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# Public Procurement & Government Contracts

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**Contributing Editor**

Dr Totis Kotsonis  
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## **LAW AND PRACTICE:**

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Contributed by Cabinet Mathias Essereke

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

**Cabinet Mathias Essereke** is composed of technical and support teams; the technical team includes three barristers and two in-house lawyers. The firm's main office is located in Pointe-Noire and is part of a wider network within the Republic of Congo. Its main practice areas relating to

the public procurement sector are administrative law and disputes, land property rights, arbitration law, tax claims, corporate law, bankruptcy law, contract law and technical contracts, debt collection procedure, charter of state-owned companies and rights of regional authorities.

## Author



**Mathias Essereke** is a partner of the firm and is its managing director. He provides regular services relating to corporate and business law as well as environmental law, including counselling, disputes in a wide range of labour law, legal assistance and representation of companies. He also provides tax and legal advice and services in relation to administrative law, tax claims, real estate transactions, auctions, construction, expropriation and oil and mining rights. He contributed to the World Bank Indicator for Public-Private Infrastructure Partnerships in the Republic of Congo for 2018.

## 1. General

### 1.1 Legislation Regulating Procurement of Government Contracts

Government Contracts are governed by the following legislation:

- Decree No 2009-156 of 20 May 2009, relating to the Code of Public Procurement;
- Decree No 2009-157 of 20 May 2009, on awarding, organising and running the regulating authority of government contracts;
- Decree No 2009-158 of 20 May 2009, reorganising the General Delegation of Major Works;
- Decree No 2009-159 of 20 May 2009 on awarding, organising and running the Directorate General of Public Procurement;
- Decree No 2009-161 of 20 May 2009 on organising and running the Public Procurement Department;
- Decree No 2009-160 of 20 May 2009, setting out terms and conditions for approving public procurement; and
- Decree No 2009-162 of 20 May 2009, setting out the thresholds for awarding, controlling and approving public procurement, as amended by Decree No 2011-843 of 31 December 2011, amending and supplementing some provisions

### 1.2 Entities Subject to Procurement Regulation

The following legal entities are subject to procurement regulation:

- the state, local authorities and their public institutions;
- public companies; and
- other bodies, agencies or offices created by the state or local authorities to meet the general public's needs (ie, organisations, either with or without legal personality, the activity of which is funded or guaranteed by the state or which enjoy the right to financial assistance or guarantee from the state or any local authority).

It should be noted that these relevant legal entities must assign their contractors to the Directorate General of Major Works responsible for awarding and performing contracts if the estimated amount is equal to or in excess of the thresholds laid down by decree (see 1.3 **Type of Contracts Subject to Procurement Regulation**, below).

### 1.3 Type of Contracts Subject to Procurement Regulation

Public works contracts, works contracts, supply contracts, service contracts and intellectual services contracts are subject to procurement regulation. Different thresholds apply as follows:

## Thresholds for Calls for Tenders

National tenders include works and supplies contracts in excess of or equal to XAF50 million and intellectual services contracts in excess of or equal to XAF10 million. Any amounts of works contracts subject to minimum value thresholds are approved on the basis of three invoices.

International tenders concern public procurement in excess of or equal to XAF2 billion, including supply contracts for goods or services in excess of or equal to XAF500 million.

## Thresholds Related to the Assignment of the Contractor Responsible for Public Procurement

For works contracts, the works owners will assign contractors to the Directorate General of Major Works for any public procurement in excess of or equal to XAF1 billion.

## Thresholds Relating to Controlling Public Procurement and Award Procedures

The procedure for public procurement and contract awards is controlled by the Directorate General for Contracts Control if the amount is in excess of or equal to:

- XAF200 million for public works contracts;
- XAF100 million for supply contracts for goods or services; or
- XAF50 million for intellectual services contracts.

Tender documents and proposed requests are reviewed in advance by the Directorate General for Contracts Control if the amount is in excess of or equal to;

- XAF400 million for works contracts;
- XAF300 million for supplies of goods or services; or
- XAF200 million for intellectual services contracts.

## Thresholds for Concluding Contracts

Contracts must be concluded by the following authorities:

- the President of the Republic, if the amount is in excess of or equal to XAF2 billion; or
- the Minister of Finance or the Minister of Plan, if the amount is less than XAF2 billion.

## 1.4 Openness of Regulated Contract Award Procedure

Subject to provisions related to thresholds, national or international tendering and participation in public procurement are open to any tenderer with the technical and financial capacity to fulfil a government contract or a public sector contract, in light of previous performance under similar contracts.

However, when launching calls for tenders, preferential treatment may be given to specific companies protected under the regulations in force. This preferential treatment

shall feature in tender documents and cannot be invoked if such preferential treatment has already been granted to national companies. This preferential treatment may be granted to national companies with their registered office in the Republic of Congo. These companies will be granted a reduction of 7.5-10% for works contracts, and 15% of their financial offer for other types of contracts.

## 1.5 Key Obligations

As part of its obligations, the works owner must:

- assess the feasibility and implementation of proposed operations in order to determine their location or contents, and to establish the planning;
- assess all the needs;
- ensure availability of borrowed funds and prior authorisations; and
- ensure availability of land and its conditions of use.

## 2. Contract Award Process

### 2.1 Prior Advertisement of Regulated Contract Award Procedures

Calls for tenders or invitations to tender may be advertised in the media, as well as being posted and e-mailed to the Chambers of Commerce of Brazzaville, Pointe-Noire and regional authorities.

The website of the Directorate General of Major Works is: [www.grandstravaux.org](http://www.grandstravaux.org)

Information included with tender documents may include the tender reference number, the identification of members of the public procurement commission and the works owner, the object, the date of signature, the funding, the requirements for obtaining tendering documents, the qualification of candidates, conditions for repudiating tenders, the selection and award criteria, the deadline, the date of opening of tenders, and the language of work.

### 2.2 Preliminary Market Consultations by Awarding Authority

The Directorate General of Public Procurement Control is entitled to carry out consultations before launching the contract award procedure.

### 2.3 Tender Procedure for Award of Contract

Public contracts are awarded following an open and competitive tendering procedure, as required by law.

The public procurement code provides for open calls for tenders, whereby any candidate with the required technical and financial capabilities and previous experience in performing contracts or the like may submit an application for pre-qualification, or a tender.

The invitation to tender is restrictive upon the sole opinion of the Directorate General of Public Procurement Control. The only candidates entitled to submit tenders are those subject to prior consultation by the works owner or the assigned contractor.

Calls for competitive tenders occur when special selections are conducted for technical, aesthetic or financial purposes.

This bidding concerns the design of works or any architectural project and is based on a plan established by the works owner or the assigned contractor.

Tender procedures are concluded without negotiation. The invitation to negotiate may be sent to any consultant that meets the requirements listed in **2.9 Evaluation Criteria**, below, for intellectual services contracts.

## **2.4 Choice/Conditions of Tender Procedure**

The legislation also provides for purchase orders contracts and services contracts, competition for pre-qualified candidates for intellectual services contracts and mutually agreed contracts.

Calls for tenders are required, and any other method of public procurement must be an exception to the rule, approved by the contractor or the works owner and subject to prior authorisation by the directorate general of the relevant public procurement division.

## **2.5 Timing for Publication of Documents**

The legislation does not impose any obligations as to the time of publication of all or some of the procurement documents (such as the pre-selection questionnaire, the invitation to tender or a draft contract), but specifies the moment of receipt of applications.

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

In open or restricted tendering procedures, the legislation specifies that the time limits for the receipt of expressions of interest or the submission of tenders cannot be less than 30 calendar days. However, this period can be brought forward to 20 days upon the approval of the Directorate General of the Public Procurement Review Body.

## **2.7 Eligibility for Participation in Procurement Process**

The criteria to be eligible for participating in a procurement process are as follows:

- the technical and financial capacities required for the execution of a public contract or a public services delegation contract; and
- experience of similar contract performance.

## **2.8 Restriction of Participation in Procurement Process**

In the case of intellectual service contracts including studies, project management and a range of technical assistance services, it is possible to restrict participation to pre-qualified candidates.

Pre-qualified candidates are shortlisted on the basis of a solicitation of public interest and their ability to perform the contract, with reference to the criteria published in this solicitation.

A minimum of three contractors, suppliers or service-providers should be invited to participate in a contract award procedure.

## **2.9 Evaluation Criteria**

Public contracts are awarded on the basis of works, supplies and services contracts or intellectual services contracts.

Contract awards for works, supplies and services shall be concluded on the basis of economic, financial and technical criteria mentioned in tender documents in order to determine the lowest offer. These evaluation criteria include cost of use, price, cost-effectiveness, quality, technical value, after-sales service and technical support, turnaround time and payment schedule, as well as the contract's subject and terms and conditions.

Intellectual property contracts are open to any candidate that meets the following requirements:

- for the selection method combining technical quality and cost, the tenderer submitting the highest bid by combining technical and financial criteria in accordance with provisions of Article 65 et seq of the Decree;
- for cost-effective selection method, the successful tenderer is the candidate that wins the highest technical bid, or wins on the basis of its technical bid;
- for the selection method based on a budget forecast, the candidate that wins on the basis of its technical score or has the highest technical score, and whose financial offer is at the minimum value equal to the proposed budget; and
- for cost-effective method of selection, the consultant offering the lowest bid among consultants whose technical bids reached the required threshold or provided the lowest technical bid.

## **3. General Transparency Obligations**

### **3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology**

Public procurement legislation provides that the specific tender rules must also specify pre-qualification and post-

qualification rules for tenderers, as well as evaluation criteria. This disclosure takes place when launching tenders.

### 3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Public procurement legislation requires the works owner or the contractor to notify any unsuccessful interested parties of the reasons for their non-eligibility in the contract award procedure.

This notification shall be given when the award decision is reported to the successful bidder, or within five days of receipt of a written application. Any notification shall be in writing.

### 3.3 Obligation to Notify Bidders of Contract Award Decision

Public procurement legislation requires the works owner or the assigned contractor to notify the successful tenderer of any contract award decision.

This decision is maintained in the minutes of the awards decision and notified in writing within a standstill period not provided by the Code of Public Procurements.

### 3.4 Requirement For 'Standstill Period'

The works owner must observe a minimum period of 15 days between the minutes of the award decision and the conclusion of the contract by the Minister of Finance or the President of the Republic.

## 4. Review Procedures

### 4.1 Responsibility for Review of Awarding Authority's Decisions

Decisions of the awarding authority shall be supervised by the works owner or the contractor, the Directorate General of Public Procurement Control and the Public Procurement Regulatory Authority.

The legislation provides for challenges of the decisions of these bodies.

### 4.2 Remedies Available for Breach of Procurement Legislation

Remedies are available for candidates to challenge:

- before the works owner:
  - (a) the decision to award or not to award the contract;
  - (b) the requirements for notification of tender notices;
  - (c) the rules concerning the participation of candidates and the required capacities and guarantees;
  - (d) the award and selection procedures;
  - (e) the technical specifications in force; and
  - (f) the evaluation criteria.

- before the Dispute Settlement Board any dispute related to the procurement procedure:

- (a) between the the works owner and the Directorate General for Controlling Public Contracts;
- (b) between the candidates; and
- (c) between a contracting authority or the general management of the control of public contracts to a candidate.

- before the Dispute Settlement Board, the absence of a decision of the owner of the works, or the hierarchical authority, within three working days following its referral by the candidate.

Appeals against decisions of the Dispute Settlement Board are brought before the courts.

### 4.3 Interim Measures

The dispute settlement committee may take interim measures to suspend any contested decision or the contract award procedure.

### 4.4 Challenging Awarding Authority's Decisions

The contractor or candidates or tenderers who feel that they have been unfairly disqualified by the works owner all have standing to challenge the awarding authority's decisions, by means of immediate submission to the Dispute Resolution Committee:

- in the event of any disagreement between the candidate/tenderer and the Directorate General for the Control of Public Procurement following the cancellation of calls for tenders or contracts awarding procedures; or
- in the absence of approval of contracts by the Minister of Finance or by the President of the Republic.

### 4.5 Time Limits for Challenging Decision

Any prior challenge must be brought to the works owner or the contractor within five working days of the provisional contract award decision, or within six working days preceding the expected date of application or submission.

Challenges must be brought to the Dispute Resolution Committee of the Contract Regulatory Body:

- within eight working days of notification of the adverse decision; or
- in the absence of a decision by the works owner, the contractor or the hierarchical authority, within three working days of its referral.

### 4.6 Length of Proceedings

The typical length of a public procurement procedure is 120 days.

## 4.7 Annual Number of Procurement Claims

Before the economic crisis, the average number of procurement claims considered annually by the review body was more or less 500 tenders, including 100 calls for tenders per year by the Major Works Directorate General.

Since the economic crisis, this figure has fallen to around ten tenders per year.

### **Cabinet Mathias Essereke**

Galerie du Plateau building, 1st floor,  
P O Box: 1119,  
downtown area in Pointe-Noire,  
Republic of Congo

Tel: +242 94 18 34  
Email: cabinet.mathess@yahoo.fr  
Web: www.cabinet-essereke.africa.com



Cabinet Mathias Essereke  
Avocat au Congo Brazzaville

## 5. Miscellaneous

### 5.1 Modification of Contracts Post-award

Any awarded contract may be modified by an addendum, within a limit of 20% of the contract's total value. However, this addendum cannot alter the object of the contract, the contract owner, the currency or the price-review formula.

### 5.2 Direct Contract Awards

Public procurement legislation provides for the award of contracts by direct agreement following special authorisation from the Directorate General for Public Procurement.

### 5.3 Legislative Amendments Under Consideration

There is currently a group working on the implementation of particular regulation of the public-private partnership model.