowest regular tender is determined on the basis of one simple order of basic tenders and tenders with variants.[2] If mandatory options apply, the tenderer with the lowest regular tender is determined on the basis of the order of the tenders increased with the therein offered price for the whole of the options.

In the case of price reductions, the lowest regular tenders are determined by taking into account the reductions offered to certain grouped lots and the lowest price for the whole of all lots. If equal prices exist, the contracting authority will request the tenderers to propose a price reduction. If there are still equal prices, the contracting authority will organise a lottery among the remaining tenderers.

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[5] Royal Decree Classic Sectors, article 99, section 2.

[6] *Commissie voor erkenning van aannemers* or *Commission d'agréation d'entrepreneurs*.

[7] Royal Decree Classic Sectors, article 99, section 3.

[Section 5:20]

[1] Act of 15 June 2006, article 24.

[2] Royal Decree Classic Sectors, article 100.

Quote Request

There is no single decisive criterion, as the contract is awarded to the regular and economically most advantageous tender, which appears from a range of predetermined economic and quality evaluation criteria that must be mentioned in the announcement of the notice or any other contract document.[3]

If the European thresholds are not met,[4] the contracting authority specifies either the weighing of the criteria or it mentions the criteria in descending order of importance. If not, all award criteria have the same value.[5] Subject to provisions in the contract documents, the economically most advantageous tender is determined on the basis of one simple order of the basic tenders and the tenders with variants according to the economically advantageous character from the point of view of the contracting authority.

In the case of free variants and options, the contracting authority chooses which variants or options it will not take into account. The variants or options it takes into account are awarded according to their most advantageous economic character.[6] If improvement proposals have been made by the tenderer,[7] the most advantageous economic character of the tender is determined by taking into account the improvement proposal. If various tenders are equally economically most advantageous, the contracting authority will request the tenderers to submit in writing an improvement proposal for their tender. If the tenders still are equal, the contracting authority will organise a lottery among the remaining tenderers.[8]

Closing of Adjudication and Quote Request Procedures

The award procedure is closed by notification of the tender approval to the successful tenderer.[9] The approval is unconditional. Notification of the approval happens by means of registered post, telefax, or any other electronic means. In case of fax or electronic means, the content of the approval must be confirmed by means of registered post within five days.

The notification must be done within the term of effectiveness of the tender (i.e., 90 days starting from final day of receipt of the tender (if not prolonged)). If the period of effectiveness of the tender expires without the contract being concluded and the authority does not

[3]Classic Sectors Directive, article 53, section 1(a), as transposed by article 25 of the Act of 15 June 2006.

[4]Classic Sectors Directive, article 53, section 2.

[5]Royal Decree Classic Sectors, article 25.

[6]Royal Decree Classic Sectors, article 101.

[7]Royal Decree Classic Sectors, article 89.

[8]Royal Decree Classic Sectors, article 101.

[9]Royal Decree Classic Sectors, article 102.

abandon the award procedure or contract conclusion,[10] it asks the tenderer in writing whether he agrees with the content of his tender. If he agrees in writing without making reservations, the contract is awarded and concluded.

If the tenderer only agrees in case of a price raise (adjudication) or a modification to his tender (quote request), the contract (including the price raise and/or tender modification) is awarded and concluded, provided that the tenderer justifies the price increase or tender modification on the basis of circumstances that occurred after the opening of the tenders, and the raised tender price remains lower than that of the other regular tenders.

If the tenderer does not agree or the price increase (adjudication) or tender modification (quote request) is not accepted, the contracting authority turns towards the other regular tenderers, following the order (whereby the same above described procedure is repeated). It also can turn to the other regular tenderers, requesting them to review their tender price (adjudication) or tender (quote request) on the basis of the initial conditions of the contract. The contract is then awarded and concluded.

Confidentiality Requirements

Article 11 of the Act of 15 June 2006 prohibits the contracting authority and any other person being informed by candidates, tenderers, contractors, suppliers, or service providers about any confidential information in the framework of the award and execution of a contract to reveal the information in accordance with article 6 of the Classic Sectors Directive.

The contracting authority may impose certain requirements in order to protect the confidential character of the information it communicates to candidates and tenderers. Article 6 of the Royal Decree Classic Sectors furthermore specifies that all communication in the framework of award and execution of contracts must be carried out in such a way as to ensure the integrity of the data and the confidentiality of the tenders and requests to participate are preserved. Therefore, the contracting authorities may examine the content of the tenders and requests to participate only after the time limit set for submitting them has expired.

Right to Reject All Tenders or Proposals

Article 35 of the Act of 15 June 2006 states that launching an award procedure does not compel the contracting authority to award or conclude a contract.

The contracting authority may decide to abandon the award or conclusion of the contract and/or to restart the procedure, even by means of a different procedure.

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[10] Royal Decree Classic Sectors, article 103 and 104.

§ 5:21 Acceptance of tender or proposal and entry into force of procurement contract

Motivated Award Decision and Information Obligation

Contracting authorities must inform candidates and tenderers as soon as possible of decisions reached concerning the selection of candidates for submitting a tender, the award of a contract or the abandonment of the award procedure. If the decision cannot be drafted immediately, it is drawn up at the latest 15 days after the decision.[1]

The obligation to inform and to motivate is applicable to all contracts with a value equal to or exceeding the European thresholds. The Legal Protection Act provides a similar, but less stringent version of the obligation and information obligations for contracts with an estimated value lower than €85.000 (VAT excluded).[2] All award decisions must mention at least:

1. The identity, object, and estimated value of the contract;
2. The names of all tenderers and candidates;
3. The names of selected and unselected candidates and tenderers, as well as the legal and factual reasons for their (non-) selection;
4. The names of tenderers whose tender is found to be irregular and motivation for the irregularity (such as abnormally low prices, tenderer not meeting performance or functional requirements); and
5. The names of chosen tenderer and tenderers whose regular tender has not been chosen as well as the factual and legal motives for the decision.[3]

The communication of the award decision to each candidate or tenderer must be accompanied by what is mentioned under article 2a of the Remedies Directives.[4] The communication furthermore must be accompanied by a recommendation to inform the contracting authority within the standstill period by means of e-mail, telefax, or any other electronic means, if the interested party introduces a claim for suspension, as well as the fax number or electronic address to which the information may be sent.

Suspension of Period of Effectiveness of Tenders

The communication of the award decision does not create any contractual obligation *vis-à-vis* the successful tenderer. It suspends

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[Section 5:21]

[1] Legal Protection Act, Article 4.

[2] Legal Protection Act, article 29.

[3] Legal Protection Act, article 5.

[4] Legal Protection Act, article 8, section 1, transposing articles 2a of the Remedies Directives and article 41, section 2, of the Classic Sectors Directive.

the period during which the tenderers remain bound by their tender, as far as such a period as well as the standstill obligation are applicable.[5] The suspension of the period of effectiveness of the tenders ends:

1. If no suspension claim has been introduced within 15 days, starting from the day after the day of communication of the motivated decision to the candidates and tenderers;
2. If a suspension claim has been dealt with before the competent authority; and
3. In any event, at the latest 45 days after the communication of the award decision.

As long as the contracting authority has not taken a decision on the selection or qualification of the candidates, the regularity of the tenders, the award of the contract, the candidates, tenderers, or third parties have no access to requests to participate, tenders and internal documents of the contracting authority.[6]

§ 5:22 Notice of results of award procedure

Every contract procedure that has been closed, including the negotiated procedure without publication, requires a notice of the results of the award procedure. The notice is sent within 48 days after the contract conclusion.[1]

§ 5:23 Effectiveness of procurement contract and standstill obligation

A contract may not be concluded following the award decision before the expiry of a period of 15 days with effect from the day following the date on which the award decision is sent to the tenderers and candidates concerned. In case of different dates of sending the decision, the last date counts.

The so-called "standstill obligation"[1] is applicable to all contracts whose estimated value reaches the European thresholds. It also is applicable to public work contracts which reach a threshold of €2.612.500 (i.e., half of the European threshold for works contracts). For the other contracts, the contracting authority is free to decide whether a

[5]Legal Protection Act, article 8, section 2.

[6]Legal Protection Act, article 10, section 2.

[Section 5:22]

[1]Classic Sectors Directive, article 35, section 4, transposed into Belgian law by article 38 of the Royal Decree Classic Sectors.

[Section 5:23]

[1]Legal Protection Act, article 11-13.

standstill period must be respected in order to limit the risk of subsequent damage claims.[2]

In the case of a suspension claim during the period, the contracting authority may not conclude the contract before the competent authority has come to a verdict. The claimant is invited to inform the contracting authority on his suspension claim; preferably by means of fax or e-mail or any other electronic means.[3] If no claim has been introduced during the standstill period, the contract may be concluded after expiry of the standstill period. However, if a claim has been introduced after the standstill period, the does not prevent the contract from being concluded.

No standstill obligation is required, if a prior European publication is not compulsory; and if the only concerned tenderer is the one who is granted the contract in absence of other concerned candidates.[4] In the event of the suspension of the execution of the award decision, an execution of the contract in violation of the standstill obligation is being suspended as well.

The contracting authority must notify the contractor immediately and orders him to stop (or not to start) the execution of the contract.[5] If the suspension is not followed by a claim for annulment of the award decision or a claim for ineffectiveness of the contract within the applicable redress time limits, the suspension of execution of the award decision and contract is repealed.

IV. PROCEDURES FOR PROCUREMENT OTHER THAN TENDER AND SOLICITATION OF REQUESTS FOR PROPOSALS

§ 5:24 Award procedure under negotiated procedures and competitive dialogue in classic sectors

As noted, in accordance with the Classic Sectors Directive, Belgian procurement legislation sets out other award procedures than the adjudication and quote request procedures, that may or must be used for awarding certain contracts.

Negotiated Award Procedures

With Publication

Under the negotiated procedure,[1] the contract can be awarded to

[2] Legal Protection Act, article 30.

[3] Legal Protection Act, article 11.

[4] Legal Protection Act, article 12.

[5] Legal Protection Act, article 13.

[Section 5:24]

[1] Royal Decree Classic Sectors, articles 106-110.

the lowest regular tender or to the economically most advantageous tender.[2] The contracting authority negotiates with the short-listed tenderers on the tenders they have submitted, after publication of the contract, in order to adapt them to the demands mentioned in the contract documents and in order to choose the best and final offer. An equal treatment of all tenderers must be guaranteed during the negotiations.[3]

The contracting authority may decide to organise the negotiation in distinct phases. The 90-day period of effectiveness of the tenders as laid down in article 57 Royal Decree Classic Sectors does not apply to negotiated procedures with publication, unless foreseen otherwise in the contract documents.

In case of the simplified negotiated procedure with publication, there is no first phase in which candidates are selected to submit a tender. The contract notice is followed immediately by the submission of tenders (a minimum time limit of 22 days applies[4]). There is no opening session and the examination. Negotiations start with the short-listed tenderers, whose tenders submitted after the negotiations will be analysed on the basis of the award criteria. Either the lowest tender or the economically most advantageous tender will then be chosen.

Without Publication

If multiple contractors, suppliers, or service providers are consulted for a contract staying below the required thresholds, they are invited simultaneously and in writing to submit a tender. The tenders have to contain the same data as the tenders which must be submitted under the adjudication and quote request procedure. After negotiations, a best and final offer is withheld.

A contract awarded through a negotiated procedure is concluded by means of correspondence according to commercial customs in the case of a negotiated procedure without publication, notification to the tenderer of the approval of his tender, or signature of the agreement by the parties. If concluded by means of an accepted invoice, the invoices serve as proof of the conclusion, and not the correspondence according to commercial customs.

§ 5:25 Award by means of competitive dialogue

Contracting authorities must publish a contract notice and a descriptive document. In the contract notice, they will set out their needs and selection requirements, which they must define in that no-

[2] Royal Decree Classic Sectors, article 57.

[3] Act of 15 June 2006, article 26, section 3.

[4] Royal Decree Classic Sectors, article 48.

tice and/or in a descriptive document.[1] After receipt of the requests to participate, the contracting authority proceeds to the selection of the candidates[2] being allowed to the dialogue. The selected candidates are invited simultaneously and in writing to participate to the dialogue.

Contracting authorities must open a separate dialogue with every selected candidate, the aim of which must be to identify and define the means best suited to satisfying their needs. Having declared that the dialogue is closed and having informed the participants of that fact, contracting authorities must ask them to submit final tenders on the basis of the solution or solutions presented and specified during the dialogue. The tenders must contain all the elements required and necessary for performance of the project.

Contracting authorities must assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and must choose the most economically advantageous tender. At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender, provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination. The award procedure is closed by the signature of the agreement by the parties concerned.

V. REGIME FOR UTILITIES PROCUREMENT

§ 5:26 Activities covered by utilities rules

Utility activities include water, energy, transport, and postal services. The activities covered in the Belgian utilities rules are identical to those enumerated in the Special Sectors Directive.[1]

Choosing Contract Award Procedure

Contracting entities have a free choice between the open procedure, the restricted procedure (by means of adjudication or quote request) and the negotiated procedure with publication.[2] Under the special sector rules, no formal provision for competitive dialogue exists. However,

[Section 5:25]

[1]Royal Decree Classic Sectors, articles 111-114, transposing article 29 of the Classic Sectors Directive.

[2]Article 57 of the Royal Decree Classic Sectors indicates that the minimum number of selected candidates to whom an invitation to tender will be sent may not be lower than three.

[Section 5:26]

[1]Special Sectors Directive, articles 3-7; Act of 15 June 2006, articles 46-52.

[2]Act of 15 June 2006, article 53.

the approach may be used within the negotiated procedure with publication. The negotiated procedure without publication may only be used in cases[3] that are similar to the ones enumerated under the classic sector rules.[4] However, other thresholds apply. The expense to be approved must stay below:

1. €418.000 for services of financial institutions (in the area of insurance, banking, and investment services) and for services in the area of research and development, as well as for the services under mentioned under Annex IIB of the Act of 15 June 2006;
2. €170.000 for all other contracts;
3. €60.000 for each lot of a contract with an estimated value not exceeding the thresholds mentioned in article 32 of the Royal Decree Special Sectors, provided the aggregated amount of the lots is no more than 20 per cent of the estimated contract value; and
4. €17.000 for contracts awarded by means of an accepted invoice.[5]

As is the case under the classic sector rules, the simplified negotiated procedure only may be used for contracts with an estimated value under the European thresholds.[6]

§ 5:27 Announcement of contract: Call for competition

Thresholds for European Publication

For the special sectors, these thresholds are €5.225.000 for works contracts and €418.000 for supply contracts and services contracts indicated in Annex II of the Act of 15 June 2006.[1]

Publication of Contacts and Methods for Making Call for Competition

As is the case under the classic sector rules, each contract that will be awarded must be given publicity, i.e., the call for competition. Requirements are less onerous than the contract notice requirements under the classic sector rules. Articles 38-40 of the Royal Decree special sectors are an exact transposition of articles 41-42 of the Special Sectors Directive. Contracts whose estimated value is below the European thresholds may be called for competition by means of a contract announcement, an announcement of a qualification system,

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[3] Act of 15 June 2006, article 53, section 2.

[4] Act of 15 June 2006, article 26, section 1.

[5] Royal Decree Special Sectors, article 104.

[6] Royal Decree Special Sectors, article 2, section 1, 4°.

[Section 5:27]

[1] Royal Decree Classic Sectors, article 32, as updated by the Ministerial Decree of 22 December 2015 modifying the European publication thresholds in multiple royal decrees executing the Act of 15 June 2006 (*Staatsblad / Moniteur belge*, 29 December 2015).

or an announcement on the drawing up of a list of selected.[2] The rules also are applicable to contracts for services meant in Annex II, B of the Act of 15 June 2006, with an estimated value reaching the European thresholds.

The contract announcement can be used for the adjudication procedure, the quote request procedure, the negotiated procedure with publication as well as the simplified negotiated procedure with negotiation. It contains detailed information on the contract to be awarded.[3]

In the case of restricted procedure or negotiated procedure with publication, the contracting entity may use the qualification system, without having to publish the above mentioned contract announcement,[4] or it may opt for the publication of a notice on the drawing up of a list of selected. The list is valid for a maximum of three years. During its validity, no other candidates may be registered on the list.[5]

§ 5:28 Suitability and selecting firms to tender or negotiate

Suitability and qualitative criteria to be met by the candidates or tenderers are similar to those under the classic sector rules.[1]

§ 5:29 Tender deadlines

For open procedures, the time limits for submitting tenders are equal to the time limits under the classic sector rules. In the case of restricted procedure and negotiated procedure with publication, time limits are in principle similar to the ones under the classic sector rules.

However, in the case of restricted procedure and negotiated procedure with publication with an estimated value reaching the European thresholds, the time limit for submitting tenders can be agreed with the suppliers. All candidates need to dispose of the same agreed time limit. If no agreement is possible, the contracting entity sets the time limit, which may be not shorter than 24 days. No such possibility exists for contracts not exceeding the European thresholds. In that case, the fixed time limits are identical to the ones under the public sector rules.[1]

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[2] Royal Decree Special Sectors, article 42.

[3] Royal Decree Special Sectors, article 44.

[4] Royal Decree Special Sectors, article 45.

[5] Royal Decree Special Sectors, article 46.

[Section 5:28]

[1] Royal Decree Special Sectors, chapter 5.

[Section 5:29]

[1] Royal Decree Special Sectors, article 52, section 2.

§ 5:30 Award of contract

As is the case under classic sector rules, the successful tender is chosen on the basis of the lowest price or its economically most advantageous character, depending on the award procedure that is followed. However, there is one significant difference with the classic sector rules. Special rules provide for certain preferences for products originating from EU member states.

Contracting entities may give preference to goods originating in the EU and, in certain cases, EU goods even must be given preference.[1] Furthermore, contracting entities have two months to submit contract award notices to the *Official Journal* and the *Bulletin der aanbestedingen / Bulletin des adjudications*, whereas the classic sector rules only provide for 48 days.[2]

VI. REVIEW PROCEDURES

§ 5:31 In general; right to review

The Legal Protection Act provides various forms of judicial protection.[1] The rules as explained below relating to annulment, suspension and damages apply to all contracts.[2]

The rules as explained below on ineffectiveness of the contract and on alternative sanctions apply in the same way as do the rules on the stand-still obligation.[3] The corrective mechanism as explained below applies to contracts with an estimated value reaching the European thresholds.

Any person showing an interest and being aggrieved or likely to be aggrieved by any decision of the contracting entity is entitled to exercise his right for annulment of the concerned decision taken by the contracting entity.[4]

§ 5:32 Review bodies

The nature of the contracting authority determines which review body is competent for dealing with the request to suspend or annul

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[Section 5:30]

[1] Act of 15 June 2006, article 54.

[2] Royal Decree Special Sectors, article 41, transposing article 58 of the Special Sectors Directive.

[Section 5:31]

[1] Belgian public procurement legislation does not recognise the principle of enforcement by public bodies. Furthermore, there is no specific legislation on arbitration or other mitigation measures.

[2] Legal Protection Act, article 31.

[3] Legal Protection Act, article 32.

[4] Legal Protection Act, article 14.

the disputed decision. If the contracting entity is an administrative authority in the meaning of article 14, section 1 of the consolidated laws on the Council of State, competence lies with the administrative section of the Council of State.[1]

If the contracting entity does not fall within the above mentioned category, competence lies with the civil courts.[2] Certain disputes, such as the declaration on ineffectiveness, alternative penalties and damages, fall exclusively under the competence of the civil court.[3]

§ 5:33 Review procedures

Pre-Contractual Review Procedures

Suspending Procedure; Summary Procedure During Standstill. On the basis of the standstill obligation,[1] a suspending procedure of extreme urgency can be brought before the Belgian Council of State[2] or a summary procedure before the civil court within 15 days between the day of the notification of the award decision and the contract conclusion with the chosen tenderer.

The review body has the competence to add a periodic penalty payment to the suspension. It also has the possibility to order interim measures with the aim of correcting the alleged violation or of preventing damage to the interests concerned. It also may order interim measures which it deems necessary for the execution of its judgment.[3]

The contracting authority cannot conclude the contract without the review body ruling either on the request for interim measures or on the request for suspension. Suspension of the award decision implies suspension of the subsequent contract. A claim for interim measures (within 15 days) may be introduced together with or separately from the suspension (within 15 days) or annulment claim (within 60 days).[4]

Corrective Mechanism. The European Commission may invoke

[Section 5:32]

[1] Legal Protection Act, article 24, 1°.

[2] Legal Protection Act, article 24, 2°.

[3] Legal Protection Act, article 24, 2°.

[Section 5:33]

[1] This is mandatory only if the European thresholds are met (and for works contracts at half of the thresholds). If the thresholds are not met, the contracting authority may choose to apply the standstill obligation. Under the latter scenario, the rules on *ex officio* suspension, ineffectiveness, and alternative sanctions do not apply (article 32 of the Legal Protection Act).

[2] No requirement of serious harm that is difficult to repair. After conclusion of the contract, third parties still can attempt to obtain annulment of the award decision before the Council of State.

[3] Legal Protection Act, article 15.

[4] Legal Protection Act, article 15, last paragraph.

the procedure of corrective mechanism[5] when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure.[6]

Contractual Review Procedures

Ineffectiveness of Contract. The judge has the power to consider certain contracts to be ineffective.[7] It concerns contracts concluded in the cases as enumerated in article 17 of the Legal Protection Act. These cases are identical to those mentioned in article 2d of the Remedies Directives.

When a contract is declared ineffective, it is declared missing element retroactively or only for the future. Such a declaration of ineffectiveness, which falls under the exclusive competence of the civil judge, can only be requested if the obligations regarding the European publication of the contract notice or the standstill obligations should not have been fulfilled. Even in these cases, the civil judge may decide not to declare the contract ineffective for reasons of public interest.

The declaration of ineffectiveness does not apply if, despite the fact that the contracting authority considered that European and Belgian public procurement legislation allows award of the contract without prior European publication of a contract notice,[8] if:

1. The contracting authority has published in the *Official Journal* a notice expressing its intention to conclude the contract; and
2. The contract has not been concluded before the expiry of a least ten calendar days with effect from the day following the date of publication of the notice.

The notice must be published in the *Bulletin der aanbestedingen* / *Bulletin des adjudications* as well, without the application criterion for the non-applicability of the declaration of effectiveness. Details on the procedure can be found in articles 2d and 2f of the Remedies Directives, as they are literally being transposed into Belgian law by the articles 17-21 and 23 of the Legal Protection Act.

Compensatory Damages[9] may only be claimed before civil courts and not before the Council of State. The claim can be filed even in the absence of any suspension or annulment claim. Such a claim must be filed within five years after the day of notification to the aggrieved contractor or supplier of the contested award decision.

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[5]Procedure is described in article 34 of the Legal Protection Act.

[6]Directive 89/665/EEC, article 3, and Directive 92/13/EEC (the Remedies Directives, as amended by Directive 2007/66/EC), article 8, which have been transposed into Belgian law.

[7]Legal Protection Act, articles 17-20.

[8]Legal Protection Act, article 18.

[9]Legal Protection Act, article 16.

In the adjudication procedure, the compensation for the lowest regular bidder has been fixed at an amount of 10 per cent of the tender. In all other procedures, general rules for liability in Belgian tort law apply, meaning that the plaintiff must prove that he suffered damage and that the damage was due to wrongful award decision, as well as the amount of the damage.

Alternative Sanctions. The court may, *ex officio* or on the request of an interested party, shorten the term of the contract or impose a financial penalty on the contracting authority.[10] An action to impose alternative sanctions must be launched within six months.

Such alternative sanction may be imposed if the contracting authority has terminated the procurement procedure in violation of the standstill obligation, if that violation has not impeded the tenderer to introduce a suspension claim and if the violation was not accompanied by a violation of European and Belgian procurement legislation affecting adversely the chances of the tenderer to obtain the mission.

The penalty, which must be effective, proportionate and deterrent, can amount to 15 percent of the awarded amount VAT excluded. In imposing an alternative sanction, all relevant elements may be taken into account, such as the seriousness of the violation, the behavior of the contracting authority and the measure in which the contract remains in force.

VII. IMPLEMENTATION OF PUBLIC PROCUREMENT CONTRACTS

§ 5:34 In general

The Royal Decree on Execution Rules imposes specific rules for execution of public contracts (in the classic and special sectors, as well as in the area of defence and security). The Royal Decree sets out thresholds that determine whether the execution rules apply:

1. Contracts with a value exceeding €30.000, all execution rules apply;
2. Contracts with a value between €8.500 and €30.000, essential execution rules apply; and
3. Contracts with a value equal to or less than €8.500, no execution rules apply.[1]

For special sector contracts, essential execution rules apply to contracts with a value between €17.000 and €30.000, and no execution rules apply to contracts with a value less than €17.000.

[10] Legal Protection Act, article 22.

[Section 5:34]

[1] Royal Decree on Execution Rules, article 5. However, these execution rules can be made applicable by the tenders' documents.

§ 5:35 Impediments to execution of contract

The contractor,[1] as well as the contracting authority,[2] may invoke negligence, delays, or any other fact for which it blames the contracting authority, respectively the contractor, and which could be the cause of any occurred delay or a harm, with a view of obtaining the review of the contract (including prolongation of execution deadlines), damages, and/or repudiation of the contract.

Damages for Suspension Ordered by Contracting Authority. Damages for suspension[3] may be claimed if the delays exceed one-twentieth of the total execution time with a duration of at least 10 or 15 working days, as far as those suspensions are not caused by unfavorable weather conditions and as far as they take place within the contractual execution time.

Unforeseeable Circumstances. In principle, the contractor has no right to modifications of the contractual conditions in the event of unforeseeable circumstances.[4] However, the contractor may demand a prolongation of the execution time, or, in case of a very important harm, demand the review or repudiation of the contract in case of circumstances he could not reasonably foresee at the moment of submission of the tender or conclusion of the contract and for which he did everything to avoid their consequences.

The threshold for a very important harm is fixed at 2.5 per cent of the initial contract value. The threshold is met in any case, if the harm reaches a cost of €100.000. In case of review of the contract under the form of damages, a franchise of 17.5 per cent of the fixed disadvantage is being applied (with a maximum of €20.000).

If the contractor has obtained a very important advantage due to unforeseeable circumstances, the contracting authority may demand a review of the contract at the latest 90 days starting the day after the day of signification of the report (*proces-verbaal / procès-verbal*) of the provisional acceptance of the contract. The invoked facts and circumstances must be made known in writing within 30 days after their occurrence or after the date on which the contracting authority should have been ware of them.[5]

Levies having an impact on the amount of the contract. At the request of the contractor or the contracting authority any modification of the levies which has an impact on the amount of the contract will lead to a price review, if specific conditions are met: (i) the

[Section 5:35]

[1]Royal Decree on Execution Rules, article 54.

[2]Royal Decree on Execution Rules, article 60.

[3]Royal Decree on Execution Rules, article 55.

[4]Royal Decree on Execution Rules, article 56.

[5]Royal Decree on Execution Rules, article 60.

modification needs to be published in the *Staatsblad / Moniteur belge* at the latest on the tenth day preceding the final day for submission of the tenders and (ii) these levies may not, directly or indirectly, be part of the price review formula.[6]

§ 5:36 Inspection and acceptance

Inspection

In General. The contracting authority may supervise or control the preparation of the execution or the execution itself of the contract at all times and by all means. The contractor must cooperate with the contracting authority (such as delivering required information).[1]

The contracting authority may abandon fully or partially the inspection, if the contractor demonstrates that the products have been controlled by an independent body during their production. The Royal Decree on Execution Rules distinguishes *a priori* and *a posteriori* inspections. For services contracts the contract documents may foresee other modes of inspection.[2]

A Priori Inspection. Products cannot be processed if they have not been approved by a leading civil servant or his representative.[3] This can be done during various stages of production. If products do not meet inspection requirements during a certain stage, they are considered to be "not able to be presented for inspection." Upon request of the contractor, the contracting authority examines whether the products meet the quality requirements or at least meet the requirements of good craftsmanship.

As soon as they are able to be inspected, a new inspection will be executed. Once approved, products may be disapproved during a future inspection. They are to be replaced immediately. The contracting authority disposes of 30 days to notify the contractor on approval or refusal of his product(s), starting from the day of receipt of the request for inspection. The time limit is 60 days if inspection takes place in a laboratory. The contract documents may fix shorter time limits.

A Posteriori Inspection. Regardless of an *a priori* inspection, the contract documents can specify certain categories of performances for which an inspection must be executed after their execution.[4] These inspections and the taking of samples happens in such a way that each side is able to submit its viewpoint (*tegensprekelijk* /

[6]Royal Decree on Execution Rules, article 56/1.

[Section 5:36]

[1]Royal Decree on Execution Rules, article 39.

[2]Royal Decree on Execution Rules, article 41.

[3]Royal Decree on Execution Rules, article 42.

[4]Royal Decree on Execution Rules, article 43.

contradictoir). The time limits are identical to those set out for *a priori* inspections. A specific complementary guarantee is foreseen or a deduction on the payment of the performances until the results of the inspection are known.

Acceptance

Performance is accepted only after a satisfactory outcome of all controls, inspections, and required tests.[5] Provisional acceptance is granted once the object of the contract has been executed. Final acceptance is granted, once the warranty time limit has expired. The definitive acceptance entails the complete termination of the mission.

In the event of a framework agreement, the last acceptance of a contract concluded on the basis framework agreement counts as acceptance of the framework agreement (if the contract documents do not foresee otherwise).

§ 5:37 Warranty

Subject to various provisions in the contract documents, no warranty[1] is required for contracts for supplies and services whose time for execution does not exceed 45 days, for certain categories of services or for contracts with an amount less than €50.000 (the classic sectors) or €100.000 (special sectors).

The amount of the warranty is fixed at five per cent of the initial contract value. For services and supplies contract not mentioning a total price, the calculation base of the warranty corresponds with six times the estimated monthly amount. In the event of framework agreements, the warranty is fixed per concluded contract. A global warranty is possible in case of single-supplier framework agreement.

The warranty can be fixed by means of cash, public funds, under the form of a joint warranty or through a guarantee granted by a credit institution or an insurance company. No other conditions than those set out in the Royal Decree or in the contract documents may be attached to the warranty.

The warranty must be set within 30 days[2] following upon the day on which the contract is concluded, unless the contract documents foresee in a longer time limit. If the contractor does not set the warranty within the time limit, he will be given notice of default by registered letter, after which he has 15 days to set the warranty (starting from the date of sending the registered letter). If no warranty has been set after expiration of the time limit, the contracting authority

[5] Royal Decree on Execution Rules, article 64.

[Section 5:37]

[1] Royal Decree on Execution Rules, articles 25-33.

[2] This is suspended during period of closure of the undertaking for reasons of yearly holiday and days off to be made up.

may proceed to an *ex officio* warranty (through deduction of the payments) with a penalty of 2 per cent of the initial contract value or apply an ex officio measure.

The request to proceed to acceptance counts as release of the warranty. Provisional acceptance counts as a request to release the first half of the warranty and definitive acceptance counts as a request to release the second half or the whole warranty (if no provisional acceptance is provided for). Within 15 days the contracting authority grants discharge of the warranty with the institution where the warranty has been set. After expiration of the time limit, the contractor may demand payment of interests (demand for reimbursement of the warranty counts as claim for the interest)[3] or payment of the costs incurred.[4]

§ 5:38 Termination rights; default

A framework or other contract concluded with one single natural person may be terminated in the event of death of the person. The entitled persons notify the contracting authority in writing within 30 days of the death and of their intention (not) to continue the mission. If the contracting authority does not respond within 30 days, the contract is terminated *ex officio*.

If the contract was concluded with more than one natural person, and one of them dies, the same notification procedure must be followed. However, the contracting authority judges within 30 days on the basis of a state of play of the mission whether the entitled persons will be able to continue with the execution of the contract.[1]

If the contractor no longer meets the suitability criteria,[2] if he is put under any form of guardianship, or has been convicted by means of an unconditional imprisonment of more than one month for (attempt to) participating in a number of crimes, the contracting authority may repudiate the contract.[3] The contractor is paid by the contracting authority on the basis of the state of the mission and on the basis of the executed performances on the date of repudiation.[4]

Means of Action of Contracting Authority

Default by Contractor. The contractor defaults in performing the

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[3]This applies in case of payment by cash or by public funds.

[4]This applies in case of joint warranty or a warranty granted by a credit institution or insurance company.

[Section 5:38]

[1]Royal Decree on Execution Rules, article 61.

[2]These criteria mainly relate to convictions for different forms of criminal offences and to situations of bankruptcy and insolvency.

[3]Royal Decree on Execution Rules, article 62.

[4]Royal Decree on Execution Rules, article 63.

contract if he does not perform in accordance with the contract documents, if the execution does not advance in such a way it will be completed on the fixed data, and if the contractor does not respect the valid written orders of the contracting authority.[5]

These shortcomings are established in a report (*proces-verbaal / procès-verbal*). A copy of the report is sent immediately to the contractor. The contractor has 15 days to send his means of defence to the contracting authority, following upon the date of sending the report.

Penalties. The contracting authority may apply a specific penalty for every defaulted execution or in the event of lack of justification within the time limit of 15 days as described above.[6] If no such specific penalty is applied, a one-time penalty of 0.07 per cent of the initial contracting sum, with a minimum of €40 and a maximum of €400, will be imposed, or a daily penalty of 0.02 per cent of the initial contracting sum with a minimum of €20 and a maximum of €200, if the defaulted execution must be offset immediately.

The contractor may obtain partial restitution of the penalties if a disproportion exists between the fines and the limited importance of the performances which have been executed too late (i.e., when the non-executed performance does not reach five per cent of the total contract amount), as far as the executed works can be used in a normal way and the contractor did everything to avoid delays.[7]

Fine for Delay. Fines for delay[8] are independent from the penalties described above. They are claimable by simple expiration of the performance time limit and are *ex officio* applied for the total number of days of delay. The contractor safeguards the contracting authority from any damages the latter owes to third persons due to the delays.

The contractor may obtain full or partial restitution[9] of the fines (with interest) if he demonstrates that the delay is (partly) due to the contracting authority or due to unforeseeable circumstances, occurred before the expiration of the contractual time limits.

Ex Officio Measures. If the contractor has failed to correctly execute the contract or has put forward unacceptable justifications for the defaulted execution after expiration of the 15 days time limit, the contracting authority may invoke *ex officio* measures.[10] He may do so sooner, if the contractor explicitly and beforehand has admitted his default. Such measures can be:

[5] Royal Decree on Execution Rules, article 44.

[6] Royal Decree on Execution Rules, article 45.

[7] Royal Decree on Execution Rules, article 51.

[8] Royal Decree on Execution Rules, article 46.

[9] Royal Decree on Execution Rules, article 50. Request must be made within 90 days of the payment for works contracts and payment of the invoice from which fines were deducted for supplies and services contracts.

[10] Royal Decree on Execution Rules, article 47.

1. The unilateral repudiation of the contract;
2. The self-execution of the contract by the contracting authority; or
3. The conclusion of a contract for account (*opdracht voor rekening / marché pour compte*) with third parties.

In the event of a contract for account, the defaulted contractor receives the contract documents of the contract for account and, if applicable, he bears the difference in price, if the execution price of the new contract is higher than the initial price. The decision to invoke *ex officio* measures is communicated to the contractor by means of registered post. From that moment on, the contractor may no longer intervene in the part of the contract that is subject to the *ex officio* measure.

Other Sanctions. The defaulted contractor may be excluded from the contract for a given period.[11] In that case, the contractor is heard prior to the exclusion and the motivated exclusion decision is notified to him. Specific sanctions apply to actions or agreements of the contractor that may distort competition.[12]

Conditions for Submitting Claims and Requests by Contractor

The contractor must inform the contracting authority as soon as possible and in writing in the event of facts or events that may disturb the normal course of the mission and if their consequences may be so harmful to the contractor that he can consider to file a complaint. He must explain in brief the impact of these facts or events on the course and price of the project.[13]

A complaint or request that has not been notified to the contracting authority in due time is inadmissible. Such complaints or requests are in any case inadmissible if the invoked events or facts have not been notified within 30 days after their occurrence or after the date on which the contracting authority should have been aware of them. Complaints and requests of the contractor must be submitted, duly justified and calculated before:

1. Expiration of the contractual time limits in order to obtain a contract prolongation or contract repudiation;
2. Ninety days following upon the report of provisional acceptance in order to obtain damages or another form of review than contract prolongation or repudiation; and
3. Ninety days following expiration of the warranty period to obtain damages or another form of review than prolongation or repudiation, if the complaints originate from facts or events that have occurred during the warranty period.

[11]Royal Decree on Execution Rules, article 48.

[12]Royal Decree on Execution Rules, article 49.

[13]Royal Decree on Execution Rules, articles 52 and 53.

The above-mentioned time limits must be respected in any legal action by the contractor originating from negligence, delays or any other fact for which he blames the contracting authority respectively the contractor and which could be the cause of any occurred delay or a harm.[14] These actions need to be the object of a written request.

Every summons introduced by the contractor relating to a mission must be notified to the contracting authority at the latest 30 months after the date of notification of the report of the provisional acceptance. If the summary concerns events or facts that have occurred during the warranty period, the time limit starts running after expiration of the warranty period. If no report is required, the time limit starts from the final acceptance.[15]

Payment Issues

In General. The Royal Decree on Execution Rules sets out rules for payment in case of objection and garnishment, interest for late payment and compensation for recovery costs, interruption or delay of the execution by the contractor, reduction due to depreciation, and compensation.

Payment in Case of Objection or Conservatory Garnishment Chargeable to Contractor. The time limit for payment is suspended.[16] Suspension ends on the day the contracting authority is notified that the impediment to pay has been abolished.

Interest for Late Payment and Compensation for Recovery Costs.[17] If the fixed time limits for payment are exceeded, the contractor is *ex officio* entitled to payment of the interest in proportion of the number of days the time limit has been exceeded. The interest rate is calculated in accordance with European union law.[18]

This rate is raised by eight per cent and does not include a flat-rate sum of €40 to be paid for recovery costs. Apart from these interests and the flat-rate, damages may be obtained for all other recovery costs due to late payment. The submission of the regular invoice counts as debt.

Interruption or Delay of Execution by Contractor. If, due to the contracting authority, no payment has been done after expiration of a period of 30 days after the fixed time limit for payment, the contractor is entitled to slow down or interrupt the pace of execution of the works, supplies or services.[19] In any case, the contractor is entitled to a prolongation of the execution time limit with a number of

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[14] Royal Decree on Execution Rules, articles 54-56.

[15] Royal Decree on Execution Rules, article 73.

[16] Royal Decree on Execution Rules, article 68.

[17] Royal Decree on Execution Rules, article 69.

[18] Directive 2011/7/EU, article 2.7(a).

[19] Royal Decree on Execution Rules, article 70.

days equal to the period that has expired after expiration of the 30 days time limit and the date of payment, as far as he requests the in writing and before the expiration of the contractual time limits.

The contractor also is entitled to damages, in the event of a real slow down in the pace of execution or in the event of an interruption. The decision to delay or interrupt execution of the contract must be notified to the contracting authority by registered post at the latest 15 days before the day of slowing down or interrupting the execution. The measure only may be used, if the late payments are important in the course of the considered period.

Reduction Due to Depreciation. If the established deviations from non-essential conditions are minimal and do not have a large impact on the use, the processing or on the lifetime, the contracting authority may except the performance under reduction due to depreciation.[20]

Compensation. Every amount that is due to the contracting authority in the framework of the execution of the mission, is firstly deducted from the by the contractor claimable amounts and then from the warranty.[21]

[20]Royal Decree on Execution Rules, article 71.

[21]Royal Decree on Execution Rules, article 72.