

# Bulgaria



Nikolay Kolev



Mihail Vishanin

**Borislav Boyanov & Co.**

## 1 Relevant Legislation

### 1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The Bulgarian public procurement legislation includes a system of legal norms:

1. **EC law and international agreements** - for more details please refer to question 1.2 below.
2. **1991 Constitution of Republic Bulgaria.** The Constitution declares that “the free economic initiative” represents the basic principle of the contemporary Bulgarian economy.
3. **2004 Public Procurement Act (“the PPA”).** The PPA has implemented in Bulgarian law the standards incorporated in the EC law (in particular Council Directive 93/36/EEC, Council Directive 93/37/EEC, Council Directive 93/38/EEC, Council Directive 92/50/EEC, Directive 89/665/EEC, Directive 92/13/EEC, Directive 2004/17/EEC, and Directive 2004/18/EEC). The PPA regulates the subject matter of public procurements, the requirements to the procuring entity and the tenderers, the different types of procedures for granting of public procurements and the grounds and procedure for appeal of the acts and omissions of the procuring entities.
4. **Secondary legislation.** The normative acts on implementation of the PPA contain detailed provisions on different types of public procurement procedures:
  - a. Regulation on the Implementation of the Public Procurement Act - provides the conditions and the procedure for keeping, maintenance, notification and use of the Public Procurement Register to the Public Procurement Agency (“the Agency”) as well as detailed rules for some of the procedures under the Public Procurement Act.
  - b. Organisation Regulation of the Public Procurement Agency - focused on the legal status and the structure, the competences and the organisation of the activity of the Agency.
  - c. Regulation on the Awarding of Small Public Procurements - provides clear definition of the “small public procurement” and stipulates the requirements and the procedure for the awarding of the small public procurements.
  - d. Regulation on the Terms and the Procedure for Awarding of Special Public Procurements - for more detail refer to question 1.4 below.
5. **Case law of the Competition Protection Commission and the Supreme Administrative Court.** The Commission has the jurisdiction to resolve as first instance the disputes arising under the PPA. Its decisions may be appealed before the Supreme Administrative Court. The case law is an important

source for authoritative interpretation of the effective legislation on the public procurements.

6. **Instructions of the Executive Director of the Agency.** According to the PPA the Executive Director of the Agency is authorised to adopt methodological guidelines on application of the PPA and the secondary legislation and to approve standard forms for contracts and award notices, statistical reports and reports for design contests conducted.
7. **Cooperation and Collaboration Agreement between the Council of Auditors, the Public Procurement Agency and the Internal State Financial Control Agency in the Area of the Public Procurement Control and the protocols thereto.** The Agreement regulates the procedure for preliminary consultation and coordination on issues of exceptional complexity when the initiating institution experience difficulties in making its own opinion. The results of that procedure are set up in a protocol for each particular case.
8. **Cooperation Agreement between the Competition Protection Commission and the Public Procurement Agency.** The Agreement regulates the exchange of information between both institutions, the composition of working groups and the training in the field of public procurements.

### 1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

The PPA has implemented in Bulgarian law the EU standards and requirements. In addition, after the accession of Bulgaria to the EU, each procuring entity is obliged to send to the Official Journal of the EU all invitations for public procurement procedures above certain amounts. The invitation can be published also in the Bulgarian State Gazette only after it has been sent to the European Commission.

Bulgaria has been a Member State of the World Trade Organisation since 1st December 1996. Bulgaria also has regular membership in the Plurilateral Trade Agreements within the framework of the WTO, but it is not member of the Agreement on Government Procurement (the country is in process of accession to this international agreement).

After the accession of Bulgaria to the EU, Bulgaria will continue its membership in the WTO. However, the EU is also member of the WTO in its own right and the European Commission alone speaks for the EU and its Member States at almost all meetings of the WTO.

### 1.3 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The PPA provides that public procurements shall be awarded in

accordance with the principles of public openness and transparency, free and fair competition and equality and non-discrimination. The general function of these basic principles is to achieve an increased efficiency in using public funds and to provide a primary guarantee for the implementation of the public procurement law. As outlined in the public procurement case law these general principles form important guiding criteria for interpretation and implementation of the formal requirements of the public procurement procedures and awarding of the public procurements.

#### 1.4 Are there special rules in relation to military equipment?

The PPA shall not be applicable to public procurements associated with national defence or national security and public procurements which are a subject of classified information constituting a state secret. Such public procurements are regulated by a special normative act - the Regulation on Granting of Special Public Procurements ("the RGSP"). The RGSP contains detailed provisions about the special public procurement procedure which includes a preliminary stage related to the granting of access to classified information.

## 2 Application of the Law to Entities and Contracts

### 2.1 Which public entities are covered by the law and is it possible to obtain a ruling on this issue?

According to the PPA contracting entities shall be:

1. bodies of State power, the President, the Bulgarian National Bank, as well as other state institutions established by a statutory act;
2. the Bulgarian diplomatic missions and the consular posts abroad, as well as the Bulgarian permanent missions to the international organisations;
3. public organisations. This term covers any legal person which, regardless of its commercial or industrial character, is established for the specific purpose of meeting needs in the public interest and which fulfils any of the following conditions:
  - more than half of its income for the preceding year is financed by the State budget, by the budgets of the Bulgarian National Bank, public social insurance or the National Health Insurance Fund, by the municipal budgets, or by any contracting authorities under point 1 or 3 or by another public organisation;
  - more than half of the members of the management or supervisory body thereof are appointed by any contracting authorities under point 1 or 3 or by another public organisation;
  - is subject to management supervision on the part of any contracting authorities under point 1 or 3 or by another public organisation; management supervision shall be presumed when a person can exert, in any way whatsoever, a dominant influence on the activity of another person; and/or
  - any medical-treatment facility, which is a commercial corporation and more than 30 per cent of the income whereof for the preceding year is for the account of the State budget and/or a municipal budget, and/or the budget of the National Health Insurance Fund.
4. the combinations formed by entities/state bodies referred to in point 1 or 3;
5. the public organisations and any combinations thereof carrying out activities relating to natural gas, heat or

electricity, water supply activities, public transport services, universal postal services; and

6. the merchants and other persons which are not public organisations carrying out one or several of the activities mentioned in point 5 above on the basis of special or exclusive rights.

### 2.2 Which private entities are covered by the law and is it possible to obtain a ruling on this issue?

Any Bulgarian or foreign natural or legal person, as well as any combination/joint venture of such persons, may be a candidate or tenderer in a public procurement procedure. The PPA contains detailed rules for the requirements to the legal, financial and technical status to be met by the candidates and the documents and information to be presented by each candidate.

### 2.3 Which types of contracts are covered?

The PPA regulates three different types of contracts: supply of goods contracts; services contracts; and construction works contracts. In addition, the PPA contains also special rules about the procedure for granting of public procurements in the field of natural gas supply, heat supply, electricity supply, water supply, public transport services, universal postal services.

### 2.4 Are there threshold values for determining individual contract coverage?

The procedures under the PPA shall apply mandatorily upon award of public procurements which have the following values (VAT excluded):

1. construction works contracts: not less than BGN 1,800,000 and, where the place of performance is outside Bulgaria, not less than BGN 5,000,000;
2. supply contracts: not less than BGN 150,000 and, where the place of performance is outside Bulgaria, not less than BGN 250,000;
3. service contracts: not less than BGN 90,000 and, where the place of performance is outside Bulgaria, not less than BGN 250,000; and
4. design contest: not less than BGN 30,000.

Public procurements below these thresholds shall be "small public procurements" and shall be regulated by the Regulation on the Awarding of Small Public Procurements.

### 2.5 Are there aggregation and/or anti-avoidance rules?

The PPA contains special rules concerning aggregation, which are intended to prevent avoidance by the use of a series of contracts which, individually, fall below the threshold values as well as special anti-avoidance rules (prohibiting direct avoidance schemes).

### 2.6 Are there special rules for concession contracts?

The general regime of the concession contract is not included in the PPA but in the 2006 Concessions Act. There are also certain special types of concessions regulated by various statutory acts - mining concession (1999 Underground Resources Act), mineral water concession (1999 Waters Act), etc.

### 3 Procedures

#### 3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

The PPA provides for open procedure, restricted procedure, competitive dialogue procedure and negotiated procedure. The contracting authority is free to choose between the open and restricted procedure unless there are grounds for application of competitive dialogue procedure or direct negotiations procedure.

#### 3.2 What are the rules on specifications?

Under the PPA the contracting authority shall define the technical specifications by reference to:

1. Bulgarian standards, which implement European standards, international standards, European technical approvals or common technical specifications, or other technical reference systems established by the European standardisation bodies, accompanying the said indication by the words "or equivalent";
2. Bulgarian standards, technical approvals or specifications, regarding design, method of calculation and execution of works, as well as use of materials, accompanying the said indication by the words "or equivalent" where standards referred to in point 1 do not exist;
3. performance characteristics or functional requirements, which must be sufficiently precise to determine the subject matter of the procurement; functional requirements may include environmental characteristics;
4. performance characteristics or functional requirements referring to the specifications under point 1 or 2, the conformity with which shall be presumed conformity with such performance characteristics or functional requirements; and
5. the specifications under point 1 or 2 for certain characteristics and the performance characteristics or functional requirements under point 3 for other characteristics.

#### 3.3 What are the rules on excluding tenderers?

The contracting authority shall exclude from participation in a public procurement procedure any candidate or tenderer who or which:

1. has been convicted by an effective sentence, unless rehabilitated, of:
  - (a) a criminal offence against the financial, tax or social security system, including money laundering, under Articles 253 to 260 of the Criminal Code ("the CC");
  - (b) bribery under Articles 301 to 307 of the CC;
  - (c) participation in an organised criminal group under Articles 321 and 321a of the CC;
  - (d) a criminal offence against property under Articles 194 to 217 of the CC; or
  - (e) a criminal offence against the economy under Article 219-252 of the CC;
2. has been adjudicated bankrupt; or
3. is being wound up or is in any analogous situation arising from a similar procedure under national laws and regulations.

The contracting authority **may exclude** from participation in a public procurement procedure any candidate or tenderer who or which:

1. is the subject of pending bankruptcy proceedings, or has made an out-of-court arrangement with the creditors thereof within the meaning given by Article 740 of the Commerce Act or, in case the candidate or tenderer is a foreign person, is in any analogous situation arising from a similar procedure under national laws and regulations, including where the affairs thereof are being administered by the court, or the candidate or tenderer has suspended the business activities thereof;
2. has been disqualified from practising a specific profession or activity according to the legislation of the State where the violation has been committed; or
3. incurs any pecuniary obligations to the State or to a municipality within the meaning given by Article 162 (2) of the Bulgarian Tax and Social-Insurance Procedure Code, established by an effective act of a competent authority, save as to where a rescheduling or deferral of the said obligations has been allowed, or any pecuniary obligations related to the payment of social insurance contributions or taxes according to the legal standards of the State in which the candidate or tenderer is established.

In addition, any candidates or tenderers, whereof any member of a management or supervisory body or any interim holder of such office is a person connected, within the meaning given by § 1 of the Civil Servants Act, with the contracting authority or with any holders of a position of responsibility at the organisation of the said contracting authority, may not participate in a public procurement procedure.

#### 3.4 What are the rules on short-listing tenderers?

The contracting authority shall appoint a commission consisting of at least three members to assess the tender offers and rank the tenderers. The criteria for assessment to be used by the commission are to be specified in the public procurement announcement published in State Gazette and entered with the Public Procurement Register to the Agency.

The restricted procedure, competitive dialogue procedure and negotiated procedure with publication of contract notice contain rules for preliminary qualification assessment procedure. The procedure is to be completed by the commission and its purpose is to determine the candidates who will be invited to submit tender offers.

#### 3.5 What are the rules on awarding the contract?

The commission shall rank the tender offers on the basis of two criteria - the lowest price tendered and the most economically advantageous tender. On the basis of this ranking the contracting authority shall pass a resolution for awarding of the public procurement to the tenderer ranked in first place. In case the tenderer ranked in first place refuses to conclude the agreement the contracting authority may conclude the public procurement agreement with the second ranked tenderer.

#### 3.6 What methods are available for joint procurements?

According to the PPA two or more of the contracting authorities as specified under question 2.1 (points 1-3) above may undertake and complete joint public procurement. In such case the PPA does not provide for any special substantive or procedural requirements and the joint public procurement shall be granted following the procedures as specified in question 3.1 above.

### 3.7 What are the rules on alternative bids?

The contracting authority may specify in the public procurement announcement that the tender offer may contain alternative bids. In such case all alternative bids have to meet the requirements as determined in the public procurement announcement. On the other side, all alternative bids shall be assessed and the respective tenderer shall participate in the final ranking with its highly ranked alternative bid.

## 4 Exclusions and Exemptions (including in-house arrangements)

### 4.1 What are the principal exclusions/exemptions and who determines their application?

The principal exemptions from the application of the public procurement regime as provided by PPA are the following:

1. construction concession contracts;
2. contracts of the contracting authorities under question 2.1 (points 5 and 6) which contracts are not connected with the activities relating to natural gas, heat or electricity, water supply activities, public transport services, or in connection with any such activities which contracts are performed in a third country and which does not involve the use of a network or geographical area within an EU Member State;
3. any supply contracts concluded by a contracting authority under the preceding point for purposes of resale or hire of the subject of the contract to third parties, provided that the contracting authority enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to carry out the said activity under the same conditions;
4. any contracts for the supply of energy or of fuels for the production of energy, concluded by contracting authority under the preceding point carrying out an activity related to natural gas;
5. any contracts for the supply of water, concluded by contracting authorities covered under the preceding point carrying out water supply activities;
6. any service, supplies or construction works contracts concluded by a contracting authority under the preceding point with a related undertaking provided that at least 80 per cent of the average annual turnover of the related undertaking with respect to services, supplies or construction works arising in Bulgaria for the preceding three years derives from the provision of such services, supplies or construction works to related undertakings. Under the PPA, related undertaking shall be any undertaking whereof the annual accounts are consolidated with those of the contracting authority, or over which the contracting authority may exercise, directly or indirectly, a dominant influence, or which may exercise a dominant influence over any contracting authority under question 2.1 (points 5 and 6) above, or which, in common with any contracting authority is subject to the dominant influence of another undertaking;
7. any supply, service or construction works contracts financed by more than 50 per cent by other States or by international or foreign organisations, where the provider of the financing has selected or has indicated the manner of selection of the supplier, contractor or service provider; and
8. any contracts of the National Health Insurance Fund for medicinal drugs under the Health Insurance Act.

### 4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The public procurement regime shall not be applicable to the following public procurements:

1. any contracts awarded by a joint venture, formed by a number of contracting authorities for the purpose of carrying out an activity relating to natural gas, heat or electricity, water supply activities, public transport services, or universal postal services, to any of the partners in the said joint venture;
2. any contracts awarded by a partner in a joint venture, formed by a number of contracting authorities for the purpose of carrying out an activity under the preceding item, to the said joint venture, provided that the said joint venture has been formed in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the said joint venture stipulates that the contracting authorities which form it will be part thereof for the same period; or
3. any service contracts awarded by a contracting authority to another contracting authority referred to in question 2.1 (point 1 and 3) or to an association of such contracting authorities which enjoy exclusive rights to provide such services by virtue of statute, secondary legislation or an administrative act; the act conferring the exclusive rights shall be issued in compliance with the provisions of the EC Treaty.

## 5 Remedies and Enforcement

### 5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

Any decision, action or omission by the contracting authority in a public procurement procedure until conclusion of the contract shall be appealable before the Commission for Protection of Competition ("the Commission"). The appeal may be filed by any interested party (i.e. any tenderer or any other party who may demonstrate sufficient connection to and harm from the decision, action or omission). The Commission is also authorised to impose interim measures (suspension of the public procurement procedure).

The decisions of the Commission are subject to appeal before the Supreme Administrative Court.

Once the contract has entered into force each interested party may bring an action for establishment of nullity of the contract, furthermore claiming compensation for damages sustained as a result of violations of the law upon the conduct of the public procurement procedure. The applicable procedure is regulated by the Civil Procedure Code and the claim shall be resolved by the civil courts.

### 5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

Please refer to question 5.1 above.

The parties under the public procurement contract may also agree that all disputes under the contract shall be resolved by arbitration court under the rules of International Commercial Arbitration Act.

### 5.3 Before which body or bodies can remedies/enforcement be sought?

Please refer to question 5.1 above.

### 5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

The appeal to the Commission shall be submitted within 10 days as of the notice of the relevant decision or action or, if not notified, within 10 days after the date of learning thereof or after the date on which the time limit for performance of the relevant action expired.

The appeal to the Supreme Administrative Court against the decision of the Commission shall be filed within 14 days as of its serving to the parties.

The law does not specify term for filing of claim for nullity of the contract.

### 5.5 What remedies are available after contract signature?

Please refer to question 5.1 above.

### 5.6 What is the likely timescale if an application for remedies/enforcement is made?

In practical terms, the timescale depends on the particular issues in dispute, the speed with which the Commission can hear the case and the remedy being sought. The Commission resolves on the interim measures within 5 days as of submission of the application.

### 5.7 Is there a culture of enforcement either by public or private bodies?

There is no public body which has responsibility for enforcement of the public procurement rules in the Bulgaria. The Agency is engaged mainly with the maintenance of the Public Procurement Register. Private enforcement through the Commission is still relatively uncommon, particularly when compared with other EC jurisdictions.

### 5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

Due to the continental law nature of the Bulgarian legal system statutory acts and secondary legislation are of the highest importance as sources of law in Bulgaria. The decisions of the Commission and courts are of limited or no significance in this regard - basically their legal effect is limited to the resolution of each particular dispute. Nevertheless, the interpretation of the PPA and the secondary legislation can be followed through the decisions of the Commission and courts so that the consecutive decisions restate and develop the conception of those institutions on the texts of the normative acts. Therefore, it is almost impossible to designate one or several cases as leading examples of obtaining remedies/enforcement measures.

However, speaking in general terms, the grounds for obtaining remedy or enforcement measures under most cases are certain material procedural violations committed by the contracting entities. For instance, the Commission had the chance to repeal a decision of the Centre for Emergency Medical Aid, Silistra, as a contracting entity, because the commission for reviewing and

assessment of the tender offers did not apply correctly the criteria for ranking thereof. The decision of the Commission was confirmed by the Supreme Administrative Court of Bulgaria.

## 6 Changes During a Procedure and After a Procedure

### 6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

The public procurement contract shall mandatorily include all proposals contained in the tender offer on the basis of which the respective tenderer has been selected as supplier, contractor or service provider. The parties to a public procurement contract may not amend and/or supplement its clauses. An amendment to the contract shall be admissible only in the following cases:

1. the time limits of the contract cannot be adhered to due to force majeure circumstances; or
2. upon change of State-regulated prices or reduction of the agreed prices in the interest of the contracting authority.

### 6.2 In practice, how do purchasers and providers deal with these issues?

Given the subsidiary application of the general contract law the parties may use various contractual rules to deal with such issues (for instance, amendment of the contract by the court in case of such circumstances which the parties could not and were not obliged to foresee upon signing of the contract and the preservation of the contract is contrary to fairness and good faith).

## 7 Privatisations and PPPs

### 7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The legislation on public procurements does not contain any special rules in relation to the privatisation. One should review the transactions as a whole so as to determine whether there is a procurement of goods, works and services pursuant to the public procurements legislation. In the event the answer is in the affirmative the transactions falls within the scope of the normative acts on public procurements in the same way as any other contract.

### 7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The normative acts on public procurements do not contain any special rules on PPPs. If a PPP agreement is a ground for a procurement of goods, works and services and is above the relevant threshold value it falls within the scope of the public procurement normative acts in the same way as any other contract.

Nevertheless, the procedures provided by the public procurements legislation that include direct negotiation with the tenderers and the competitive dialogue procedure are infiltrated by elements of the principles for nominating a partner in PPP arrangements.

## 8 Other Relevant Rules of Law

### 8.1 Are there any related bodies of law of relevance to procurement by public and other bodies?

Any unregulated matters in connection with the conclusion, performance and termination of public procurement contracts shall be governed by the general principles and rules of the Bulgarian contract law (as embodied in the Commerce Act and of the Obligations and Contracts Act).



**Nikolay Kolev**

Borislav Boyanov & Co.  
82 Patriarch Evtimii Blvd.  
Sofia 1463  
Bulgaria

Tel: +359 2 8055 055  
Fax: +359 2 8055 000  
Email: [n.kolev@boyanov.com](mailto:n.kolev@boyanov.com)  
URL: [www.boyanov.com](http://www.boyanov.com)

Nikolay is an Associate in Borislav Boyanov & Co. specialised in Public Procurements & Concessions, and Corporate Law/M&A. Nikolay is a member of the Sofia Bar and is admitted as Junior Research Fellow in Civil and Family Law with the Institute for Legal Studies to the Bulgarian Academy of Sciences. He graduated from the Legal Faculty to the Sofia University St. Kliment Ohridski (2005, LL.M degree).

## 9 The Future

### 9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

For the time being there are three bills on amendment and supplementation of the PPA, submitted to the Bulgarian Parliament. The effect of the new law is to reflect the inflation processes by increasing the domestic threshold values, to introduce additional guarantees for the principles of public openness and transparency, to improve the control over the public procurement procedure and to reduce the administrative and financial burden on tenderers during public procurement procedure.



**Mihail Vishanin**

Borislav Boyanov & Co.  
82 Patriarch Evtimii Blvd.  
Sofia 1463  
Bulgaria

Tel: +359 2 8055 055  
Fax: +359 2 8055 000  
Email: [m.vishanin@boyanov.com](mailto:m.vishanin@boyanov.com)  
URL: [www.boyanov.com](http://www.boyanov.com)

Mihail Vishanin is a graduate of the Law Faculty at the Sofia University (2005, Master of Laws). He is in the process of admitting to the Sofia Bar and joined Borislav Boyanov & Co. in March, 2008. Presently he is Associate in the M&A department of Borislav Boyanov & Co.

## BORISLAV BOYANOV & CO.

### ATTORNEYS AT LAW

Established in 1990, Borislav Boyanov & Co. has evolved into a leading law firm on the Bulgarian legal market. Both clients and competitors recognise the firm as an outstanding one stop shop for legal services which is modern, dynamic and business oriented. In the past decade Borislav Boyanov & Co. has always been ranked as a top tier law firm by various reputable legal directories. Among the firm's recognised strengths are extensive national legal expertise, strong regional know-how and contacts based on excellent professional reputation and integrity.

The law firm has very strong expertise in Corporate Law/M&A, International Transactions, Public Procurements, Concessions, Banking & Project Finance.

For more detailed information please visit [www.boyanov.com](http://www.boyanov.com)