

BOND REQUIREMENTS IN A PROCUREMENT PROTEST PROCEDURE IN SELECTED COUNTRIES

Argentina • Armenia • Bangladesh • Botswana • Egypt
India • Israel • Kenya • Mauritius • Mexico
Mozambique • Nepal • Philippines
Russia • Singapore • Switzerland • Taiwan • Turkey •
Uganda • Ukraine • United Kingdom

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SUMMARY This report contains information on twenty-one countries on the question of whether a bond is required for a protest procedure in government procurement. In some countries the term “deposit” or “fee” is used instead of “bond.” The majority of countries included in this report require the payment of fees for an administrative review. These fees can be forfeited if the claim is found to be frivolous. In Israel, there were proposals to adopt a bond requirement, most recently in 2007, but they were not enacted. Thirty-seven additional jurisdictions were reviewed and not found to have provisions requiring a bond: Angola, Austria, Bahrain, Belgium, Brazil, Cameroon, Canada, Cape Verde, China, Costa Rica, Denmark, El Salvador, the European Union, Finland, France, Germany, Greece, Haiti, Honduras, Hong Kong, Iceland, Italy, Japan, Kuwait, Lebanon, Morocco, New Zealand, Nicaragua, Norway, Oman, Pakistan, Portugal, Saudi Arabia, Senegal, South Korea, Sweden, and Vietnam.

Argentina

Decree 893/12 Regulation of the Regime for Contracting with the National Administration¹ provides for the remedies available in awarding bidding procedures in Argentina. Regarding the guarantee required to be posted in order to challenge an evaluation decision in a bidding procedure, if the bidder has submitted more than two challenges against a bidder evaluation assessment in one calendar year, the bidder may be required to post a bond equal to 3% of the amount of the offer in order to challenge another evaluation, if the contracting entity so requires in the terms of reference for the bid.² In order to challenge a prequalification decision, the bidder is required to deposit a bond equal to the amount provided in the terms of reference for the bid.³

Armenia

Armenian legislation does not provide for placing a bond when an unsuccessful bidder files an appeal with a court because the appeal procedure prescribed by the Law of Armenia on

¹ Decreto 893/2012 Reglamento del Régimen de Contrataciones de la Administración Nacional [Decree 893/2012 Regulation of the Regime for Contracting with the National Administration] art. 93, June 7, 2012, BOLETÍN OFICIAL, available on the InfoLEG website of Argentina’s Ministry of the Economy and Public Finances, at <http://www.infoleg.gob.ar/infolegInternet/verNorma.do;jsessionid=07DC14E21DD5B948F5B8368E1B26FC5D?id=198583>; Annex to Decreto 893/2012 Reglamento del Régimen de Contrataciones de la Administración Nacional art. 100(d), <http://infoleg.mecon.gov.ar/wp-content/uploads/2013/05/dec.-893-2012-anexo.pdf>.

² Annex art. 100(d).

³ *Id.* art. 100(e).

Procurements⁴ first requires filing a complaint protesting the bid results with the Procurement Complaint Review Board. Decisions of the Board can be appealed in court. The Procurement Complaint Review Board is an independent and impartial body comprised of representatives of the government, public organizations, the Central Bank, and local communities. When submitting a complaint, a protesting bidder must pay an appeal fee, which will be refunded to the appellant if the Board decides in his favor.⁵

Bangladesh

In Bangladesh the public procurement process is regulated by the Public Procurement Act 2006⁶ and its subordinate rules.⁷ If a person has exhausted all of his or her options for complaints to an administrative authority, including the head of the procuring entity and the Secretary of the concerned ministry or division, then that person can submit an appeal to a review panel, with a registration fee and a refundable security deposit.⁸ The amounts of the fee and security deposit vary depending on the potential estimated contract price or tender price and are listed under Schedule II of the rules. Under rule 60(3), the deposit is forfeited if the claim is found to be frivolous.⁹

Botswana

In Botswana a request for administrative review of any part of the procurement and disposal process requires the payment of a fee, which is nonrefundable if the complaint is deemed frivolous. The Independent Complaints Review Committee (the Committee) would consider a complaint for review only after, among other requirements, the complainant has paid lodging and complaint fees.¹⁰ The complaint fee is refundable only if the Committee finds the complaint “to have merit in relation to its substance”; otherwise, it is forfeited.¹¹

⁴ Law of December 22, 2010 on Procurements, in force from Jan. 1, 2011, available on the Armenian Ministry of Finance website, at <http://gnumner.am/en/category/6/1.html> (in Armenian).

⁵ *Id.* art. 48.

⁶ Public Procurement Act, No. 24 of 2006, July 6, 2006, available on the Bangladesh Ministry of Planning website, at <http://www.cptu.gov.bd/ProcurementPolicy.aspx>.

⁷ Public Procurement Rules 2008, April 2008, <http://www.cptu.gov.bd/ProcurementPolicy.aspx>.

⁸ *Id.* Rule 57(12)(c).

⁹ *Id.* Rule 60(3).

¹⁰ Public Procurement and Asset Disposal Act of 2002 (PPADA) § 103, 8 LAWS OF BOTSWANA, Cap. 42:08 (rev. ed. 2012), available on the Public Procurement and Asset Disposal Board website, at http://www.ppadb.co.bw/documents/PPAD_Act_revised.pdf; Public Procurement and Asset Disposal (Independent Complaints Review Committee) Regulations (PPAD Regulations) § 9, S.I. 20 of 2006, 8 LAWS OF BOTSWANA, Cap. 42:08 (rev. ed. 2012).

¹¹ PPAD Regulations § 9.

While the lodging fee is a flat rate of BWP250 (about US\$28), the complaint fee varies depending on the tender value in question. It is set at 1% of the tender value, with floor and ceiling caps of BWP1,500 (about US\$169) and BWP350,000 (about US\$39,410), respectively.¹²

It appears that, in addition to forfeiture of complaint fees, a complainant who is at fault may also be fined. The Committee is authorized to impose fines, in consultation with the Public Procurement and Asset Disposal Board (the Board), on complainants, as needed to recover costs.¹³ It appears that this would occur if the Committee finds fault on the part of the complainant.¹⁴ The term “fault” is not defined, and thus its application to filing frivolous complaints is unclear. The Committee determines the fine amount.¹⁵

The Committee does not have the final decision; a complainant dissatisfied with the determination of the Committee may approach the High Court for judicial review.¹⁶

Egypt

Egypt has very recently promulgated Law No. 32 of 2014, which prevents a third-party challenge to any contract entered into by the government, any government agency, or a government-owned company. However, the Law permits third-party challenges to these government contracts only if a final verdict has been issued charging any of the parties to the government contract with a crime committed against public funds, provided that the government contract has been awarded based on this crime. This Law has immediate effect, and accordingly, courts are required to dismiss, on their own initiative, any currently pending lawsuits challenging a government contract if the lawsuit is brought by a third party and does not fall under the criminal liability exception.¹⁷

India

In India there is no specific law governing public procurement; instead certain government rules, directives, and guidelines apply.¹⁸ Moreover, the states have their own procurement laws.¹⁹ The only reference to frivolous claims and deposits located was in a manual for the public

¹² *Id.*

¹³ PPADA § 107.

¹⁴ PPAD Regulations § 17.

¹⁵ *Id.*

¹⁶ PPADA § 104.

¹⁷ Law 32 of 2014, *al-Jarīda al-Rasmīyya*, vol. 16 (bis), 22 Apr. 2014, available on the Egypt Court of Cassation website, at http://www.cc.gov.eg/Legislations/Egypt_Legislations_Images.aspx?ID=284604.

¹⁸ CUTS CENTRE FOR INTERNATIONAL TRADE, ECONOMICS AND ENVIRONMENT, GOVERNMENT PROCUREMENT IN INDIA: DOMESTIC REGULATIONS & TRADE PROSPECTS 37 (Oct. 2012), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/186988/GovtProcurementinIndiaDomesticRegulations-1.pdf.

¹⁹ *Id.*

procurement of goods, which appears to contain only guidelines for federal ministries and departments. It mentions that a tenderer has a right to be heard “in case it feels that proper procurement process is not being followed and/or its tender has been rejected wrongly.”²⁰ The manual goes on to state that to “discourage frivolous complaints, a non-refundable fee of suitable amount (linked to the value of the purchase) should be prescribed.”²¹ It is unclear how many agencies have implemented this procedure.

Israel

Israeli law currently does not contain bond requirements in protest procedures over nonselection in a tender. Several bills proposing to include such requirements, however, have been introduced to the Knesset (Israel’s Parliament).

The latest bill on bond requirements in protest procedures appears to be from 2007.²² The bill, similar to earlier bills on the subject, calls for requiring any person who requests an injunction against implementation of a tender selection decision to deposit an amount equal to 20% of the worth of the tender. The injunction will be void and the deposit forfeited if it is found that after the granting of the injunction there have been negotiations between the tender winner and the requester regarding the employment of the requester by the winner.²³

According to explanatory notes for the bill, legal proceedings instituted by parties losing the tender have been causing delays of months and even years in the performance of projects. Such proceedings, according to proponents of the bill, are often baseless and intended to impose pressure in order to reach an agreement with the winning parties. Proponents have argued that requiring a substantial deposit as a precondition for an injunction, and the forfeiture of the deposit if negotiations between the parties are found to exist, are expected to minimize the high volume of litigation involving tender selection and prevent the stopping of important public projects.²⁴

Although depositing a bond at the time of protest is not required at this time, bidders may be required to submit a deposit upon filing tender bids. The deposit may be forfeited under circumstances involving fraud and other types of improper behavior.²⁵

²⁰ GOVERNMENT OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF PUBLIC EXPENDITURE, MANUAL ON POLICIES AND PROCEDURES FOR PURCHASE OF GOODS ¶ 11.12 (Aug. 31, 2006), http://finmin.nic.in/the_ministry/dept_expenditure/acts_codes/MPProc4ProGod.pdf.

²¹ *Id.*

²² Private Member Bill No. 3014-17, Tender Duty (Amendment – Protest over Results of Tenders) 5778-2007 (Oct. 22, 2007), <http://www.knesset.gov.il/privatelaw/data/17/3014.rtf> (in Hebrew).

²³ *Id.*

²⁴ *Id.*

²⁵ Tenders Duty Regulations, 5753-1993, KOVETZ HATAKANOT 5753 No. 5523, p. 826, *as amended*.

Under the Tenders Duty Regulations, 5753-1993,²⁶ committees of tenders may be appointed for any government agency, excluding the Ministry of Defense.²⁷ The committees of tenders are authorized, subject to some exceptions, to determine the agency's scope of engagement in transactions in goods or in land, in the performance of work, or in the acquisition of services. Committees of tenders are further authorized to make decisions regarding the issue of tenders, approval of tenders' documentation, and examination of bids.²⁸

The Tenders Duty Regulations provide the following:

- (a) The Committee of Tenders is authorized to determine that participation in [either] a public or close tender, or in another competitive procedure, will depend on the deposit of a bond under conditions as determined by the Committee regarding the type of bond, its conditions, its size and duration (in this regulation- Tender Bond).
- (b) The Committee of Tenders will be authorized to order the forfeiture of a bidder's Tender Bond, [either] fully or partially, after giving him [or her²⁹] the opportunity to make his claims, if one of the following [is found to] exist:
 - (1) He resorted to cunning, trickery or [did not have] clean hands [had engaged in unfair conduct] during the course of the tender;
 - (2) He provided the Committee of Tenders misleading information or inaccurate substantive information;
 - (3) He retracted the bid he had submitted in the tender after the expiration of the last date for submission of bids in the tender;After being selected as the winner in the tender he did not act in accordance with the instructions determined in the tender [to] constitute a precondition for creating the engagement of the public body with the tender winner.³⁰

Kenya

Kenya imposes nonrefundable fees on all applicants seeking administrative review of procurement proceedings. Any candidate in a tender "who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity" by the applicable laws may approach the Public Procurement Complaints, Review and Appeal Board (the Review Board) for administrative review of procurement proceedings.³¹ However, filing a

²⁶ *Id.*

²⁷ *Id.* §§ 1 & 8.

²⁸ *Id.* § 8A.

²⁹ All references in the Regulations to the masculine gender apply equally to the feminine gender (Ruth Levush, author).

³⁰ *Id.* §16B (translated by Ruth Levush).

³¹ Public Procurement and Disposal Act 3 of 2005 §§ 25 & 93, 17 LAWS OF KENYA (rev. ed. 2012) (a version of this Law updated through 2013 is available on the Laws of Kenya website at http://www.kenyalaw.org:8181/exist/kenya/lex/actview.xql?actid=CAP.%20412A#part_XII).

request for review, among other things, entails payment of nonrefundable fees, the amount of which depends of the nature of the tender in question.³²

If the tender in question is of ascertainable value, the applicable fees are tied to the amount of the tender in question. If the amount of the tender is not above KSH2 million (about US\$22,844), the applicable filing fees are 1% of the amount, subject to a minimum payment of KSH10,000 (about US\$114).³³ If the amount is in the range of KSH2 million to 50 million (about US\$22,844 to US\$571,100), the applicable fees are 1% of the first two million and 0.1 % of the rest of the amount.³⁴ If the tender amount is above KSH50 million, the applicable fees are equivalent to those applicable when the tender value is KSH50 million for the first 50 million and 0.025% of any additional amount.³⁵

However, if the value of the tender is unascertainable, flat fees calculated on the bases of the complexity of the tenders are payable. The complexity of the tenders is defined in three levels (simple, medium, and complex), and fees ranging from KSH10,000 to 40,000 (about US\$114 to US\$457) are levied. For all other tenders, the Secretary of the Review Board sets the applicable fees within the range of KSH10,000 to 20,000 (about US\$114 to US\$228).³⁶

Once a request for a review is filed, the Review Board has unfettered authority to dismiss it if it is “of the opinion that the request is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or the procurement.”³⁷ However, the Review Board’s decision may be appealed to the High Court, whose decision on the matter is final.³⁸

Mauritius

Mauritius imposes a security deposit requirement on any unsatisfied bidder seeking review of a procurement process. The amount of the security deposit varies depending on the particular stage of the procurement process and the value of the tender. While the security deposit is MUR100,000 (about US\$3,305), if the review request relates to a bid-opening process or involves the award of a major contract (contracts above MUR1 million) (about US\$33,058), the security deposit is MUR25,000 (about US\$826).³⁹ The security deposit is not refundable if the Review Panel before which the application is filed “dismisses the application as frivolous.”⁴⁰

³² Public Procurement and Disposal Regulations, 2006 § 73, available on the Tenders and Business Consulting Ltd. website, at http://tendersconsult.com/public_procurement_regulations_2006.pdf.

³³ *Id.* Fourth Schedule.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Public Procurement and Disposal Act § 95.

³⁸ *Id.* § 100.

³⁹ Public Procurement Act No. 33 of 2006 § 45 (a version of this Law amended through 2013 is available on the Mauritius Procurement Policy Office website at <http://ppo.gov.mu/English/Documents/PPA2006.pdf>; Public Procurement Regulations, 2008 §§ 48 & 51, Government Notice No. 7 of 2008 (a version of these Regulations

In addition, Mauritius imposes a nonrefundable, flat processing fee on everyone seeking to file an application for the review of a procurement process, which was substantially increased to MUR50,000 (US\$1,653) in 2013 from MUR5,000 (US\$165).⁴¹

Mexico

Government procurement in Mexico is governed by a wide variety of statutes and regulations issued at the federal and local level. Because of the broad legal spectrum in place in Mexico's thirty-one states and federal district (Mexico City) with regard to procurement protest procedures, research on Mexico for this report was focused on two of the most relevant federal statutes, the Law of Acquisitions, Leases and Services of the Public Sector and the Law of Public Works and Related Services. These Statutes do not appear to include rules specifically requiring that a bond be posted at the time that a contractor files a bid protest and that the bond be forfeited by the contractor in case the complaint is deemed frivolous or baseless. However, these Statutes provide that, at the time that a protest procedure concludes with a declaration that the claim is unfounded, the losing party may be fined if it is determined that the protest was filed with the purpose of delaying or hindering the contracting procedure.⁴²

Mozambique

In Mozambique public procurement is regulated by Decree No. 15 of May 24, 2010.⁴³ The Decree determines that the placement of a bond corresponding to 0.25% of the estimated value of the contract is required as a condition for the admission of a complaint regarding adjudication, classification, or declassification of bidders. This amount, however, is limited to Mt125,000 (about US\$3,953). If the complaint proceeds, this amount must be reimbursed to the person or company making the complaint; otherwise, it is retained by the contracting entity.⁴⁴

amended through 2013 is available on the Procurement Policy Office website at <http://ppo.gov.mu/English/Discussion-Board/Documents/Public%20Procurement%20%28Regulations%202008%29%20-July%202013%281%29.pdf>.

⁴⁰ Public Procurement Act § 45; Public Procurement Regulations § 51.

⁴¹ Public Procurement Regulations § 51; Non-Refundable Processing Fee in Respect of Submission of an Application for Review, Circular No. 7 of 2013 (July 10, 2013), available on the Procurement Policy Office website, at <http://ppo.gov.mu/English/Circulars/Documents/Circular%207%20of%202013.doc>.

⁴² Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público [Law of Acquisitions, Leases and Services of the Public Sector] art. 74(II), *as amended* through Jan. 2012, DIARIO OFICIAL DE LA FEDERACIÓN [D.O.], Jan. 4, 2000, available on the website of Mexico's House of Representatives, at <http://www.diputados.gob.mx/LeyesBiblio/pdf/14.pdf>; Ley de Obras Públicas y Servicios Relacionados con las Mismas [Law of Public Works and Related Services] art. 92(II) *as amended* through Mar. 2012, D.O. Jan. 4, 2000, <http://www.diputados.gob.mx/LeyesBiblio/pdf/56.pdf>.

⁴³ Decreto No. 15/2010 de 24 de Maio, Boletim da República, Série I, No. 20, de 24 de Maio de 2010.

⁴⁴ *Id.* arts. 140 & 141.

The same rule applies in hierarchical appeals, which are appeals made to either the Ministry in charge of the contracting entity, the Governor of the Province, or the Administrator of the District, regarding, *inter alia*, violations of Decree No. 15.⁴⁵

Nepal

In Nepal the procurement process is regulated by the Public Procurement Act and its subordinate rules. Under the Act, filing an application for review of a procurement decision requires a security deposit, which is forfeited if the application is dismissed by a review committee.⁴⁶ According to the applicable regulation, the security deposit requirement may be met either with a cash deposit or a bank guarantee in the amount of 0.5% of the price offered by the applicant in the tender.⁴⁷

Philippines

Philippine Republic Act 9184, known as the “Government Procurement Reform Act,” provides that all procuring entities must establish a Bids and Awards Committee (BAC) to administer their procurement procedures.⁴⁸ This Act also provides that decisions of the BAC may be protested by fulfilling applicable requirements, which include paying a nonrefundable protest fee.⁴⁹ The nonrefundable protest fee amount, which depends on the amount of the Approved Budget for the Contract (ABC),⁵⁰ is as follows:

⁴⁵ *Id.* arts. 142 & 143.

⁴⁶ Public Procurement Act, 2063, §§ 50(6) & (7) (2007), available on the Public Procurement Monitoring Office website, at http://www.ppmo.gov.np/upload/topmenu/public_procurement_act_2063.pdf.

⁴⁷ Public Procurement Rules, 2064, § 104 (2007), available on the Pokhara University website, at <http://pu.edu.np/university/wp-content/uploads/2013/06/public-procurement-Rules.pdf>.

⁴⁸ Republic Act No. 9184, An Act of Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes art. I, § 5(b) & art. V, § 11 (2002), available on the Philippine Government Procurement Policy Board website, at http://www.gppb.gov.ph/laws/laws/RA_9184.pdf.

⁴⁹ *Id.* art. XVII, § 55.

⁵⁰ *Id.* art. I, sec 5(a). See also Revised Implementing Rules and Regulations of Republic Act 9184 rule I, § 5(b) & rule XVII, § 55.3, available at http://www.gppb.gov.ph/laws/laws/RevisedIRR_RA9184.pdf (last visited June 4, 2014).

ABC RANGE	PROTEST FEE
PhP50 million (about US\$1.14 million) and below	0.75% of the ABC
PhP50 to 100 million	PhP500,000
PhP100 to 500 million	0.5% of the ABC
PhP500 million to 1 billion	PhP2,500,000
PhP1 to 2 billion	0.25% of the ABC
PhP2 billion to 5 billion	PhP5,000,000
More than PhP 5 billion	0.1 % of the ABC

Source: Revised Implementing Rules and Regulations of Republic Act 9184 rule I, § 5(b) & rule XVII, § 55.3, available on the Philippine Government Procurement Policy Board website, at <http://www.gppb.gov.ph/laws/laws/RevisedIRR.RA9184.pdf> (last visited June 4, 2014).

Russia

While Russian legislation does not provide for placing a bond or making any other payments accompanying a complaint regarding the tender results,⁵¹ the Federal Antimonopoly Service of the Russian Federation proposed payment of a nonrefundable fee as a requirement for submission of complaints regarding the results of contract bids because, according to the Service, up to 53% of complaints submitted appear to be frivolous and baseless.⁵² A similar proposal was made in 2013 at the Federal Antimonopoly Service conference, where the head of one of the Service's provincial offices stated that unless payment for protesting bid results is introduced, the existing free complaint procedure will be used by unsuccessful entrepreneurs with the purpose of delaying the conclusion of contracts with the winners. He mentioned the necessity of establishing a fee that would be paid by the protesting party and would not be refunded if the complaint were found to be baseless. According to him, the amount of the fee should depend on the price of a contract.⁵³

Singapore

Under the Government Procurement Act of Singapore, a supplier may bring a challenge against a breach of a duty by the contracting authority before the Government Procurement Adjudication Tribunal.⁵⁴ At the time of filing the challenge, the applicant must make a deposit, in cash or in such other form as the Registrar of the Tribunal may allow. The challenge is deemed to have

⁵¹ Federal Law No. 44-FZ of April 5, 2013, on Procurement of Works, Services, and Goods for Government and Municipal Needs, available at GARANT, <http://base.garant.ru/70353464/6> (in Russian).

⁵² Press Release, Federal Antimonopoly Service of the Russian Federation, Payment for Complaint, Federal Antimonopoly Service of the Russian Federation (Feb. 25, 2011), http://www.fas.gov.ru/fas-in-press/fas-in-press_31760.html (in Russian).

⁵³ *Payment for Protesting Procurement Contracts*, TYUMEN REGIONAL DEPARTMENT OF THE FEDERAL ANTIMONOPOLY SERVICE (Oct. 8, 2013), <http://xn---8sbufgda3bekug.xn--p1ai/news/10019094/> (in Russian).

⁵⁴ Government Procurement Act (Chapter 120, Act 14 of 1997, revised edition 1998) art. 8, SINGAPORE STATUTES ONLINE, <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=b764344e-4cef-4bbb-ab92-7802af21689c;page=0;query=Id%3A%22ca7d2539-a353-4a56-ba47-a45abe25f7d8%22%20Status%3Ainforce;rec=0#legis>.

been withdrawn if the applicant fails to make the deposit. The deposit will be used to pay any costs awarded by the Tribunal to the contracting authority in relation to the challenge. The contracting authority may recover the balance of the costs where the deposit is insufficient to cover the costs. After the challenge has been disposed by the Tribunal and if the Registrar is satisfied that there are no outstanding claims of costs against the applicant by the contracting authority concerned, the deposit or the balance of the deposit will be released to the applicant.⁵⁵

Switzerland

Swiss federal procurement law does not provide a statutory basis for requiring a tenderer who protests an awarded procurement contract to post a bond.⁵⁶ Federal procurement law applies to purchasing by the Swiss federal government.

At the cantonal level, however, a judge may require a tenderer who protests a contract award to post a bond, if the protest were to hold the award of the contract in abeyance until a decision on the protest was reached and if serious detriment were likely to ensue from this delay. This is provided in article 17 of the Inter-Cantonal Agreement on Public Procurement,⁵⁷ which may be translated as follows:

Art. 17. Suspensory Effect

¹ The protest has no suspensory effect.

² The authority adjudging the protest may impose a suspension either upon petition or *ex officio* if the protest appears to be sufficiently justified and a suspension were not counterindicated by any serious public or private interests.

³ If the suspensory effect is imposed upon petition of the protester, and if it could lead to a significant detriment, the protester may be obligated to post, within a reasonable time limit, a bond for the costs of the proceeding and potential damage to the [other] party. If the bond is not posted within the time limit, the decision on the suspensory effects becomes void.

⁴ The protester is obligated to compensate for the damage that arose from the suspensory effect, if he or she had acted intentionally or with gross negligence.⁵⁸

According to a recent commentary on Swiss procurement law, article 17(3) allows the bond to cover only damage to the awarding government agency and not to the successful tenderer, even though the latter may claim damages under article 17(4).⁵⁹

⁵⁵ *Id.* art. 13.

⁵⁶ Bundesverwaltungsgericht, interim decision, May 27, 2009, docket no. B-3402/2009, available at SWISSLEX, <https://www.swisslex.ch/> (by subscription).

⁵⁷ Interkantonale Vereinbarung über das öffentliche Beschaffungswesen (Mar. 15, 2001), SYSTEMATISCHE GESETZSAMMLUNG KANTON BASEL-LANDSCHAFT [SGS-BL] 420.12, http://www.baselland.ch/fileadmin/basel_land/files/docs/recht/sgs_4/420.12.pdf.

⁵⁸ Translated by Edith Palmer.

⁵⁹ PETER GALLI ET AL., PRAXIS DES ÖFFENTLICHEN BESCHAFFUNGSWESENS 685 (2013), available at SWISSLEX (by subscription).

Some Swiss cantons make it possible to require a bond from the protester of a government contract on the basis of cantonal statutes,⁶⁰ and these may differ from the otherwise governing Inter-Cantonal Agreement. The Procurement Act of the Canton of Basel-Land,⁶¹ for instance, contains a similar provision on the delaying effects of a protest and the possibility of requiring a bond. That provision, however, appears to make it possible to require a bond to cover liability for any damages that may arise from the protest, including those of the successful bidder. This appears to be stated in article 32(3) of the Act, which may be translated as follows:

³ Whoever petitions for suspensory effects may be obligated to provide security for potential claims for damages if the detriments that can be expected are significant. If security is not posted within the time limit, the decision about the suspensory effects becomes void.⁶²

Taiwan

Under the Government Procurement Act of Taiwan, a supplier who lost a bid may file a protest in writing with the procuring agency.⁶³ If the supplier is not satisfied with the agency's decision on the protest or the agency fails to make a decision within specified periods, the supplier may then file a complaint with the Complaint Review Board for Government Procurement.⁶⁴ Before conducting a review, the Board may collect from the supplier review fees, examination fees, and other necessary expenses.⁶⁵ If the Board makes a decision that the procuring agency was in breach of the law, it may order the agency to change the award, under which circumstance the supplier may request that the agency reimburse any necessary expenses incurred by the supplier for the preparation of the tender and the filing of the protest and the complaint.⁶⁶

Turkey

There does not appear to be a requirement under Turkish law to oblige contractors to place a forfeitable bond in protesting government tenders to preclude a losing contractor from lodging frivolous complaints.

⁶⁰ *Id.*

⁶¹ Gesetz über öffentliche Beschaffungen (June 3, 1999), SGS-BL 420, <http://www.baselland.ch/420-0-hm.287296.0.html>.

⁶² Translated by Edith Palmer.

⁶³ Zhengfu Caigou Fa (Government Procurement Act) (Jan. 26, 2011), LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030057>.

⁶⁴ *Id.* art. 76.

⁶⁵ *Id.* art. 80(4).

⁶⁶ *Id.* art. 85(3).

The Public Procurement Law⁶⁷ provides for a mechanism whereby “[c]andidates, tenderers or potential tenderers” claiming to have suffered a loss of right or damage or being likely to do so because of unlawful procedures or actions within the tender process file a complaint and appeal the process based on the Law’s procedures and principles.⁶⁸ Mandatory paths of application for complaint and appeal must be exhausted before a lawsuit may be filed.⁶⁹ Complaint applications are to be filed with the contracting authority; appeal applications are to be submitted the Public Procurement Authority, by means of signed petitions.⁷⁰

The Law prescribes that the Council of Ministers (Turkey’s Cabinet) may decide to require receipt of an “application security” from the applicant of up to four times the amount specified in the Law as the charges for appeal applications in goods and services procurements. For example, an appeal application charge of TRY1,000 (about US\$474) is charged for procurements whose estimated costs were up to TRY576,629 (about US\$272,080) (for the period February 1, 2011–January 31, 2012); the charge was TRY4,000 (about US\$1,887) for those whose estimated costs were TRY23,065,198 (about US\$10,883,200) and above (during the same period).⁷¹

Uganda

Uganda imposes fees on a bidder seeking administrative review of a procurement process. The fees are forfeited if the application is rejected, including for being frivolous. A bidder aggrieved by a decision of a procuring or disposing entity may make a complaint to the Accounting Officer of the entity.⁷² If the bidder is not satisfied with the decision of the Accounting Officer, he may make a further complaint to the Public Procurement and Disposal of Public Assets Authority (the Authority).⁷³ Making an administrative review complaint requires payment of fees to the procuring and disposing entity.⁷⁴ While the fee is refundable if the complaint is upheld by the Accounting Officer or the Authority, this is not the case if the complaint is either withdrawn or dismissed.⁷⁵

⁶⁷ Sayılı Kamu İhale Kanunu 4734 [Public Procurement Law No. 4734] (Jan. 4, 2002), RESMÎ GAZETE, No. 24648 (Jan. 22, 2002), official English translation entitled Public Procurement Law published by Public Procurement Authority of the Republic of Turkey in Jan. 2012, available at http://www.ihale.gov.tr/english/4734_English.pdf; 4734 Sayılı Kamu İhale Kanunu (Değişiklikler İşlenmiş) [Public Procurement Law No. 4734 (Amendments Processed)] (as last amended Feb. 19, 2014) (click on hyperlink to view), <http://www.ihale.gov.tr/Mevzuat.aspx>.

⁶⁸ Public Procurement Law art. 54 ¶ 1.

⁶⁹ *Id.* art. 54 ¶ 2.

⁷⁰ *Id.* art. 54 ¶ 3.

⁷¹ *Id.* art. 53(2)(j).

⁷² Public Procurement and Disposal of Public Assets Act (PPDPA) 1 of 2003 § 90, available on the Public Procurement Disposal of Public Assets Authority (PPDA) website, at http://www.pdda.go.ug/index.php/reports/audits-and-investigations/doc_download/836-ppda-act-2003.html; Public Procurement and Disposal of Public Assets (Administrative Review) Regulations (PPDPA Regulations), 2014 §§ 4 & 5, CVII (9) STATUTORY INSTRUMENTS SUPPLEMENT TO THE UGANDA GAZETTE (Feb. 14, 2014).

⁷³ PPDPA §§ 90 & 91; PPDPA Regulations §§ 6 & 7.

⁷⁴ PPDPA §§ 90; PPDPA Regulations § 11.

⁷⁵ PPDPA Regulations § 11.

The amount of the fee paid as a condition for seeking an administrative review is tied to the value of the tender in question. While the amount payable varies with the value of the procurement, it comes with floor and ceiling caps. The minimum payable amount, which applies to all complaints involving procurement value up to UGX100 million (about US\$39,200) is UGX500,000 (about US\$196).⁷⁶ The maximum payable fee, applicable to all complaints involving procurement value of over UGX100 billion (about US\$39.2 million), is UGX15 million (about US\$5,880).⁷⁷

An applicant aggrieved by a decision of the Authority may appeal to the Public Procurement and Disposal of Public Assets Appeals Tribunal (the Tribunal).⁷⁸ A party aggrieved by the decision of the Tribunal may appeal to the High Court.⁷⁹ However, it does not appear that any additional fee is imposed in either instance.

Ukraine

In Ukraine payment of an administrative fee is required for protesting the award of a contract. The procedure for protesting the tender results is prescribed in the Law on Organization of Government Procurement.⁸⁰ The Law states that the bid protest must be submitted to the State Antimonopoly Committee of Ukraine (an executive branch government agency). A Cabinet of Ministers Regulation⁸¹ established that a protest must be accompanied by payment of a fee in the amount of UAH5,000 (about US\$425) if a contract on provision of goods or services is disputed, and in the amount of UAH15,000 (about US\$1,275) if a contract on works is disputed. A complaint can be filed with the Administrative Court of the Kyiv Circuit if the protest is rejected by the Antimonopoly Committee or if a contract following the disputed tender has already been concluded. In such cases, a regular court fee must be paid.⁸²

United Kingdom

The United Kingdom has what is known as the “Alcatel standstill period” of a minimum of ten days between the date a government contract has been awarded and the date it is signed. This time frame commences as soon as the contracting authority publishes a notice that the contract

⁷⁶ PPDPA Regulations *Schedule*.

⁷⁷ *Id.*

⁷⁸ PPDPA §§ 91 & 91I.

⁷⁹ *Id.* § 91M.

⁸⁰ Law No. 1197-VII art. 18, available on the Ukrainian Parliament website, at <http://zakon4.rada.gov.ua/laws/show/1197-18> (in Ukrainian).

⁸¹ Cabinet of Ministers Regulation No. 773 of July 28, 2010, <http://zakon2.rada.gov.ua/laws/show/773-2010-%D0%BF>.

⁸² Law No. 1197-VII art. 19.

has been awarded or a framework agreement has concluded. The notice must be in writing and communicated in the most rapid form practicable.⁸³

The ten-day period is to allow an unsuccessful bidder to challenge the decision. The initial challenge to the decision must be submitted at the end of day two of the standstill period and is known as requesting an additional debriefing.⁸⁴ The debriefing contains information about the characteristics and advantages of the successful tender.⁸⁵ All tenderers have the ability to file a court case during the standstill period if they are unsuccessful, regardless of whether or not they have requested an additional debriefing. It appears that the tenderer disputing the contract award does not have to provide a bond during the process.⁸⁶

This process was a result of two judgments from the European Court of Justice, jointly known as the Alcatel case.⁸⁷

There currently appear to be no pecuniary fines specifically directed at people who bring repeated frivolous complaints; however, court rules for abuse of process will apply to these individuals. If the courts find that there has been an abuse of process, they can strike out the case, either in its entirety or in part, and can make a civil restraint order, in which any future applications to file a case would have to be first approved by the court. In some cases, a party to a case that has been brought as an abuse of process may obtain damages.⁸⁸

⁸³ Public Contracts Regulations 2006, SI 2006/5 ¶ 32(3), <http://www.legislation.gov.uk/ukxi/2006/5/regulation/32/made>.

⁸⁴ ISLINGTON, TIPS FOR SUPPLIERS ON THE STAND STILL PERIOD (undated), [http://www.islington.gov.uk/public-records/library/Procurement/Information/Guidance/2011-2012/\(2012-03-03\)-Tips-for-Suppliers-on-the-Stand-Still-Period.pdf](http://www.islington.gov.uk/public-records/library/Procurement/Information/Guidance/2011-2012/(2012-03-03)-Tips-for-Suppliers-on-the-Stand-Still-Period.pdf) (last visited June 3, 2014).

⁸⁵ Public Contracts Regulations 2006, SI 2006/5 ¶ 32(4).

⁸⁶ Public Contracts Regulations 2006, SI 2006/5.

⁸⁷ Case C-81/98, Alcatel Austria AG v. Bundesministerium für Wissenschaft und Verkehr, 1999 E.C.R. I-07671, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61998CJ0081>.

⁸⁸ *Abuse of Process*, DRUKKER SOLICITORS (Sept. 7, 2013), <http://www.drukker.co.uk/publications/reference/abuse-of-process/>.