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OF YOUNG LAWYERS

# Public Procurement of infrastructure projects and energy projects

**Organising Commissions: International Business Law and  
Environmental/Energy Law**

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## **National Report of Lithuania**

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### **Introductory note:**

Practitioners advising public entities on legal issues regarding large infrastructural project are, besides contractual issues, facing a massive legal framework of rules concerning public procurement. The legal framework for, as an example, European practitioners is, though disguised in national legislation, deriving from EU Directives. These are under review and new directives are to be decided early 2014. The proposals might very well affect how procurement of large infrastructural projects, such as roads, railroads, bridges, power plants etc. is procured by the public entities. In the existing directives, procedures like the negotiated procedure and specific regulations about Work concessions aims to be applicable to large infrastructural projects (Works = construction contracts). In other jurisdictions, not touched by the EU Directives, the legal framework for public procurement might have a completely different structure and other solutions providing tools for the procuring entities to be able to realize these kinds of projects. This national report questionnaire is aiming to establish, from a comparative perspective, a perspective of the legal environment practitioners dealing with energy projects and large-scale infrastructure projects are facing on a day-to-day basis.

The questionnaire is intended to enable you as National Reporter to provide an overview on the key issues which arise in your jurisdiction in relation the subject matter. We have structured the questionnaire, based on broad open questions, in order for you to elaborate on the main topics as freely as possible and the questions should be seen more as guidance rather than specific questions that could be answered with a simple yes or no. That said, please focus on the practical aspects rather than the theoretical aspects. National Reports should be no more than 10 pages, but could be less, and be formatted on a consistent basis as described below. You will find the formatting guidelines at the end of the questionnaire. Please ensure that these guidelines are observed.

The National Reports will be published on the AIJA website. Furthermore, we plan to prepare a booklet containing the General Report and all National Reports, which will be provided at least as a pdf-document. Such booklet could be used as a marketing tool. To make the booklet a success, we kindly request you to meet certain academic standards when preparing the report, such as references to court decisions, applicable law, literature, etc. Should the National Report be prepared by more than one National Reporter, please ensure that only one single document is provided. In such case, please also note that we will not coordinate the preparation of the Reports between the co-reporters. You may do so on your own.

Looking forward to working together and we remain at your disposal whenever you have any questions or like to discuss. Thanks again for showing interest in this subject, which is of great interest to us, and we are looking forward to be seeing you in Prague!

Jan and Per-Ola

### **Public Procurement of infrastructure projects and energy projects**

1. What is the legal framework on public procurement in your country governing public purchases of energy projects and large-scale infrastructure projects? Are the relevant rules to be found in a broad public procurement package or are they found in separate legislation? Are there relevant thresholds obliging to apply public procurement rules to such projects? Are there any exemptions from the application of the public procurement rules provided for in the legislation for such projects?

The public procurements of energy and (or) large-scale infrastructure projects are regulated mainly by the provisions of the Law on Public Procurement of the Republic of

Lithuania<sup>1</sup> (the **Law on Public Procurement**) and the Law on Concessions of the Republic of Lithuania<sup>2</sup> (the **Law on Concessions**). The rules provided by the Law on Public Procurement are applicable mostly to any public procurement (not exclusively to the public procurements of energy and (or) large-scale infrastructure projects) and these rules could be recognised as a broad public procurement package. The rules provided by the Law on Concessions are applicable mostly to any concession contracts (not exclusively to the concession contracts of energy and (or) large-scale infrastructure projects) and these rules could be recognised as a broad concession contracts package.

The obligation to follow the provisions provided by the Law on Public Procurement mainly depends on the status of a contracting authority, not on the nature of the performed public procurement itself. The contracting authorities complying with the criteria provided by Article 4 of the Law on Public Procurement must follow the requirements of the latter law and related legal acts (e. g. if a contracting authority is a state or local authority, the public procurement rules are to be applied). The obligation to follow the provisions provided by the Law on Concessions mostly depends on the nature of the purchase. If awarding authorities are seeking to conclude the contracts of energy and (or) large-scale infrastructure projects, whereby concessions are granted to concessionaires, the rules of the Law on Concessions are applicable.

There are many exemptions from the application of the Law on Public Procurement and (or) the Law on Concessions. However, we are not aware of any exemptions associated specifically to the public procurements of energy and (or) large-scale infrastructure projects.

2. Is this legal framework based on international agreements and commitments, like the EU Directives?

The provisions of the Law on Public Procurement and the Law on Concessions mainly

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<sup>1</sup> The Law on Public Procurement of the Republic of Lithuania (*Official gazette*, 1996, No 84-2000 with further amendments).

<sup>2</sup> The Law on Concessions of the Republic of Lithuania (*Official gazette*, 1996, No 92-2141 with further amendments).

are harmonised with the following EU legal acts:

- 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;
- 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;
- Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts (the **Directive 2004/18/EC**);
- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (the **Directive 2004/17/EC**).

On 15 January 2014 the European Parliament approved the new rules on public procurement and concession contracts. The Directive 2004/17/EC and the Directive 2004/18/EC were revised and a new directive on concessions was adopted. The new directives are expected to enter into force at the end of March 2014. The new EU legal acts must be implemented within 2 years from the date of their adoption (hence most probably by March 2016).

National court practice often interprets the provisions of the Law on Public Procurement and the Law on Concessions in the light of the above EU legal acts as well as the clarifications provided by the Court of Justice of the European Union.

3. If based on international agreements and commitments, have your country added any specific procedures and tools to the national legislation directed to the procurement of energy projects and large-scale infrastructure projects?

To our knowledge, the national legislation in the field of public procurement provides

no any specific procedures and tools (directed to the procurements of energy and (or) large-scale infrastructure projects) other than those based on international agreements and commitments.

However, it should be noticed that the Law on Concessions provides the specific rules for the conclusion of service concession contracts, while service concession contracts are not governed by any of the directives by which the EU legislature has regulated the field of public procurement.

4. Which, if any, is the procurement procedure envisaged in the legal framework for the procurement of energy projects and large-scale infrastructure projects? What is the most commonly used procurement procedure within the legal framework for the procurement of energy projects and large-scale infrastructure projects? Are conditions for use of various procurement methods clearly established?

The Law on Public Procurement and (or) the Law on Concessions do not provide a procurement procedure applied specifically to the procurements of energy and (or) large-scale infrastructure projects. Depending on the specific conditions provided by the Law on Public Procurement the procurements of energy and large-scale infrastructure projects might be performed by means of the following procedures: 1) open procedure, 2) restricted procedure, 3) competitive dialogue, 4) negotiated procedure: with or without publication of a contract notice and 5) design contest procedure. According to the provisions of the Law on Concessions a concession could be awarded following open public procurement procedure, except cases when concession contracts may be concluded without any public procurement procedure.

To our knowledge, the most common procurement procedure used for the procurements of energy and (or) large-scale infrastructure projects is an open procedure. To our opinion, one of the main reasons why the open procedure is most commonly used public procurement procedure is that there are no limitations provided by the Law on Public Procurement to choose such procedure for contracting authorities, while the other procurement procedures (except restricted procedure) could be used only if the concrete

circumstances specified by the Law on Public Procurement exists.

To our assessment, the circumstances established by the Law on Public Procurement under which the concrete public procurement procedure could be chosen by a contracting authority are quite detail and clear. However, most of the circumstances are of evaluative nature. Therefore, the latter circumstances are interpreted differently by contracting authorities or national courts and the principle of transparency of public procurements is not ensured completely.

5. What are the award criteria (in public procurement procedures) most commonly used for energy and large-scale infrastructure projects? Are the Lowest price or the most economically advantageous tender most common? Are circumstances related to quality, time and output evaluated?

To our knowledge, the most commonly used award criterion for the procurements of energy and (or) large-scale infrastructure projects is the lowest price. If the latter award criterion is chosen by a contracting authority, the quality, time, output or other related circumstances are not evaluated. If a contracting authority chooses the award criterion of the most economically advantageous tender, the circumstances linked to the subject-matter of the contract, usually quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date, delivery period or period of completion may be evaluated.

6. Do the public procurement rules regulate relations between the investor, the contractors and subcontractors?

The relation between an investor and a contractor or subcontractors is not regulated by the Law on Public Procurement. However, the latter relation to some extent is regulated in case of concessions by the Law on Concessions and the Law on Investments of the Republic of Lithuania<sup>3</sup>. The provisions regarding the rights of investors and protection of investments are established by the latter legal acts as well.

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<sup>3</sup> The Law on Investments of the Republic of Lithuania (*Official gazette*, 1999, No 66-2127).

The relation between contractors and subcontractors is regulated by the Law on Public Procurement. It is required from a bidder to indicate the subcontractors, subsuppliers or subproviders which it intends to contract, and may be required in tender documents a bidder to indicate in its tender the part of procurement for which it intends to contract the subcontractors, subsuppliers or subproviders. However, the said instructions does not affect the main bidder's responsibility for the performance of the contract.

7. Are there works concession procedures used for the procurement of energy projects and large-scale infrastructure projects? And if so, are there one or several specific procurement procedures envisaged for this in your national legislation?

The works concession procedures are used for the procurements of energy and (or) large-scale infrastructure projects. The concessions are awarded following open public procurement procedure provided by the Law on Concessions. However, concessions may be awarded without the latter procurement procedure in the presence of at least one of the following circumstances:

- an urgent need for infrastructure which could not have been foreseen in advance and / or a need for ensuring continuity in the provision of public services, and under the unforeseen circumstances it is not possible to hold a procurement procedure for awarding the concession;
  - the concession contract relates to matters involving national security and defence;
  - where, due to the possessed exclusive rights to provide public services as granted by a legal act which is compliance with the Treaty establishing the European Community, there is only one source reasonably capable of providing the public services in relation to which the concession is to be awarded and there is no other alternative etc.
8. According to your experience, how often do foreign bidders participate in award procedures related to energy projects and large-scale infrastructure projects in your country?



Foreign bidders are quite commonly participating in the public procurements of energy and (or) large-scale infrastructure projects in the Lithuania projects on the basis of joint venture or they are involved as subcontractors. However, number of self-participating foreign bidders is not high. Some uncertainty about the particularities of the national legal and institutional environment could be the main obstacle for which the number of self-participating foreign bidders in the public procurements is inconsiderable.

9. Are the model contracts for the construction works commonly used (at national as well as international level, like the FIDIC Books)? If so, which are the most commonly used model contracts for the procurement of energy projects and large-scale infrastructure projects? Are the model contracts specifically designed for public procurement?

The FIDIC Books as the model contracts for construction works are being used quite commonly in Lithuania. To our knowledge, the Red and Yellow FIDIC Books are the most commonly used model contracts in the Lithuania for the procurements of energy and (or) large-scale infrastructure projects, depending on the design of a project issue, ie who undertakes to design the project, a customer or contractor. When the latter projects are financed by the EU funds, Implementing Agencies of the Lithuania (e. g. Transport Investment Directorate (TID), Lithuanian Business Support Agency (LBSA), Central Project Management Agency (CPMA) etc.) recommends using the FIDIC Books.

The FIDIC Books are often specifically designed for public procurements. From our point of view, a significant part of the specific conditions of FIDIC Books are defined specifically, depending on the public procurement performed.

10. Please briefly describe the how do the model contracts regulate the contractual liability of the contractor. Are models of liability similar to those applied in case of Turn-Key Contracts, design-build contracts or build contracts (where the design is provided by the procuring entity) commonly used?

Contractors are responsible for execution and completion of works and remediation any defects therein, in conformity with the provisions of a specific contract concluded with a

contracting authority. The contractual liability of contractors to some extent is different than provided in the model contracts. For example, contractors must ensure throughout the whole guarantee period (with some exceptions) the compliance of the object of construction to the indicators established in the technical construction regulations and its fitness for use for the designation specified in a contract. The warranty period of a construction works may not be shorter than (i) five years; (ii) for hidden structural elements (structures, pipelines etc.) – ten years; and (iii) if defects, which were deliberately hidden in these structures, have been established - twenty years. The warranty period is counted from the date of the acceptance of the construction works as fit for use. Another example, the concept of *force majeure* in the Lithuania does not include *inter alia* (i) actions of the State and (ii) activities of the third parties. Therefore, in cases of actions of the State and activities of a third person contractors (if the liable person is a business entity) may not be exempted from the contractual liability etc.

11. To what extent are external lawyers engaged to draft, or otherwise involved, contract notices and/or contract documents in the case of procurement of energy projects and large-scale infrastructure projects?

To our knowledge, the external lawyers are involved in drafting tender documents of the procurements of energy (and (or) large-scale infrastructure projects quite commonly. However, the extent to which the external lawyers are involved depends on the economic and structural capacities of a respective contracting authority, the deadlines provided by the project-financing conditions to start (finish) procurement procedures of a respective energy and (or) large-scale infrastructure project etc. Without the assistance to draft the tender documents, the external lawyers usually provides legal assistance for answering the inquiries or claims provided by the bidders, participating in a respective procurement procedures of energy and (or) large-scale infrastructure project etc.

12. Is it, in your country, common to appeal against award decisions related to procurement of energy projects and large-scale infrastructure projects? What is the authority relevant to recognize the appeal (common court, arbitration court, other)?

From our point of view, the award decisions of contracting authorities are appealed quite commonly. The award decisions are appealed due to various reasons, such as inappropriate qualification assessment of a respective bidder, inadequate assessment of the criteria of most economically advantageous tender etc. The bidders who believe that the contracting authority has not complied with the requirements of the Law on Public Procurement and violated or will violate their legitimate interests have the right to refer to a regional court of the Republic of Lithuania as a court of first instance for annulment or amendment of the decisions of the contracting authority etc. The disputes regarding annulment or amendment of the decisions of the contracting authority are heard by regional courts (as a court of first instance), which belongs to the court system of general (common) jurisdiction. According to the national court practice the public procurement disputes are not arbitrable.

13. From your experience – what would you indicate as the most problematic issue while awarding public procurement for such projects and on the other hand what would you call the biggest achievement/improvement made of the legislation implemented during last years for such projects.

To our knowledge, the formal approach of contracting authorities and (or) the Public Procurement Office of the Republic of Lithuania<sup>4</sup> to the public procurement procedures could be identified as the most problematic issue while performing the public procurement procedures of energy and (or) large-scale infrastructure projects. Even a respective bidder is competent, reliable and capable to perform a specific contract; the formal and nonessential non-compliance of a proposal to tender documents may lead to dismissal by a contracting authority of a bidder from the further participating in the procurement procedures. The Public Procurement Office also prefers the formal approach of public procurement procedures. Even if a respective project is recognised by national authorities as important to the Lithuania, the public procurement procedures

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<sup>4</sup> Public Procurement Office of the Republic of Lithuania co-ordinates the activities of public procurement, supervises compliance of procurement activities in accordance to the Law on Public Procurement and the implementing legislation.

could be terminated due to formal infringement identified by the Public Procurement Office.

To our assessment, a significant increase of the use of the Central Public Procurement Information System (CVP IS) by contracting authorities could be identified as the biggest positive change in the sphere of public procurement during last years. The Central Public Procurement Information System (CVP IS) ensures more efficient public procurement procedures and greater transparency.

14. What are the most commonly used/provided by the public procurement laws instruments for securing of the performance of the contracts?

There are a lot of ways to secure the performance of contracts. The right of a contracting authority to choose the way of securing the performance of a contract is not limited by the provisions of the Law on Public Procurement. The performance of a contract may be secured by the application of the following instruments: fine, interests, pledge, mortgage, guarantee etc.

To our knowledge, the most commonly used instruments for securing the performance of a contract are a bank guarantee or suretyship issued by an insurance company.

15. Is it possible to sign the contract for the procurement of energy projects and large-scale infrastructure projects in other than national language?

There is no explicit prohibition under the national laws to conclude and sign a contract with a contracting authority in other than Lithuanian language. To our knowledge, a contract may be concluded and signed in other than Lithuanian language as well; however, the text of the contract should be bilingual and in case of discrepancies between the texts in the Lithuanian and other foreign language, the text in Lithuanian should prevail.

16. Is there a legal or regulatory requirement for public disclosure of the information related to the award procedure?

Contracting authorities are obliged (with some exceptions) by the provisions of the Law on Public Procurement to publish in the Central Public Procurement Information

System (CVP IS) the proposal of a successful bidder, the contract concluded and amendments thereto not later than within 10 (ten) days calculating from the date of conclusion of the contract and (or) amendments. The latter obligation of contracting authorities was produced by the latest amendments of the Law on Public Procurement and will take effect as of 1 January 2015.