PROCUREMENT LAW ASSOCIATION

REVIEW BODY WORKING GROUP

REVIEW BODY MECHANISMS IN OTHER JURISDICTIONS

INTRODUCTION

1. This paper contains a review of the public procurement review systems available in other jurisdictions, carried out as a part of a scoping exercise by a sub-group of the Procurement Law Association's Public Procurement Review Body Working Group.

2. The two aims of this review were to (a) identify any particular global trends in the way in which review systems are implemented (this is considered in **Section A**) (b) set out some examples of different models of review systems (set out in **Section B**) and (c) identify some areas of "best practice" (if any) which can be drawn from that review (see **Section C**).

3. The review has been based on published literature online, supplemented by specific reports provided to the sub-working group from particular jurisdictions.[1]

SECTION A: GLOBAL TRENDS IN THE IMPLEMENTATION OF PROCUREMENT REVIEW SYSTEMS

4. An important starting point for assessing review systems is to recognise that the United Kingdom, together with most nations of the world, have acknowledged the need for an effective procurement review system as part of the international commitments under the United Nations Convention Against Corruption (UNCAC). Article 9 of UNCAC, which addresses public procurement, provides that each party to the Convention:

> *"[S]hall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.*

[1] The sub-working group is also very grateful to the input it has received from Professor Christopher Yukins of the George Washington University Law School who has reviewed an earlier draft of this paper and provided several valuable insights.

Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia: . . . (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed".

5. To implement UNCAC's call for an "effective system of domestic review," when the United Nations Commission on International Trade Law (UNCITRAL) was revising what is now the UNCITRAL Model Law on Public Procurement[2], the accompanying guide to enactment noted that internationally there are three basic forums for review: (1) review by the procuring entity itself, (2) review by an independent agency, and (3) review by the courts. Article 64 of the UNCITRAL model law explicitly left it to the enacting state to decide which forum, or forums, would be used, and the accompanying Guide to Enactment discussed their implementation.[3]

6. An important study that seeks to assess procurement review systems globally is the study carried out by the World Bank Group in 2017 entitled "*Benchmarking Public Procurement – Assessing Public Procurement Regulatory Systems in 180 Economies*".[4] This is a 260-page document setting out the result of a global survey into public procurement complaint review mechanisms. It focussed on three key areas: complaints submitted to the first-tier review body during the pre-award stage, complaints submitted to a second-tier review body before the awarding of a contract, and post-award complaint procedures were also covered. 180 economies were surveyed.

7. The report draws a distinction between "first-tier review" (defined as the first instance where a complaint is reviewed by a procuring, administrative, or judicial body) and "second-tier" review (where the decision of the first-tier review body is appealed"). The report presents the survey results by each jurisdiction. In terms of first tier review, the report groups the three review bodies available as either "procuring entity, Independent Review Body ("IRB") or a Court".

8. The questions asked by the report are fairly generalised and its utility is therefore relatively limited due to the lack of granularity in the data it presents. The report does however contain the following conclusions based on the income status of each particular economy:

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[2] https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf.

[3] UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, at 306-07 (2014), https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf.

[4] http://documents1.worldbank.org/curated/en/121001523554026106/Benchmarking-Public-Procurement-2017-Assessing-Public-Procurement-Regulatory-Systems-in-180-Economies.pdf

a. In nearly half of the economies measured, complaints during the award process had to be submitted to the procuring entity in the first instance, rather than an independent administrative review body or a court.

b. The procuring entity itself is the first-tier review body in around 86% of "low income" economies, whilst among high-income economies the first-tier review is spread between three types of procuring entity: in 43% of jurisdictions a first tier review had to be submitted to the procuring entity, 34% to an IRB, and only 20% to the Court.

c. It notes that a two-tier review mechanism has "become the norm globally" (153 economies offered a second-tier review mechanism out of 183 surveyed).

9. Beyond the World Bank Study, there are surprisingly few comparative studies published online, though a private firm, Lexology, publishes an online database (prepared with input from practitioners and experts) which can be interrogated to produce comparative reports on remedies systems across multiple national procurement systems.[5] SIGMA, as part of a joint initiative on behalf of the OECD and the EU, carried out a comparative analysis in 2007 of the public procurement review and remedies systems of Member States.[6] However, since that pre-dated the introduction of the Remedies Directive in 2009 it is of limited utility as an up to date comparative guide.

10. SIGMA provided a review of the main institutional models within the EU in 2016 which sets out some useful analysis of what might be considered as the key requirements of a specialised review body.[7] Some of the findings are referred to below in the examples of the main institutional models.[8]

11. There are also several useful academic studies describing the enforcement of EU Public Procurement which describe the various features of the particular enforcement and review mechanisms in Member states, but these are generally neither comprehensive nor comparative in scope.[9]

[5] https://www.lexology.com/gtdt/workareas/public-procurement.
[6] https://www.oecd-ilibrary.org/governance/public-procurement-review-and-remedies-systems-in-the-european-union_5kml60q9vklt-en
[7] SIGMA Brief No.25 Establishing Procurement Review Bodies (September 2016):
[8] We have also been provided with a useful analysis by P.Bogdanowicz, W.Hartung and A Szymanska presented to the Warsaw Procurement Conference in 2017 entitled "Functioning of legal protection measures in EU countries".
[9] See for example the *Enforcement of the EU Public Procurement Rules* by S.Treumer and Lichere, DJOF Publishing Copenhagen (2011).

SECTION B: EXAMPLES OF DIFFERENT REVIEW SYSTEM MODELS

12. This part of the review limited itself to countries which are either EU Member States or members of the Government Procurement Agreement.[10] In the course of the review the following generic structures or models have been identified (and have been used as categories under which various country specific case studies have been grouped):

    a. The IRB model. The use of an Independent Review Body ("IRB") at the first stage review (whether "in-tender" or "post-tender"). Decisions of these bodies are not subject to appeal *per se* (although there may be concurrent or alternative recourse to judicial remedies).

    b. A two-tier Tribunal system. The use of a two-tier Tribunal system (in which decisions of a first stage review body can be appealed to a superior Court).

    c. A hybrid/multi-tiered model. The use of hybrid/multi-tiered system (which comprises elements of both the IRB and Tribunal systems above)

    d. The Court model. This is the 2 (or sometimes 3) tiered court model (with first instance and appellate courts) which the UK review system currently follows.

(1) The Independent Review Body Model

13. The best examples (in the sense of systems with relatively detailed procedural rules with a relatively high degree of utilisation) the sub-working group could find of the use of an IRB were in the US and Canada (both at federal level). Other examples have been included from Singapore and Japan (both signatories to the GPA). All have different permutations and characteristics, driven largely by the constitutional make-up of the particular country (and in particular whether it is federalised or has a more unitary and centralised method of administration).

Case Study 1: the US system and the Government Accountability Office.[11]

[10] On the basis that the UK has formally applied to accede to the GPA at the end of the transition period. Article XVIII of the GPA requires each party to establish an independent agency or court to hear challenges (paragraph 4), to ensure that suppliers may appeal any initial decision to an impartial independent or judicial authority (paragraph 5), and that each party either (i) allow an appeal from the procuring entity or the independent reviewing authority to a court, or (ii) ensure that the reviewing body (the procuring entity itself or the independent agency) meet certain procedural minima (paragraph 6).

[11] Source: ICLG Public Procurement Guide 2020 (12th edition)

14. US Federal procurement law (mainly to be found in title 48 of the U.S. Code of Federal Regulations (the Federal Acquisition Regulation ("FAR")) and Titles 10 and 41 of the United States Code ("USC")) provides for various enforcement procedures and remedies.

15. Tenderers can protest either pre- or post-award to the Government Accountability Office ("the GAO"), or the procuring agency,[12] or by filing an action (including for injunctive relief) in the U.S. Court of Federal Claims. Aside from bid-and-proposal costs and (in some instances) attorney fees, no damages or costs are generally available in the U.S. federal system; vendors bring protests primarily to gain an opportunity for a new competition, fairly done. The availability for a stay during the pendency of a challenge may be restricted depending on the type of contract, the value of it, the forum selected, and the agency involved.

16. The vast majority of disappointed tenderers file "protests" against procuring agency's decisions with the Government Accountability Office ("GAO"), which has authority under 31 U.S.C. para. 3552 to resolve such protests. Parties may seek "*de novo*" review in the Court of Federal Claims of agency procurement decisions following the disposition of a timely GAO protest.

17. The regulations at 21 C.F.R. Part 4 govern the GAO's protest procedures, and only actual or prospective tenderers whose direct economic interest would be affected by the award of a contract may file or participate in a GAO protest. The protesting party additionally must show that, but for the procuring agency's action, the protestor would have had a substantial chance of receiving the contract. The procurement will be stayed automatically pending the outcome of a GAO protest, per 31 U.S.C. § 3553, though the procuring agency may "override" that stay if compelling circumstances so warrant.

18. Under the governing statute, 31 U.S.C. § 3554, the GAO must issue a recommendation on a protest within 100 days from the filing of the date of the protest, or within 65 days under an expedited timeframe referred to an "express option". Detailed provisions for disclosure of the administrative record are set out in FAR 33.104.

[12] For a study of the U.S. federal bid remedies system, and recommendations for improvements to challenges before procuring agencies in the U.S. government, see Christopher Yukins, *Stepping Stones to Reform: Making Agency-Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government* (draft May 1, 2020), available at https://www.acus.gov/sites/default/files/documents/Agency%20Bid%20Protests%20Report.pdf.

19. A hearing can be held at the request of the agency, protestor or interested party who has received notification of a protest.

Case study 2: Canada and the Canadian International Trade Tribunal

20. In Canada, an aggrieved bidder seeking to challenge a federal government procurement can sue directly in the Courts for breach of the General Contracting Regulations ("GCRs") or can complain to the Canadian International Trade Tribunal ("CITT"). This is the body that provides recourse to complaints brought on the grounds of a breach of Canada's obligations under various trade agreements, including the GPA, CETA, CPTPP and the CFTA. Decisions by the CITT are subject to judicial review by the Federal Court of Appeal. The CITT typically has 90 days from the filing of a complaint to complete its inquiry.[13] For those procurements that fall outside the scope of the CITT's jurisdiction, judicial review is available before the Federal Court or Superior Court of a Province.

21. For procurements outside the jurisdiction of the CITT, at both federal and provincial level, bidders can seek remedies via judicial review. At provincial level, there may be specific provincial public contracting regulations. Both CFTA and CETA contemplate the creation of an administrative/bid challenge process which has not yet been fully implemented in all the Canadian provinces.

22. There is also an Office of the Procurement Ombudsman that can investigate complaints for low level federal contracts (for goods below 26,400 Canadian dollars, and for services below 105,700 Canadian dollars). The Ombudsman publishes findings and any recommendations within 120 days of when a complaint is filed. The Ombudsman's power does not extend to cancellation of any contract awarded, but is limited to making recommendations as to compensation.

Case Study 3: Singapore

23. As an example of a relatively simple system, complaints against contracting authorities for breaches of the Government Procurement Act can only be brought before the Government Procurement Adjudication Tribunal, which normally has to issue any determination on a challenge within 45 days. The courts do not have any jurisdiction to entertain challenges for breach of the Government Procurement Act.

Case Study 4: Japan

[13] See Section 6 of the Canadian International Trade Tribunal Procurement Inquiry Regulations

24. Following accession to the GPA, Japan has established the Government Procurement Challenge System ("CHANS"). A bidder can file a complaint to the Government Procurement Review Board, which can make a number of recommendations including starting a new procurement procedure, re-evaluating tenders or terminating the contract as awarded. The Board can suspend the contract award. It has to issue its report within 90 days (50 days in the case involving public construction work). The recommendations to the contracting authority are however not legally binding.

25. Claims for compensation can only be dealt with under existing general legislation (the State Redress Act) which requires a claimant to prove intentional or negligent violation of the law on the part of a public officer.

(2) A 2 tier-tribunal system

26. In countries which operate a 2-tier tribunal system, again whether or not a country has a federalised system or not is a key differentiating factor when comparing its review mechanisms and in particular which review bodies are used as the fora for determining complaints.

27. Within the EU, specialised public procurement review bodies exist in approximately half of all Member States. These bodies are usually of a non-judicial or quasi-judicial nature (namely, similar to courts in the meaning of the TFEU, Article 267) and have the function of a first-instance review body.[14]

Case Study 1: Germany

28. Germany operates a regionalised two-tier Tribunal system. Claims are heard by the Public Procurement Tribunal in the first instance at regional level (or at federal level if the contract is awarded by a federal authority) with the ability to appeal to the Higher Regional Courts (or Federal Supreme Court for procurement by federal authorities). Each federal state has at least one public procurement tribunal. Claims filed in the Public Procurement Tribunal automatically suspend the procurement procedure. The Tribunal has to issue a decision within 5 weeks (extendable by 2 weeks).

29. Decisions by the appellate court can take at least 4 – 7 months.

[14] See SIGMA Public Procurement Brief 25, page 3

30. An application to the Tribunal is inadmissible if a compliant has not been made first to the contracting authority or more than 15 days have expired since notification from a contracting authority that it is unwilling to redress the complaint. A one-day hearing is held by the Tribunal.

31. Certain regions also have particular review procedures for tenders below the relevant EU thresholds.

Case Study 2: Iceland

32. Iceland also operates a centralised 2 tier system. Complaints are dealt with by the Claims Commission in the first instance, with a right of appeal to the Court. Costs are borne by each party.

33. Any level of damages is left to the jurisdiction of the Courts (although the Commission can give a view on the level of damages).

34. Interim hearings are held fairly quickly: eg within 2-3 weeks. The process before the Commission is entirely written.

Case Study 3: Denmark.

35. Denmark also operates a centralised 2 tier Tribunal review system. Complaints are held by the Complaints Board for Public Procurement in the first instance, with the ability to appeal to the Courts. Costs are awarded to the winning party but are generally capped at approximately £9,000. The procedure is primarily written but the parties have the ability to request an oral hearing. Contract suspension and the full scope of remedies as per in the UK are available.

Case Study 4: Norway

36. Awards of public contracts can be filed with the Complaints Board, but its decisions are only advisory (except in the case of direct illegal awards) and filing with the Complaints Board has no suspensive effect. For "in-tender" decisions, the Complaints Board usually concludes within 2 months.

(3) Two-tiered Court system.

37. Amongst EU member states Austria, Belgium, France, Ireland, Lithuania, Netherlands, Portugal, Sweden and the United Kingdom, the review of public procurement decisions is

exclusively the task of regular courts. Several non-EU countries that are accessories to the GPA have continued to adopt a standard 2-tiered court or judicial system i.e similar to the UK.

38. Australia is an example of a non-EU country which continues to adopt this model, and is considered below.

Case study 1: Australia

39. The Government Procurement (Judicial Review) Act 2018 sets out a statutory basis for challenges to procurements covered by the Commonwealth Procedure Rules. Claims are heard by the Federal Circuit Court and the Federal Court of Australia.

40. Suspensions are triggered by a complaint in the first instance to the relevant accountable authority, and remain in place until the court determines the claim. The Courts also have power to order injunctions.

(4) Multi-Forum Model

41. Certain jurisdictions operate a hybrid or "multi-forum" model, depending for example on the stage at which claims are filed (in particular whether a claim is to review the contract award itself or annul a contract already entered into) or the remedy sought (in particular whether damages are sought).

Case Study 1: Slovenia.

42. Review procedures are set out in the Legal Protection in Public Procurement Procedures Act ("LPPPPA").[15] The LPPPPA provides for three different types of procedure:

(1) The pre-review procedure, which is conducted by the contracting authority.

(2) The review procedure, which takes place before the National Commission for Reviewing Public Procurement Award Procedures; and

(3) Judicial proceedings at District Court level, which determine claims for annulment of public contracts or damages, and so apply where a contract has been entered into.

Case Study 2: Greece

[15] See ICLG Guide 2020 for more detail.

43. Greece has a multi-tiered system, involving a combination of administrative and judicial remedies dependent on contract values.

44. For contracts above €60,000, challenges can be heard by filing an objection to the Authority for the Hearing of Pre-Judicial Objections, also known as the Authority for Examination of Preliminary Recourses ("the AEPP") (with the payment of an administrative fee equal to 0.5% of the estimated value of the contract).[16] Cases have to be heard by the AEPP 40 days after the filing of the objection with a time limit for issuing the ruling 20 days after the hearing. Decisions of the AEPP are subject to judicial review either by the Council of State (the Supreme Administrative Court) or by administrative courts of appeal.

45. For contracts below that value, complaints have to be lodged with the contracting authority itself.

46. Damages claims (regardless of contract value) have to be heard by the competent administrative court.

SECTION C: WHAT EXAMPLES OF BEST PRACTICE CAN BE DISCERNED?

47. It is not the aim of this initial scoping exercise to reach any final conclusion on what constitutes best practice, but the following very broad (and generalised) observations can be made following a review of procurement review mechanisms established by countries that are signatories to the GPA:

    a. It is clear that no particular type of model (whether IRB/Tribunal/court based) dominates or is significantly more prevalent. Conversely, the "traditional" 2 tiered court based system (i.e the UK system) is not the norm in terms of international practice amongst EU or non-EU GPA states.

    b. There is clear evidence of a move towards some form of the IRB/specialist tribunal model by countries in direct response to their international obligations contained in trade agreements, including the GPA. Canada, Japan and Singapore are examples of specialist review bodies established within their legal systems specifically to administer complaints procedures based on breaches of obligations derived from international trade agreements.

[16] The procedure is laid out in Book IV of Law 4412/2016, which is the main piece of legislation transposing the 2014 Public Contracts Directive and Utilities Directive.

c. Where specialist IRBs, Tribunals, or Courts are used, the use of specified time limits for those review bodies to reach their conclusions and issue their decisions (whether binding or non-binding) are more prevalent.

d. In several countries which employ some features of an IRB or Tribunal model, damages are left to the exclusive jurisdiction of the Courts.[17]

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[17] The availability of damages as a remedy in other jurisdictions is beyond the scope of this particular paper.