GETTING THE DEAL THROUGH

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GLOBAL COMPETITION REVIEW

# Public Procurement

## An overview of regulation in 46 jurisdictions worldwide

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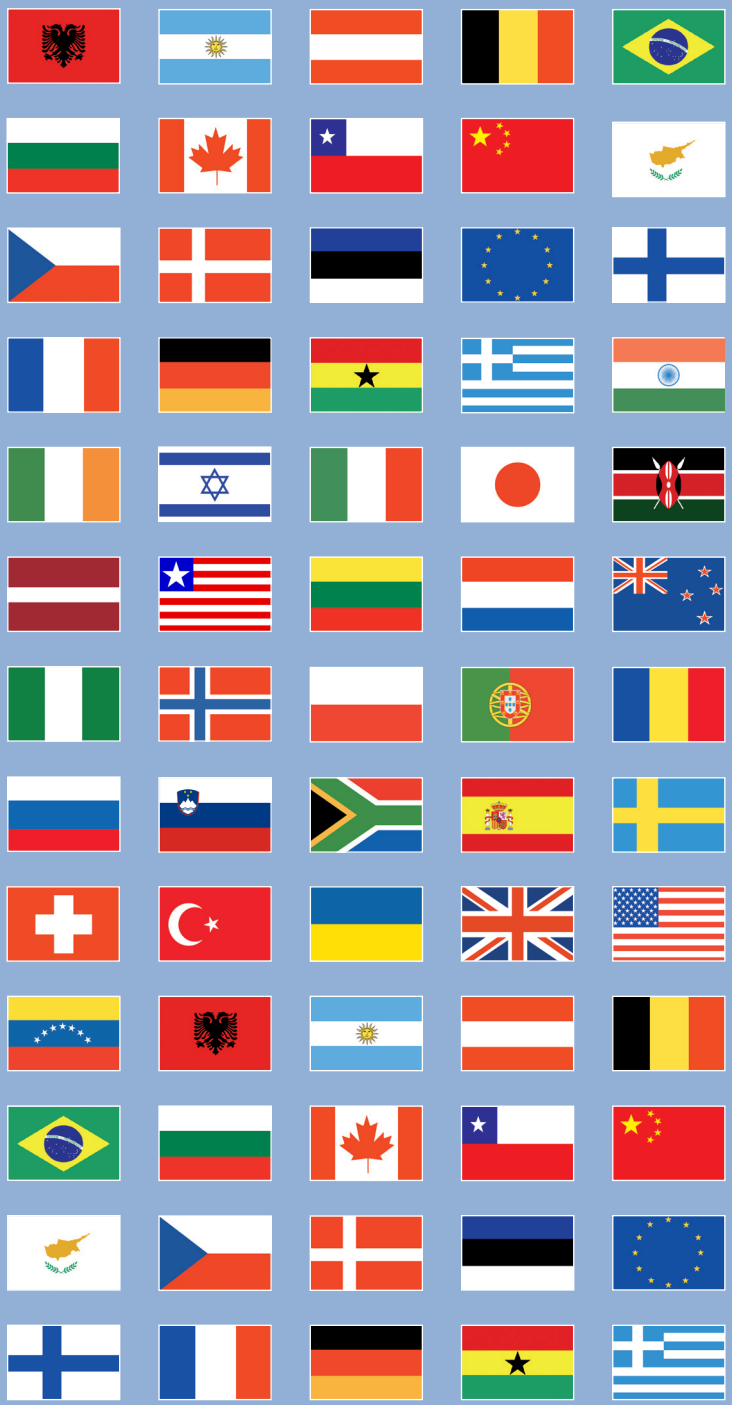


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# New Zealand

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## Legislative framework

**1** What is the relevant legislation and who enforces it?

This section is an introduction to the other comments on the position in New Zealand.

### Multiple procurement frameworks

While there are overlapping procurement principles for each public sector agency, New Zealand does not have a uniform procurement regime for all agencies. That reflects the decentralised decision-making devolved to each agency. Additionally, a key element of the procurement regime is the obtaining of value-for-money outcomes. It is recognised that, while fair treatment of vendors is appropriate, the ultimate objective is value for money and good outcomes for the public sector and its stakeholders.

Additionally, there are important procurement requirements that are not directly legal or legislative in nature. For example, the government auditor (the auditor-general) audits almost all public sector agencies. The auditor-general has major requirements for procurement, conflict of interest, etc.

### Distinguishing central government from other public sector agencies

In deciding what principles apply to particular purchases and agencies, the first step is to distinguish between:

- entities within central government, namely ministries, departments, defence and police (collectively, the central government); and
- the wider public sector: other entities such as Crown-owned companies (including commercially driven state-owned enterprises), local government and their commercial operations, Crown entities, etc.

#### Central government

Central government must apply the following:

- Mandatory Rules for Procurement by Departments (2006) (the Mandatory Rules); and
- Ministry of Economic Development – Government Procurement in New Zealand – Policy Guide for Purchasers (the MED Guidelines).

The Mandatory Rules dominate central government procurement. They set out processes and principles that must be followed. The focus is on open competition, non-discrimination between local and overseas suppliers and fair opportunity for all suppliers.

The Mandatory Rules implement the government procurement requirements of the P4 Free Trade Agreement between Brunei, Chile, Singapore and New Zealand. In early 2010, the United States commenced negotiations based on joining this FTA.

#### Other public sector agencies

Applying the Mandatory Rules is not a requirement for other public sector agencies. However, both the Mandatory Rules and the auditor-general encourage other agencies to follow those Rules in their own procurement activities. The degree of implementation of the Mandatory Rules so far by agencies outside central government is mixed, and often not clearly defined.

### Sector-specific legislation

A public sector agency may have specific legislation relevant to its processes. For example:

- local government has specific obligations under the Local Government Act 2002;
- many stand-alone Crown entities and companies have requirements under the Crown Entities Act 2004 (and the State-Owned Enterprises Act 1986 in the case of Crown owned commercially operated companies); and
- some sectors have specific requirements. For example there is the detailed regime that applies to land transport issues (road, rail, etc) under the Land Transport Management Act 2003.

Both the local government and the land transport regimes are particularly relevant to PPPs and other public-private models.

### Legal enforcement

The courts have the ability to review procurement processes and decisions, arising out of public sector obligations as to specific legislation obligations, duties as to fairness, etc. The court decisions, however, indicate that judicial review will be relatively light-handed. Most procurements are seen as commercial (and therefore at the less reviewable end of the spectrum) compared with judicial review as to human rights issues.

However, a key unresolved issue is the degree to which a breach of the Mandatory Rules by central government could be legally reviewable by the courts. Central government has received legal advice that a breach of the Mandatory Rules by central government would be illegal. This implies that the courts may be able to judicially review compliance with the Mandatory Rules. That would be significant as it would give much stronger grounds to dissatisfied vendors to seek remedies for procurement breaches (such as the setting aside of the award of the contract to another supplier).

Non-compliance with aspects of the Mandatory Rules remains relatively commonplace. The approach is likely to tighten over time, particularly with the government's current initiative to drive stronger procurement outcomes into government purchasing.

### Agency procurement manual

Each agency is required to have processes (typically set out in a procurement manual) that reflect its obligations and the way in which it will undertake procurement.

**Summary**

In summary, for each public sector agency and each type of procurement it is necessary to consider several key relevant sources to ascertain the applicable procurement rules. The sources include:

- Legislation specifically applicable to the agency, the procurement, or both. Typically, the courts and the auditor-general can review compliance with legislation. There is generic legislation such as the Ombudsmen Act 1975, in relation, for example, to decision-making with inadequate information. The ombudsman has intervened rarely in procurement processes, although that may be because vendors are not aware of the ability of the ombudsman to review aspects of procurement.
- The Mandatory Rules and the MED Guidelines (which are mandatory for central government and advisory for other agencies). As noted above, the courts may have review powers as to central government's application of the Mandatory Rules. The Ministry of Economic Development and the auditor-general have review powers as to these Rules and Guidelines.
- The Auditor-General Guidelines, in particular the 2008 Guidance on Procurement and the 2007 guidelines, Managing conflicts of interest: Guidance for public entities. Both those documents are particularly important among the various sources of information. The auditor-general has the power to investigate and provide a public report. This raises reputational issues for the procuring agency. In limited instances, judicial review is available.
- The agency's own procurement manual and related material. An agency's compliance with the manual and the required processes may be subject to review by the courts, the Ministry of Economic Development and the auditor-general.

**Creating and maintaining records for the procurement**

There are important obligations on public sector agencies in relation to decision-making and record-keeping under the Official Information Act 1975 (OIA), its local government equivalent (the Local Government Official Information and Meetings Act (LGOIMA)) and the Public Records Act 2005. Sufficient records of the procurement process must be created and maintained. Failure to do so can be reviewed by the ombudsman or the chief archivist, or both. In some instances, judicial review by the courts may be possible. Overlapping obligations are in the auditor-general's guidelines on procurement, and the Mandatory Rules.

**2** In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

New Zealand has not adopted the GPA although its regime broadly follows the principles in the GPA: openness, non-discrimination between local and foreign suppliers, etc. The EU directives do not apply.

**3** Are there proposals to change the legislation?

No, although New Zealand has an ongoing review as to whether to adopt the GPA. Further, new FTAs may lead to changes in the government procurement regime.

The government commenced a major review of procurement practices in 2009, aimed at improving public sector procurement outcomes. While this does not change the basic framework outlined in question 1, it is changing some of the practices. For example, there is a move towards improved procurement skills within the government, harmonising the way the government goes to market (to make it more efficient), whole-of-government procurement for certain categories of goods and services, etc. While the non-discrimination rule between local and foreign suppliers remains, the government is encouraging procurers to look more closely at opportunities for local suppliers.

The review may lead to some changes, but the extent of these is restricted by commitments such as the P4 Free Trade Agreement. One change that might (and should) occur is to ensure greater coordination between some of the sources of the rules.

**4** Has the legislation recently been amended or has its application in practice been adjusted in response to the global economic and financial crisis? If so, are the amendments or adjustments limited in time?

The legislation has not changed but other changes flow from the current financial situation and the desire of the government to achieve better outcomes for public sector purchases and for the New Zealand economy. See question 3. The developments are not time-bound.

**5** Is there any sector-specific procurement legislation supplementing the general regime?

Yes. See question 1. A key feature of the New Zealand government is the decentralised decision-making by each agency. For example, land transport acquisition is governed by the requirements of the Crown entity, Land Transport New Zealand and the Land Transport Management Act 2003. As noted in question 1, there is considerable sector-specific legislation, guidance and practice. In relation to most potential PPP scenarios, there will be specific issues to consider.

## Applicability of procurement law

**6** Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

See question 1. While the entities fall into two categories (central government and other agencies), the entities that must apply public sector procurement obligations are clearly defined (for example, under the Public Audit Act). Demarcation issues may arise where there are combined public and private sector issues, but they will be situation-specific.

**7** For which, or what kinds of, entities is the status as a contracting authority in dispute?

There are no such disputes: see question 6.

**8** Are there specific domestic rules relating to the calculation of the threshold value of contracts?

Much of the procurement regime is principles-based, rather than prescriptive. This particularly applies to the Auditor-General's Guidelines, which reflect international best practice. Therefore, for example, a particular procurement format (eg, an RFP) is usually not prescribed.

A more robust and careful process is expected as to a large procurement compared to a small procurement. For example, a NZ$10,000 purchase would require just two or three estimates from vendors in many cases. A NZ$1 million purchase would require a full RFP (request for proposal), or similar, and other detailed steps.

Superimposed on this approach are the Mandatory Rules. They only apply, with limited exceptions, to purchases of goods and services with a whole of life cost exceeding NZ$100,000 (NZ$10 million in the case of construction services).

However, compliance with other procurement obligations applies below those thresholds. For example, the auditor-general adopts a principles-based approach for all procurement. Also, the free trade agreement with Australia (known as CER) has no threshold limit.

**9** Does the extension of an existing contract require a new procurement procedure?

Generally, yes. If the Mandatory Rules apply, the situations where there does not need to be a new procedure are limited (assuming the extension is not worth more than NZ$100,000 for goods and services). An illustration of an exception is acquisition of additional IT equipment to supplement an IT system already supplied. The procurer may only need to go to the same vendor, as other equipment is incompatible. However, this could not be used as a workaround to avoid going to the market at appropriate times.

Where the Mandatory Rules are advisory only (ie, as to an agency outside central government), the agency may be able to avoid a new procurement procedure. However, the grounds for doing so would not normally exist and should be justified by a robust documented business case.

**10** Does the amendment of an existing contract require a new procurement procedure?

See question 9. Unless the change is minor, or it was clearly envisioned as possible in the initial procurement process, change is not possible where the Mandatory Rules apply, but may be possible for other entities (as long as there is a robust business case). Many acquisitions do involve changes (for example, an IT software development project is very likely to require substantial change). Prudent procurers allow for this in the initial RFP document by allowing for substantial variations.

There is significantly more flexibility for construction services under the Mandatory Rules (there can be variations worth up to half the initial tendered price).

**11** May an existing contract be transferred to another supplier or provider without a new procurement procedure?

Generally, transferring the obligations of the successful tenderer to another supplier will be difficult for a purchasing agency to accommodate. Legally and contractually, it will often be possible to do this. However, this would entail procurement compliance risk in many situations. The procurer would need to do a robust business case to justify this.

However, there will be some instances where transfer to a new vendor is appropriate. For example, this may be acceptable where the supplier is merged into a new owner.

**12** In which circumstances do privatisations require a procurement procedure?

Privatisation of public sector entities or functions is not generally covered by the procurement regime. However, there could be overlaps, for example, where a government department outsources its IT function and the supplier pays for the assets and business acquired in the process. Procurement rules would apply.

In any event, similar principles apply where the privatisation is a straight sale of the entity or function. Each circumstance will differ (for example, as to the applicable legislation). However, it is likely that the agency will need to (or choose to) consult with interested parties including purchasers before finally deciding what and how to sell.

The agency would be prudent to apply open market sales techniques, ideally seeking market input as to how best to do this. While fairness is important, the process, like procurement, is dominated by getting the best value for money for the agency.

Sometimes agencies will face difficult choices; for example, whether to sell the assets on the stock exchange via a listed company, and then how to parcel the shares (in ways suitable for 'Mom and Pop' New Zealanders or for the larger investors, or both).

**13** In which circumstances do public-private partnerships (PPPs) require a procurement procedure?

Always. This will be tailored to the specific needs and obligations of the particular procurement and agency (see question 1). Most PPPs and similar situations will have specific legislation and rules applicable to the relevant sector (eg, land transport, local government, prisons, etc).

The auditor-general has produced useful guidelines on PPPs, namely, Achieving Public Sector Outcomes with Private Sector Partners.

New Zealand is behind other countries in using PPP structures, but this appears to be changing. A lot more opportunity is emerging and the government has recently established a National Infrastructure Unit. Among its roles is the coordination of PPP initiatives in the public sector. The Unit's website (at www.treasury.govt.nz ) provides valuable information.

The public sector in New Zealand is seeking to learn and benefit from the PPP experience off-shore (good and bad), particularly in Australia and the UK.

New Zealand is developing a body of material, precedents, principles, etc, around PPPs. This will build on the underlying New Zealand procurement model.

The Mandatory Rules mean that there should generally be no discrimination between foreign and local suppliers. There are limited exceptions (for example, New Zealand security requirements may call for a particular approach for certain purchases).

**14** What are the rules and requirements for the award of services concessions?

This will generally require a competitive approach, applying the principles outlined in questions 1 and 13. Where the Mandatory Rules apply, this requires non-discrimination between local and foreign providers, etc (unless limited exceptions apply).

**15** To which forms of cooperation between public bodies and undertakings does public procurement law not apply and what are the respective requirements?

The Mandatory Rules specifically exclude transactions between public sector agencies. Generally, the question of whether to insource within the public sector, or outsource, is an issue for the agencies to decide. However, the agencies will sometimes choose to (or be required to) consult stakeholders, including vendors, before making that choice. This is an issue to which the answer depends on the applicable rules, legislation, etc.

The degree to which procurement rules apply to a public–private joint ventures is also dependent on the specific situation.

## The procurement procedures

**16** Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

See question 1. The procurement approach firmly reflects equal treatment for local and foreign vendors, transparency and competition. The need for confidentiality as to some processes and some suppliers' information, however, in practice restricts some of the theoretical transparency. Vendors are sometimes concerned around that aspect, and therefore whether there is genuine competition and equal treatment in all instances. It can be challenging to establish the facts as to whether there has been fair and equal treatment in some instances.

**17** Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes, this is required generally. However, New Zealand's highest court (then, the Privy Council), in *Transit v Pratt*, issued a major judgment on procurement. In that case, concerning a roading contract, an engineer on the tender evaluation panel had strong views about the suitability of the tenderer, Pratt Contractors, for the project. This was based on his past negative experience with Pratt on another project.

The court confirmed that the engineer was entitled to use that information in the evaluation, as could his fellow panel members. Furthermore, the court encouraged this approach, to aid pragmatic purchase decisions based on real-life experience.

**18** How are conflicts of interest dealt with?

See question 17 for an important qualification in this area. There are three layers in relation to conflicts of interest:

- legal (eg under statute, or under case law);
- ethical; and
- good (or best) practice.

The courts deal with the first layer (legal) and the auditor-general and other agencies deal with all three.

Procurers and their staff and consultants should comply with all three layers. Perception of conflict of interest is often more important than actual conflict of interest. Additionally, whether someone has a conflict of interest extends beyond monetary issues (for example, it includes family relationships).

A conflict of interest does not necessarily mean that the affected person can no longer be involved. It may be possible to manage the interest (for example, to exclude that person from certain discussions).

New Zealand, being a small country, sometimes has unavoidable conflicts of interest that need to be managed.

The treatment of conflict of interest issues by agencies is variable.

As noted in question 1, the auditor-general provides guidelines on the handling of conflicts of interest. It is commonplace for parties to treat conflicts of interest purely as a legal issue when it covers all three layers.

**19** How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Under the Mandatory Rules, particular care is required to avoid a vendor being involved in the early stages, with the risk of the subsequent procurement being distorted in its favour. This may mean that the vendor is precluded from subsequent tendering, although practice can be variable in this regard. There is the related problem of the incumbent vendor bidding for later work when the incumbent has knowledge of the requirements or has been involved in designing them (or both).

This principle (of avoiding vendor capture) strongly underpins procurement generally in New Zealand. However, compliance is variable, and this is a significant vendor concern.

**20** What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing types are the request for tender (RFT) when the specifications are clear and the request for proposal (RFP) when a wider array of solutions is possible. This is often preceded by an expression of interest (EOI) step, which narrows down the field to a limited number of vendors for the RFP or RFT. The approach reflects international practice. There are some variations on this, such as a two-step RFP, a request for information, pre-RFP market soundings, etc.

**21** Are there special rules or requirements determining the conduct of a negotiated procedure?

The Mandatory Rules have some prescriptive requirements, although they are high level and reflect best practice. There are rules, for example, around fairness, evaluation criteria, confidentiality of vendor information, providing information equally to all parties (unless inappropriate), awarding the contract regardless unless there is good reason to the contrary, and so on.

The general guidelines applicable to all agencies also reflect best practice, as implemented via the Auditor-General's Guidance. See question 1.

There are sector-specific requirements although these tend to reflect best practice as well. A good example is the new guidelines in relation to land transport procurement.

**22** When and how may the competitive dialogue be used?

New Zealand does not have a formal competitive dialogue regime. The process is little used, although the increase in PPP opportunities is likely to see increased use of the model. It should be used in other complex purchases by the public sector. Non-use appears to have led to sub-optimal outcomes for some major projects.

**23** What are the requirements for the conclusion of a framework agreement?

Framework agreements are permitted, provided the general procurement rules are followed (for example, all relevant vendors are given an opportunity to propose, and the extent and scope of the likely purchases is apparent). The flexibility to do this reflects the principles-based nature of the procurement processes in New Zealand.

**24** May several framework agreements be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

See question 23. Several framework agreements may be concluded; these tend to be called panel contracts. Depending on the circumstances, an additional competitive procedure may be required. Alternatively, there should be a methodology for achieving some fairness as between vendors, while delivering value for money. Fairness does not usually mean that all vendors get the same amount of work.

The application of the procurement requirements by agencies is variable (some appear to pick and choose at will from the panel).

**25** Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Unless the procurement process allows for it, this is difficult and may not be possible in some instances. This is particularly the case where the changed member of the consortium is a substantial provider.

A change, if accepted by the procurer, may require the latter to go back to the other vendors to give them an opportunity to make a change.

Such a change is easier earlier rather than later in the process.

**26** Are unduly burdensome or risky requirements in tender specifications prohibited?

Reflecting the principles-based nature of procurement, there is usually no restriction on unduly burdensome or risky requirements. The current government review of procurement will encourage a reasonable approach to issues such as limitation of vendors' liability, ownership of IP, etc.

The Mandatory Rules, and best practice as reflected in the Auditor-General's Guidelines, have some limitations on the way in

which the RFP requirements, RFT requirements and specifications are framed. In particular, the specifications must not be such that only one of several technical solutions is possible (eg, only Microsoft operating systems).

**27** What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

See question 17. While the procurer needs to act fairly, it can also act pragmatically, recognising the ultimate objective of value for money, and buying the services that the agency and its stakeholders actually want.

The example in question 17 shows the breadth of information that the procurer can take into account.

Apart from the Mandatory Rules, the principles-based approach allows an array of approaches to be taken as long as they are consistent with fundamental principles such as non-discrimination and fairness (unless exceptions apply).

Under the Mandatory Rules, central government must generally use evaluation criteria as advised in advance to vendors.

**28** Are there specific mechanisms to further the participation of small and medium enterprises in the procurement procedure?

No, but the current government procurement initiative is looking at ways that participation of SMEs can be encouraged. However, the government cannot force agencies to do this against the background of free trade and other commitments, including the devolved nature of the public sector.

**29** What are the requirements for the admissibility of alternative bids?

The procurer would need to specify that alternative bids are possible. Often this is a prudent thing to do in order to ensure that the procurer has the best information and proposals, even though that can create more work for both the vendor and procurer.

If there is no provision for alternative bids and a party puts one forward to the procurer, the procurer may only use it if other bidders are then given the same opportunity.

**30** Must a contracting authority take alternative bids into account?

See question 29.

**31** What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Assuming the procurer has made acceptance of a particular specification, or procurer terms, mandatory and a vendor submits other specifications or its own terms of business. In that event, the vendor has failed to meet a mandatory requirement and its proposal cannot be considered. This is a clear rule under the Mandatory Rules. It is less clearly entrenched for non-central government agencies.

It may be possible, in both cases, for the procurer to go back to all proposers, giving them a chance to submit on the basis that the requirement is not mandatory.

An ombudsman's decision indicates that, where the bid may fail due to non-acceptance of a mandatory requirement, the procurer may need to give the vendor an opportunity to revisit the issue.

Often, the proposal will not be mandatory as to, for example, terms of business. Instead it may require a response to the proposed clauses. Likewise regarding specifications.

**32** What are the award criteria provided for in the relevant legislation?

Generally there are no specific criteria although there is a default position in relation to land transport. Usually, therefore, the procurer chooses the criteria, although they would need to be suitable on a principles basis.

**Update and trends**

The current year will see increased focus on the following areas.

- PPPs and comparable procedures: New Zealand is a late starter in this area, but quite a few opportunities are developing. This is becoming a big issue in New Zealand.
- As a result of a major government initiative, greater focus on getting better value for money, upskilling procurement expertise in the public sector and getting business for New Zealand SMEs and other businesses, as long as that is consistent with New Zealand's strong free trade stance. The latter will mean low discrimination (in theory) against foreign vendors.
- Increased attention to conflict of interest issues, and the position of incumbent vendors and strategic advisers seeking downstream work.
- A more strategic approach to procurement including publicly available annual strategic procurement plans
- The rise of more innovative procurement methods such as competitive dialogue.
- A greater focus on procurement compliance while achieving value for money.
- A more centralised resource for procurement expertise, such as the procurement team at the Ministry of Economic Development and the National Infrastructure Unit.

**33** What constitutes an 'abnormally low' bid?

This is not specified anywhere, but abnormally low bids (low-balling) requires close consideration by the procurer.

**34** What is the required process for dealing with abnormally low bids?

There is no specific process. See question 33.

**35** How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is 'self-cleaning' an established and recognised way of regaining suitability and reliability?

While there is 'Clean Slate' legislation as to criminal convictions after a number of years, generally the solution is pragmatic rather than based on some legal or other formal regime. Generally, it is a matter of persuading the procurer that past misdemeanours are just history.

## Review proceedings and judicial proceedings

**36** Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Judicial review is for the New Zealand Courts. It is possible to appeal judicial review decisions to the Court of Appeal, and then to the Supreme Court (subject to restrictions).

**37** How long does an administrative review proceeding or judicial proceeding for review take?

Six to 18 months, although it may be possible to get urgent relief more quickly.

**38** What are the admissibility requirements?

See question 1. Judicial review is about process (natural justice, fairness, legality) rather than the merits (merits are relevant only in extreme cases of error, applying the UK-sourced *Wednesbury* principles).

In the leading recent judicial review of procurement (purchase of pathology services by hospitals) the unsuccessful and successful vendors, the procurer and clinician interests (ie, stakeholders) had standing to be heard to by the court. In that case, extensive and wide-ranging evidence was lodged, although that is generally discouraged in relation to judicial review.

**39** What are the deadlines for a review application and an appeal?

For an application for judicial review, there is no relevant formal deadline. Rather, undue delay is a major factor against success of the application. Dissatisfied vendors should move quickly. Appeals from the court decisions should be lodged within a month.

**40** Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

No. An application would have to be made for interim relief.

**41** Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

No. Only subsequently.

**42** Is access to the procurement file granted to an applicant?

See question 1. Records must be maintained. Under the freedom of information regime (OIA and LGOIMA), access is technically possible. In practice much of the file is withheld, rightly or wrongly, based on exceptions such as commercial confidentiality. Generally, those decisions by agencies are not challenged, as they can be, to the ombudsman.

**43** Is it customary for disadvantaged bidders to file review applications?

It is infrequent. Some vendors say they are concerned that taking such a step will earn them a bad reputation.

**44** May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Yes, although this is infrequent – in part due to the low number of applications.

**45** Is legal protection available in cases of a de facto award of a contract, namely an award without any procurement procedure?

See question 1. It may well be that such a step is reviewable, particularly where the Mandatory Rules apply. In some instances, the courts may reverse the initial award of the contract. That is so, despite the light-handed approach to procurement.

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