

UNDERSTANDING THE STANDARDS OF
BID PROTEST STANDING: A COMPARATIVE
ANALYSIS OF BID PROTEST STANDING RIGHTS
AND REQUIREMENTS ACROSS NINETY-EIGHT
COUNTRIES AND THE EUROPEAN UNION

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ABSTRACT

*Standing is a fundamental part of any legal challenge and, as such, is a fundamental aspect of bid protest and procurement challenge systems around the world. Yet the extent to which standing is conferred often differs from one country to the next, as each confers standing to different types of parties and under different circumstances. With the recent decision of the United States Court of Appeals for the Federal Circuit in *Acetris Health v. United States*, it is possible that standing rights and requirements in the United States will be interpreted more broadly in the near future. With *Acetris Health* and the United States as a backdrop, this Article will analyze standing by analyzing the specific elements that, when taken together, affect a country's overall standing regime. Additionally, this Article analyzes the considerations behind a country's implementation of standing rights and requirements. In performing this analysis, this Article will introduce the standing rights and requirements of ninety-seven other countries and the European Union, while identifying various trends and observations. This Article then endorses a potential shift in the U.S. bid protest system's interpretation of standing rights and requirements, toward a standing regime in line with Canada, the United Kingdom, and the European Union. This Article argues that this change would allow the United States to provide improved access to more parties in its protest forums.*

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I. INTRODUCTION

A recent decision in the United States Court of Appeals for the Federal Circuit, *Acetris Health LLC v. United States*,¹ signals a potential shift in the United States' bid protest standing requirements. In the United States, procurement challenges are brought before the contracting agency, the United States Court of Federal Claims, or the United States Government Accountability Office

1. *Acetris Health LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020).

(GAO).² For the past two decades, only bidders or prospective bidders who had a substantial chance of receiving the contract being protested, but for the adverse actions of the procuring entity, were conferred bid protest standing in the United States.³ When compared to bid protest standing regimes in other countries, the U.S. standard is narrow.

Acetris Health suggests a possible shift toward a broader configuration of bid protest standing, one in which bidders and potential bidders will not have to show that they had a substantial chance of winning the award. Such a shift would align more closely with the European Union (EU) and United Kingdom (U.K.) standards. As a result, the U.S. bid protest standing regime would be improved. Such a shift would allow protest fora to address problems in the procurement system, particularly those resulting from recurring agency behavior, without the requirement that challenges be brought by “perfect protesters.” This broader bid protest standing regime would minimize procurement delays and limit the extent to which litigation resources are wasted on protests that never reach disposition on their underlying merits.

Part II of this Article begins with analysis on the concept of standing, an introduction to standing thresholds for parties in the United States, and a discussion of the wider themes that shape the U.S. bid protest: providing oversight of government accountability and achieving efficient remedies for protesters. Part III provides an overview of global standing trends and analyzes different protest standing requirements from around the world, specifically identifying and examining popular standing regimes. Part IV applies the observations on foreign bid protest systems to the United States and ultimately endorses the potential change in course suggested by the Federal Circuit in *Acetris Health*. This Article also includes an appendix containing a survey of bid protest standing regimes in over 100 countries. Appendix A consists of individual profiles for the EU and ninety-seven different countries with identifiable protest systems, and it also briefly addresses several countries without identifiable protest systems.⁴

2. Standing is a necessary element when pursuing any legal claim, including for parties pursuing agency review, but this Article will focus on standing before the Court of Federal Claims and the GAO.

3. See *Am. Fed'n of Gov't Emps. v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001).

4. The countries and sovereign entities whose challenge systems are under analysis in this Article include the European Union and, listed in alphabetical order: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Barbados, Belarus, Belgium, Bermuda, Bhutan, Bolivia, Brazil, Burkina Faso, Cambodia, Cameroon, Canada, Chile, China, Colombia, Democratic Republic of the Congo, Republic of the Congo, Cote d'Ivoire, Croatia, Czech Republic, Denmark, Dominica, Dominican Republic, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Hong Kong, Iceland, Ireland, India, Indonesia, Italy, Japan, Jordan, Kazakhstan, Kenya, South Korea, Kuwait, Kyrgyz Republic, Laos, Latvia, Liberia, Lithuania, Luxembourg, Macau, Malawi, Malaysia, Malta, Mexico, Nigeria, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Qatar, Russia, Saudi Arabia, Senegal, Serbia, Singapore, Slovenia, Somalia, South Africa, South Sudan, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, Uruguay, Venezuela, Vietnam, Yemen, and Zimbabwe.

II. STANDING, THE U.S. PROTEST SYSTEM AND *ACETRIS HEALTH*: A POTENTIAL NEW STANDARD FOR STANDING

To understand why U.S. bid protest standing should be expanded to accommodate broader protest circumstances, it is first important to clarify just what “standing” is, what the traditional (and perhaps pre-*Acetris Health*) U.S. standard for standing is, and why standing plays such an important role in protest proceedings.

A. An Introduction to Standing

“Standing” is a fundamental concept in litigation, serving as the threshold for determining under what circumstances a party may bring a claim before a court or other legal forum.⁵ Analyzing protest standing requires answering three essential questions: (1) which type of party can bring a procurement contract award challenge; (2) under which circumstances; and (3) before what forum?⁶

Complicating standing in actions against a government body is the doctrine of sovereign immunity.⁷ In most countries, this doctrine, which holds that the actions of the government are non-contestable in legal proceedings unless the government has waived its immunity, precludes private parties from suing the government.⁸ In practical terms, sovereign waivers are created when the sovereign explicitly confers the right to sue the government to certain parties in certain situations.⁹

As discussed in detail below, the extent of standing rights conferred to procurement contract award protestors differs among governments, with significant variation in which parties can bring actions, under which circumstances, and in which fora. For example, in some countries, only parties who submitted bids for a solicitation may challenge related procurement decisions;¹⁰ in other

5. RICHARD J. PIERCE, JR. & KRISTIN E. HICKMAN, *ADMINISTRATIVE LAW TREATISE* § 18.1 (6th ed. 2018).

6. Nonetheless, defining “standing” is often a controversial subject, as is demonstrated by the many cases on the matter before the United States Supreme Court throughout its existence. Some argue that standing is distinct from prejudice, meaning harm to a party. See Frederick W. Claybrook Jr., *Standing, Prejudice, and Prejudging in Bid Protest Cases*, 33 *PUB. CONT. L.J.* 535, 554 (2004). In effect, it can be argued that prejudice goes more to the question of “under what circumstances can a party bring suit,” rather than “which party can bring suit.” Regardless of whether the two are distinct from one another, if “standing” rights are broad, but the threshold outlining the circumstances under which a party can bring a suit is too stringent, then, in effect, fewer parties can bring suit. In short, both prejudice and standing rights are inherent in answering “which party may bring a claim?” and, as such, this paper will not attempt to answer whether a distinction exists.

7. See *Am. Fed’n of Gov’t Emps.*, 258 F.3d at 1301 (“In resolving this issue, we are guided by the principle that waivers of sovereign immunity, such as that set forth in § 1491(b)(1), are to be construed narrowly.”) (citing *McMahon v. United States*, 342 U.S. 25 (1951) (“[S]tatutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign.”)).

8. See *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

9. See *id.*

10. See *infra* note 133.

countries, any interested party may challenge a procurement decision.¹¹ The evaluation of any one system must account for three factors to understand how that protest system compares to others: (1) the types of parties permitted to raise a protest; (2) the circumstances in which procurement decisions can be protested; and (3) the forum options for bringing a protest.¹² Restrictions in any one of these areas can greatly affect the flexibility of a country's bid protest standing rights.

B. U.S. Bid Protest System's Standing Requirements

In the United States, challenges to federal agency procurement decisions can be raised in one of three distinct fora: (1) the agency conducting the procurement, (2) the GAO, and (3) the United States Court of Federal Claims.¹³ Decisions of the United States Court of Federal Claims can be appealed to the United States Court of Appeals for the Federal Circuit.¹⁴ Protest jurisdiction at the GAO and the Court of Federal Claims, the two tribunals where preliminary independent review may be obtained, is conferred by specific legislation. The Court of Federal Claims' jurisdiction is established by the Administrative Dispute Resolution Act of 1996 (ADRA) and the GAO's authority is established by the Competition in Contracting Act (CICA).

Both ADRA and CICA provide that standing is conferred to "interested parties."¹⁵ For purposes of GAO bid protest jurisdiction, CICA defines an "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."¹⁶ Regarding standing, the GAO has stated: "[O]ur Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions[,] it would have had a substantial chance of receiving the award."¹⁷

By comparison, the term "interested party" was left undefined in ADRA, with no uniform definition agreed upon at the Court of Federal Claims. Prior to 2001, a majority of judges on the Court of Federal Claims found the Administrative Procedure Act (APA) definition of "interested party" to be most appropriate.¹⁸ The APA defines an interested party as one that is "adversely affected or aggrieved."¹⁹ Very few judges adopted the CICA defini-

11. See *infra* App. A: A Survey of Bid Challenge Standing Requirements Worldwide.

12. Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002).

13. See 28 U.S.C. § 1491(b); 31 U.S.C. §§ 3551–3556.

14. See 28 U.S.C. § 1295(a)(3).

15. Claybrook, *supra* note 6.

16. 14 C.F.R. § 21.0(a)(1) (2020).

17. See IGIT, Inc., B-275299.2, 97-2 CPD ¶ 7 (Comp. Gen. June 23, 1996).

18. Claybrook, *supra* note 6.

19. 5 U.S.C. § 702.

tion of requiring that bidders or prospective bidders had a substantial chance at receiving the award in order to lodge a protest.²⁰

The United States Court of Appeals for the Federal Circuit resolved this split among judges of the Court of Federal Claims in 2001 when it adopted the CICA definition.²¹ As such, for the past twenty years, challenges to the actions of procuring entities—whether brought before the GAO or the Court of Federal Claims—could only be raised by bidders or potential bidders who had a substantial chance of receiving the award. Consequently, standing to raise a bid protest in the United States was essentially conferred only to parties who can show that they were the next-highest bidder.²²

Within the United States, the distinction between pre-award and post-award protests also impacts standing.²³ Any potential bidders are permitted to raise issues for pre-award protests and can challenge the solicitation, but, because of the “substantial chance” standard, only actual bidders can raise issues for post-award protests.²⁴ For post-award protests, the substantial chance threshold, limits the class of potential protestors to only those who submitted bids.²⁵ Thus, in the United States, despite somewhat broader access to pre-award protest standing, post-award protest standing is typically reserved only for those actual bidders who can reasonably assert that, but-for the protested violation, they would have won contract award.

C. A Potential New Standard for Standing

The Federal Circuit’s 2020 *Acetris Health* decision, however, reflects a potential change in its interpretation of “interested party” and may signal acceptance of

20. *Fed. Data Corp. v. United States*, 911 F.2d 699, 703 (Fed. Cir. 1990); *XTRA Lease, Inc. v. United States*, 50 Fed. Cl. 612, 617 (2001).

21. *See Am. Fed’n of Gov’t Emps. v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (adopting the CICA definition for “standing” before the Court of Federal Claims).

22. *See Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009) (“Thus, to come within the Court of Federal Claims’ § 1491(b)(1) bid protest jurisdiction, Weeks is required to establish that it ‘(1) is an actual or prospective bidder and (2) possess[es] the requisite direct economic interest.’ *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1308 (Fed.Cir.2006). We have stated that ‘[t]o prove a direct economic interest as a putative prospective bidder, [the bidder] is required to establish that it had a ‘substantial chance’ of receiving the contract.’ *Id.*; *see also Info. Tech. & Applications v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003) (“To establish prejudice, [the protestor] must show that there was a ‘substantial chance’ it would have received the contract award but for the alleged error in the procurement process.”); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1580 (Fed.Cir.1996) (same.”); *see also Ogden Support Servs., Inc.*, B-270354.2, 97-1 CPD ¶ 135, at 6 (Comp. Gen. Oct. 29, 1996) (holding that the protester was not an “interested party” where the protester was not the next-highest bidder since another offeror had a lower cost and a higher technical score).

23. *See FAR* pt. 33.1.

24. *See FAQs*, GAO, <https://www.gao.gov/legal/bid-protests/faqs> [<https://perma.cc/B7U8-STSV>] (last visited Jan. 20, 2022). “In the case of a solicitation challenge, an interested party is generally a potential bidder for the contract. In the case of a contract award challenge, an interested party is generally an actual bidder that did not win the contract. In addition, other factors, such as the bidder’s standing in the competition and the nature of the issues raised may affect whether it qualifies as an interested party.” *Id.*

25. *See id.*

a broader class of protesters in the near future.²⁶ In the protest at issue, Acetris, a pharmaceutical company, argued that its injury-in-fact was an inability to compete in a solicitation on equal footing because of an agency interpretation that excluded Acetris's products.²⁷ Acetris was not the next-highest bidder after the awardee, and under conventional bid protest rules would not be considered an "interested party," a fact that the court squarely acknowledged in stating that Acetris lacked standing to contest the actual award of a specific contract.²⁸

Nonetheless, the court found that Acetris still possessed sufficient standing to challenge a decision to exclude its products from consideration for award because the court found it "virtually certain" that the issues raised by Acetris would reoccur in the future and that Acetris had therefore pled a significant injury in fact.²⁹ Acetris was effectively granted standing as an "interested party," despite it being explicitly unqualified to bring a protest under the historically narrow standard of having to demonstrate that it would be "next in line" for award if it prevailed on one or more of the disputed issues.³⁰

This decision may signal a substantial shift in U.S. bid protest standing rights for protestors, bringing the standard closer to the APA standard for an "interested party," rather than the CICA standard that has been applied for the past two decades.

D. Larger Tension

At play behind the scenes of *Acetris Health* are competing perspectives on two compelling purposes of a protest system: providing a private remedy and correcting broader government error or mismanagement.³¹ On the one hand, a protest system can empower a protestor to serve as a sort of private attorney general, creating an accountability check on government action through an expedient mechanism for "blowing the whistle" on agency errors.³² On the other hand, a protest system can provide fora in which parties injured by government action in discrete transactions can seek remedies.³³

In theory, if the purpose of a protest system is only to grant an injured party a remedy, then standing requirements should be more restrictive; if the purpose is to also provide an oversight function, then standing requirements should be less restrictive.³⁴ Proponents of a transactional remedy-focused

26. See *Acetris Health LLC v. United States*, 949 F.3d 719, 727 (Fed. Cir. 2020).

27. *Id.* at 726.

28. *Id.* at 726–27.

29. *Id.* at 727.

30. *Id.*

31. Christopher R. Yukins, *Rethinking Discretionary Bid Protests*, REGUL. REV. (May 27, 2021), <https://www.theregreview.org/2021/05/27/yukins-bid-protests> [<https://perma.cc/Q6JB-RMEWJ>].

32. See Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 692–93 (2001) ("[P]rotest proponents advocate that, while pursuing their own interests, protestors serve the public as private attorneys general.")

33. See William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 486 (1995).

34. See *id.*

protest system argue that looser requirements will give rise to frivolous and unsuccessful lawsuits, resulting in more protests, less efficiency, and longer waits for resolving protests.³⁵ Proponents of the private attorney general function argue that the ability of private parties to check government powers enables those whose interests are at stake to police those interests more directly, maintaining transparency and fairness in the government-run protest system. In this sense, protests serve an important whistleblower function.³⁶

The optimal balance of purposes, and correlated standard for protest standing, likely lies between these two ends of the functional spectrum. As alluded to above, a protest system should accommodate both functions to some extent.³⁷ Accepting that both interests should be served to some degree, consideration then turns to finding the proper balance of systemic characteristics to promote oversight and transparency in a given procurement system and characteristics that promote efficient transactional adjudication.³⁸

III. GLOBAL TRENDS

In examining this balance between systemic oversight and efficient transactional adjudication in the U.S. system, numerous bid protest systems from other countries can serve as useful points of comparison. It is clear from the survey of countries detailed in Appendix A that various configurations of bid protest standing rights are in place around the globe.³⁹ This Part examines the three key standing elements—parties, circumstances, and protest fora—more closely, then analyzes how these three elements operate together to establish a balance between systemic transparency and oversight and efficient transactional adjudication.

A. Trends: A Closer Look at Individual Standing Elements

The best place to start in analyzing a bid protest system in a given country is to determine which classes of parties could potentially have standing. From there, the next step is to determine whether there are limitations on the circumstances under which a protest may be brought, or whether there is a lack of confidence in a protest forum's ability or willingness to fairly adjudicate grievances, that could directly or indirectly limit standing.

For ease of reference, the scope of each component of standing is illustrated via diagrams. Appendix A provides the underlying information supporting where each country is placed, while Appendix B lists the abbreviations used for each country.

35. Schooner, *supra* note 32, at 691–92 (noting the common arguments raised); Kovacic, *supra* note 33, at 489–91 (summarizing five basic critiques of protest systems)).

36. Schooner, *supra* note 32, at 693.

37. See Daniel L. Gordon, *Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make*, 35 PUB. CONT. L.J. 427 (2006).

38. *Id.*

39. See *infra* App. A: A Survey of Bid Challenge Standing Requirements Worldwide.

1. Which Type of Party

Starting first with addressing the element of “which types of parties” can bring a challenge, many of the surveyed countries use similar descriptive terms.⁴⁰ Common terms include “bidder,” “potential” or “prospective” bidder, and “interested party,” among others. As a general matter, these terms demonstrate a broad scale, although caution is advised in assuming that “interested party” includes third parties without confirmation.⁴¹

Generally speaking, “bidders” refers only to those parties who actually participated in the solicitation process by submitting bids.⁴² While a small number of countries broaden the definition of bidder, the more common usage of the term “bidder” excludes parties that did not participate in the solicitation process. Alternative terms that are often used interchangeably with bidder are “candidates,” “tenderers,” and “participants.”⁴³ Notably, “supplier” can be used to describe those parties who actually submitted bids, but this word is not a universal definition; other countries define the term “supplier” to include potential bidders as well.⁴⁴

The next category on the scale is “potential bidder.” It includes bidders as well as contractors and vendors who have not yet submitted bids but would be capable of performing the work.⁴⁵ This category also fits the EU’s definition of “economic operator,” as established in Directive 2014/24 and adopted as the delegation of choice by most EU member states.⁴⁶

As reflected by the discussion of the Court of Federal Claims’ historically divergent interpretations in Part II, the meaning of “interested party” can be somewhat complicated to decipher absent additional context or an express definition. In some cases, “interested party” can include third parties such as unions, subcontractors, and local governments in addition to bidders and potential bidders.⁴⁷ Yet in other cases, the term is limited in referring to bidders and potential bidders only, without the inclusion of third parties (for example, this is the interpretation favored within the United States).⁴⁸ When certain third parties are granted rights to appeal decisions, that right often

40. See, e.g., Public Contract Regulations 2015, SI 2015/102, art. 2, ¶ 1 (UK) (using terms “tenderer” and “economic operator”).

41. “Interested party” can be read as including third parties in some cases, but can also be defined more strictly as the term is defined in the United States. Compare *Am. Fed’n of Gov’t Emps. v. United States*, 258 F.3d 1294, 1301–02 (Fed. Cir. 2001) (stating that “interested party” means prospective bidder or bidder with a direct economic interest), with Eitenne Amblard & Kéryn Gillet, *France, PUBLIC PROCUREMENT 2021: A PRACTICAL CROSS-BORDER INSIGHT INTO PUBLIC PROCUREMENT* 44, 49 (13th ed. 2021) (stating that third parties are allowed to challenge the contract).

42. See, e.g., App. A, *supra* note 39.

43. *Id.*

44. Consider New Zealand, which provides standing to “suppliers,” a term defined as including both bidders and potential bidders. See *infra* note 387.

45. See 28 U.S.C. § 1491(b); 31 U.S.C. §§ 3551–56.

46. See *infra* notes 123–28 and accompanying text.

47. Claybrook, *supra* note 6, at 536–37.

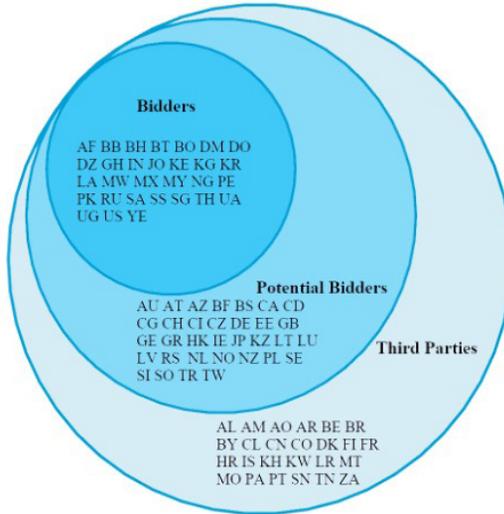
48. *Id.* at 537; see also *IGIT, Inc., B-275299.2, 97-2 CPD ¶ 7* (Comp. Gen. June 23, 1996).

exists only in connection with a prejudice requirement, meaning that some sort of harm, likelihood of harm, or general legal interest is often required.⁴⁹

The remaining category is “no parties permitted.” It is synonymous with no protest system or administrative challenge system in existence. Such lack of standing appears to be found in authoritarian or “failed” states.⁵⁰

Figure 1 depicts the approach of the various jurisdictions examined for this Article with respect to permitting bidders, potential bidders, or third parties to bring challenges to award decisions.

Figure 1. Comparing the Parties Factor



Though the classifications in Figure 1 reflect overall tendencies, the lines between categories are not always clear, and some countries’ legal regimes may stretch across lines.⁵¹ Still, the trend shown by an examination of these systems is that more developed countries generally confer standing to a broader range of parties, while developing countries generally confer standing to a narrower range of parties.

49. See, e.g., Ilkka Aalto-Setälä & Henrik Koivuniemi, *Finland: Public Procurement Laws and Regulations 2021*, ICLG (Apr. 2, 2021), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/finland>; see also Ordonnance no. 2015-899 du 23 juillet 2015 relative aux marchés publics [Public Contracts Ordinance no. 2015-899 from July 23, 2015] (Fr.); Décret no. 2016-360 du 25 mars 2016 relatif aux marchés publics [Decree no. 2016-360 from March 25, 2016] (Fr.), <https://www.economie.gouv.fr/daj/textes-marches-publics> [<https://perma.cc/C2JE-THHC>].

50. See *infra* text accompanying note 500. Not pictured are several states without standing conferred to any party. *Id.*

51. A useful example of this latter point can be observed with the word “interested,” for while the term “interested parties” connotes a potential for a broad class of parties beyond bidders and potential bidders, the term “parties interested in receiving award” clearly limits the class of protestors to bidders and potential bidders and thereby excludes third parties (emphasis added). See *supra* notes 41–50, accompanying text, and Figure 1.

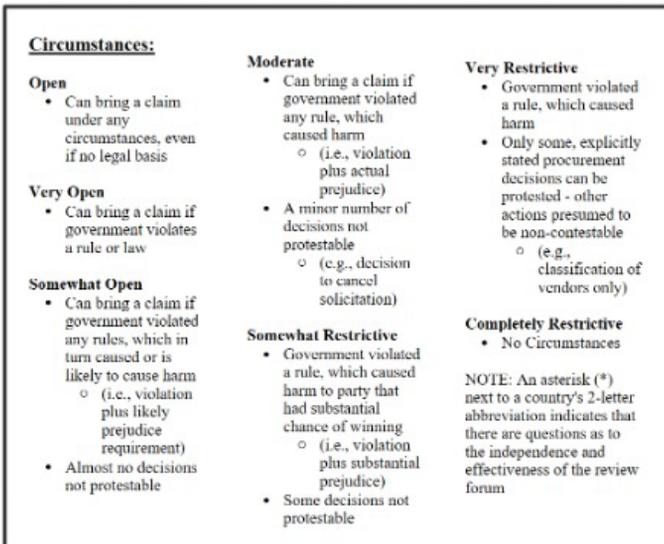
The floor for standing in the EU permits both bidders and potential bidders to bring protests, meaning that, at a minimum, any member state will be required to start on the middle tier.⁵² Some member states, like France, have opted to go beyond this floor by conferring standing more broadly.⁵³ On the other end of the spectrum, many African and Caribbean countries, for example, have opted to include only bidders, thus placing them in the lower tier.⁵⁴

2. Which Circumstances

Unlike stipulating which classes of parties may bring suit (where countries in effect choose from a handful of available options of bidders, potential bidders, or third parties), the possibilities for limiting the circumstances under which a challenge may be brought are almost infinite.⁵⁵ Countries can (and do) add a wide range of requirements to qualify standing.⁵⁶ For purposes of this analysis, however, circumstantial limitations can be reasonably grouped into two essential categories: (1) adding prejudice requirements, and (2) limiting what kinds of decisions can be protested. Requirements falling under either of these two categories, and the combination thereof, can greatly affect standing.

Using these characteristics, the following diagram establishes and defines “circumstance” categories ranging from “very open” to “completely restrictive.”

Figure 2. The Spectrum Underlying the Circumstances Factor



52. See *infra* note 123.

53. See *infra* text accompanying notes 275–76.

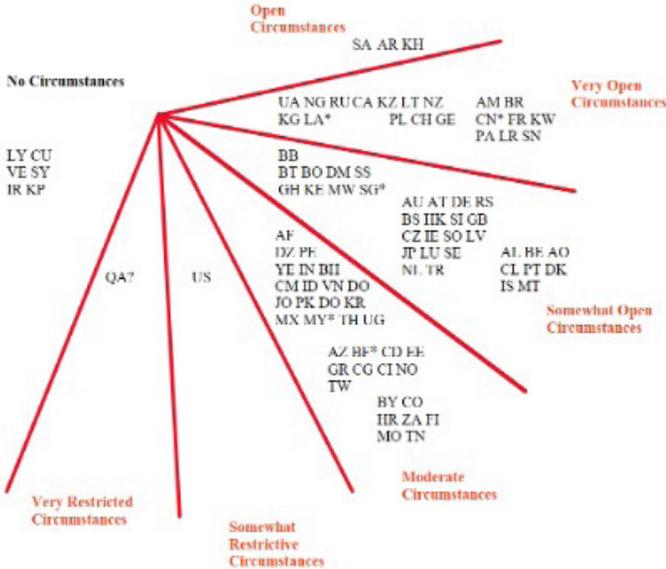
54. See, e.g., App. A, *supra* note 39. Naturally, there are exceptions: Senegal, for example, provides comparatively high access in terms of bid protest standing. See *infra* note 430 and accompanying text.

55. Compare Figure 1, with Figures 2 and 3.

56. See *infra* text accompanying notes 85, 266, 277, 315, and 322.

Using the categories defined in Figure 2, the countries described in Appendix A can be grouped for analysis of global trends. The results are depicted in Figure 3.

Figure 3. The Circumstances Factor Spectrum



3. Prejudice as a Limiting Factor

A prejudice requirement can significantly limit standing. For example, in Croatia the law granting standing stipulates that actual harm needs to have been suffered.⁵⁷ By comparison, in Germany and most other EU countries, the prejudice requirement is actual harm *or* likely harm—meaning that the protestor (assuming that they are a permitted party, per the discussion above) must merely establish that they *are likely to suffer harm* as the result of the procuring entity’s violation.⁵⁸

As discussed above, the United States employs the “substantial chance of award” rule, requiring that any bidders or potential bidders seeking to protest a decision must be able to claim that they would have been the next highest bidder were it not for the violation of law or regulations.⁵⁹ In effect, only a few parties are actually capable of filing a protest after each award decision, because

57. See *infra* text accompanying notes 249–51.

58. Note that Germany relaxes the requirement that the government need have violated procurement law. See *infra* text accompanying note 285. While most countries require successful protests to identify a violation of procurement law, not all countries do (e.g. Argentina). See *infra* text accompanying notes 149–55.

59. See *supra* text accommodating notes 13–20; see *Am. Fed’n of Gov’t Emps. v. United States*, 258 F.3d 1294 (Fed. Cir. 2001) (adopting the CICA definition for standing before the Court of

the substantial chance of award barrier constitutes a significant limitation on the overall grant of standing rights.⁶⁰ With the “substantial chance of award” circumstance limitation further restricting the United States’ already narrow “bidders only” standing regime, the American regime is far more restrictive than the approach of many similarly situated countries.

On the opposite end of the spectrum, a handful of countries do not require that a party be prejudiced as a prerequisite to exercising standing rights.⁶¹ Simply asserting that a rule was violated is enough for a party to be granted standing.⁶² Further, Argentina, Cambodia, and Saudi Arabia do not require that any violation have occurred; instead, mere disagreement with a government decision is enough for a party to validly bring a protest.⁶³

4. Type of Claim as a Limiting Factor

Another limitation on protest standing occurs where only claims with certain specific bases can be form valid challenges to procurements. In practice, almost every protest system has some sort of action that cannot be contested. Given that most jurisdictions have exceptions, this element does not impact most countries’ rankings on the spectrum of openness.⁶⁴ A rare example of a significant limitation, however, was one created by Qatar in 2005, which allowed bidders to challenge only agency mistakes concerning bidder classifications.⁶⁵

Countries can and do constrict standing by limiting the circumstances in which approved parties can raise challenges, even where a given country may

Federal Claims); *see also* *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009). The *Weeks Marine* court summarized the standard well, stating:

Thus, to come within the Court of Federal Claims’s § 1491(b)(1) bid protest jurisdiction, Weeks is required to establish that it ‘(1) is an actual or prospective bidder and (2) possess[es] the requisite direct economic interest.’ *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1308 (Fed.Cir.2006). We have stated that ‘[t]o prove a direct economic interest as a putative prospective bidder, [the bidder] is required to establish that it had a ‘substantial chance’ of receiving the contract.’ *Id.*; *see also* *Info. Tech. & Applications v. United States*, 316 F.3d 1312, 1319 (Fed.Cir.2003) (“To establish prejudice, [the protestor] must show that there was a ‘substantial chance’ it would have received the contract award but for the alleged error in the procurement process.”); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1580 (Fed. Cir. 1996) (same).”

Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1359 (Fed. Cir. 2009).

60. *Id.*

61. *See supra* notes 149, 214, 275, 280, 427, and accompanying text.

62. While the vast majority of countries require the occurrence of a violation of procurement to be present, most of those countries do so in conjunction with a prejudice requirement. The laws of a sizable minority of those countries, however, require only the existence of a violation. Even further, in Argentina, no legal violation needs to have occurred, as the law clearly provides standing even in non-legal challenges. *See infra* text accompanying note 149. This is the widest set of circumstances identified.

63. *See infra* notes 149, 214, 427, and accompanying text.

64. OECD PRINCIPLES FOR INTEGRITY IN PUBLIC PROCUREMENT, OECD (2009), <https://www.oecd.org/gov/ethics/48994520.pdf> [<https://perma.cc/4KVM-6AEY>].

65. *See infra* text accompanying notes 421–23. Qatar adopted a new set of procurement regulations. There is no reference to bid challenges in the recent legislation, however. This silence makes ascertaining whether the current bid challenge in Qatar difficult.

otherwise allow a broader range of parties to bring protests. Limitations on valid types of protest claims can counteract the effect of granting standing to a wide class of parties or can restrict narrow standing even further.

5. Which Tribunal or Decision-Making Authority

Finally, the last standing element, the authorities before which challenges can be brought, can also impact the breadth of standing rights in a particular jurisdiction. If standing rights are conferred to a large variety of individuals under a wide set of circumstances but no suitable tribunal exists to hear a particular challenge, the issue of standing can be moot. If only limited tribunal access exists, then the effect that standing rights can have is significantly weakened.

In China, for example, procurement law provides for an agency protest system but neither indicates that such review must be independent, nor indicates any potential for court proceedings.⁶⁶ Similarly, Singapore provides a special tribunal to decide bid challenges, but explicitly prohibits any challenges from being heard in court.⁶⁷ The effectiveness of Singaporean law conferring standing to bidders is therefore arguably undermined by limited access to judicial appeal.⁶⁸

Still, a system affording at least some protest authority is preferable to one that affords none. It is doubtful that Venezuela's review process counts as a viable protest system, for example, in that it allows only bidders to see the procurement file, but not to contest it.⁶⁹ Moreover, several countries such as Iran, North Korea, Syria, Libya, and Cuba do not appear to possess any redress system for public procurement decisions at all.⁷⁰

B. Comparing Countries Based on Their Overall Standing Configurations

Combining the three aspects of standing into a diagram, the following graphic approximates where the individual countries from the survey fall in comparison to one another. While some placement on this graphic is subjective, the diagram taken in whole demonstrates how each standing element can have considerable effects on the overall "grade" of a country's bid protest standing rights.

66. See *infra* text accompanying notes 232–35.

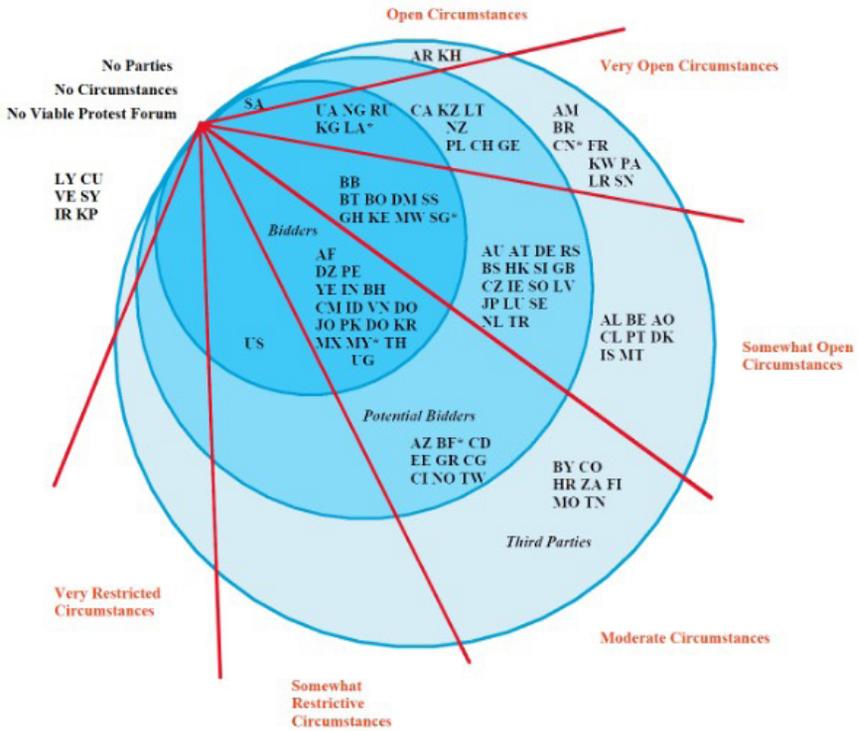
67. See *infra* note 439.

68. *Id.*

69. See *infra* note 490.

70. See *infra* text accompanying notes 499–500.

Figure 4. Comparing How Countries Approach Both Circumstances and Parties



Several popular configurations appear on the spectrum presented in Figure 4. The configuration chosen by most EU states, Japan, and Australia appears to be the middle option on the spectrum.⁷¹ This grouping provides standing to bidders and potential bidders who suffer, or are likely to suffer, harm following a violation.

On the more restrictive side of the spectrum, the configuration adopted by Indonesia, India, and Mexico appears to be the popular choice for a more restrictive system, one in which (1) only bidders who suffer harm may bring a challenge, and (2) likelihood of harm is not sufficient to secure jurisdiction.⁷²

On the more open side of the spectrum, the option chosen by France and Brazil appears to be the more popular broader standing option, in which

71. See *infra* text accompanying notes 123, 159, 319.

72. See *infra* text accompanying notes 305–11, 381–85.

bidders, potential bidders, and third parties may bring claims if there has been a violation, with no apparent prejudice requirement.⁷³

There are outliers, of course. Argentina and Cambodia permit challenges to be raised by any party under any circumstances, even if there is no violation of procurement law or harm caused.⁷⁴ This presents an outer boundary of the spectrum, the broadest possible standing granted in challenging contract awards.⁷⁵ The other extreme is to provide no standing at all—this is typically only found in states that are autocratic or which possess no viable central government, commonly referred to as “failed states.”⁷⁶

Notably, among countries that do offer viable bid protest mechanisms, the United States falls on the restrictive end of the scale. The configuration adopted by the United States is arguably more restrictive than that of India, Indonesia, or Mexico.⁷⁷ In particular, the “substantial chance of award” requirement precludes a significant number of potential protestors from bringing challenges.⁷⁸ In fact, the combined effect of the United States limiting post-award protests to bidders and limiting bidder challenge rights further with the “substantial chance of award” requirement is that, out of all credible protest regimes evaluated, the United States’ protest regime is the most restrictive.

C. The Need to Address All Three Elements While Making Comparisons

The immediate impression from the above graphic is that circumstances and prejudice requirements can have a substantial effect on limiting a country’s standing rights, to the extent that it can substantially counterbalance the classes of parties permitted. In other words, it is not enough to consider one element on its own; instead, a country’s entire configuration must be considered.

The second impression is that comparing the overall standing rights conferred between any two countries is a more difficult task than one might initially expect. For example, while Iceland’s inclusion of third parties is clearly broader than New Zealand’s exclusion of third parties, New Zealand appears to possess a less stringent prejudice requirement than Iceland.⁷⁹ As such, determining which country confers broader standing becomes much more subjective and dependent on whether one thinks that the circumstances element is more influential than the “parties” element. Determining whether the parties or circumstances element is more consequential likely depends on a variety of factors that could vary from country to country. If third parties are being routinely adversely affected by award decisions, then the “parties” element is more influential. On the other hand, if protestors are routinely failing to show that actual harm occurred, then the circumstances element would have a greater effect.

73. See *infra* text accompanying notes 203–06, 275–76.

74. See *infra* text accompanying notes 149–55, 214–18.

75. See *infra* text accompanying note 203–06, 275–76.

76. See *infra* text accompanying notes 499–500.

77. See *infra* text accompanying notes 305–11, 381–85.

78. See *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009).

79. See *infra* text accompanying notes 300–04, 387–89.

The efficacy of various protest fora is not addressed in these figures, limiting the scope of this analysis. China, for example, appears to have few restrictions on the circumstances that can be challenged while allowing bidders and potential bidders to challenge actions, but whether China’s protest forum is adequate to reliably provide either accountability or means for recovery is highly questionable.⁸⁰ It is thus difficult to argue that China confers wider standing rights than many of the countries located in the less “open” areas of the chart given that it likely does not possess a suitable forum for addressing disputes.

With the difficulties of comparisons acknowledged, it is still possible to consider the overall access provided by the various bid protest regimes. Figure 5 demonstrates that a rough ranking can be achieved by cataloguing the openness of circumstances with the different classes of parties allowed. Figure 5 also labels the configurations based on three ranges, indicating systems affording high, moderate, and low access to protest fora.⁸¹

Figure 5. Overall Accessibility Provided by Protest Regimes Matrix

High Access-Low Access Chart: Overall Comparisons

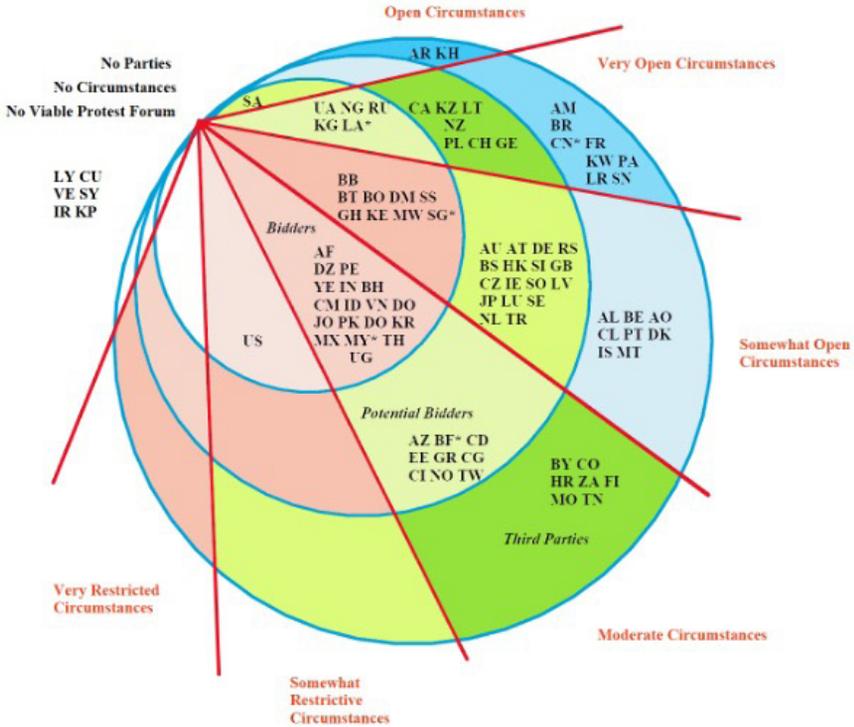
High Access
Moderate Access
Low Access

6 - Open	AR KH		SA
5 - Very Open	AM BR CN* FR KW PA LR SN	CA KZ LT NZ PL CH GE	UA NG RU KG LA*
4 - Somewhat Open	AL BE AO CL PT DK IS MT	AU AT DE RS BS HK SI GB CZ IE SO LV JP LU SE NL TR	BB BT BO DM SS GH KE MW SG*
3 - Moderate	BY CO HR ZA FI MO TN	AZ BF* CD EE GR CG CI NO TW	AF DZ PE YE IN BH CM ID VN DO JO PK DO KR MX MY* TH UG
2 - Somewhat Restrictive			US
1 - Very Restrictive			
	Bidders, Potential Bidders, and Third Parties	Bidders and Potential Bidders	Bidders

80. See *infra* text accompanying notes 232–35.

81. The three ranges are created by weighing circumstances and parties as being approximately the same. Thus, these ranges are largely subjective. Further, each is a simplification of complex elements and, as such, likely exclude relevant information, the most important being the efficacy of the protest forums. Nonetheless, the figures demonstrate that comparing the overall protest regime is possible and underscores how each regime must balance the various elements.

Figure 6. Overall Accessibility Comparison



Figures 5 and 6 show that a significant number of countries provide broad standing rights and a high level of access to protest fora. France and Iceland have provided standing to unions and other third parties in addition to bidders and prospective bidders where the parties are likely to suffer harm.⁸² Armenia, Georgia, and Liberia provide for less restrictive circumstances, in that their laws only stipulate that a violation is required for standing to be proper.⁸³

Some countries appear to make a trade-off. For example, standing in Nigeria extends only to bidders, but bidders can report any violation, regardless of effect.⁸⁴ Further, some countries provide for challenge rights only under very limited overall circumstances. Venezuela, for example, provides an extremely limited mechanism that only applies to small number of contractors, whereas the previously discussed Qatari regulation only affords standing for bidders to challenge government actions concerning contractor classification, not all procurement actions.⁸⁵

82. See *infra* text accompanying notes 275–77, 300–04.

83. See *infra* text accompanying notes 156–58, 280–84, 355–60.

84. See *infra* text accompanying notes 390–91.

85. Another observation of interest concerns the variation in providing definitions within the applicable regulations. Some challenge regulations provide definitions for interpreting terms,

Overall, the different configurations of the three standing elements contained in the protest systems of the observed countries in Part III show multiple ways to balance systemic oversight goals with the goal of efficient transactional adjudication. Moreover, restricting any one element of standing can severely affect a country's overall configuration of standing rights.

D. Weighing Preferences

Having observed numerous possible approaches and trends begs multiple questions: Which combination of standing requirements and limitations is best? Should a bid protest system strive for high, moderate, or low access?

The answer to these questions requires another question: Do protest systems exist to provide efficient transactional remedies, or to force accountability upon the government? Ideally, the answer is "both," as the government can identify internal issues more quickly when private parties can receive compensation for damage caused and suffered when they succeed in protests.

Increased protest forum access for external interested parties provides a fast-tracked and enforceable line of communication from external whistleblowers to the government.⁸⁶ Whereas internal whistleblowing systems can be slow to function and can be subject to internal pressures, external whistleblower systems face no such obstacles.⁸⁷ Further, it is no coincidence that procurement systems often undergo significant changes following corruption scandals.⁸⁸ Private parties whose interests are impacted are generally more incentivized than the entity administering the challenged system to aggressively pursue challenges to their end results.⁸⁹ Therefore, allowing more parties to raise issues provides a check on the government that is often more tangible and direct.⁹⁰ For this reason, both high and moderate access bid protest systems are preferable over low access systems.

A number of countries inherently expect their respective bid protest systems to serve as routes for whistleblowers to raise concerns, as demonstrated where countries do not impose prejudice requirements.⁹¹ For example, the imputation of a whistleblower-type function within a protest system is squarely addressed in Cambodia.⁹²

but others do not. As such, in some cases, standing rights might be limited by case law or interpretations contained outside the regulations. As noted above for example, the United States does not define "interested person" in the regulations providing jurisdiction to the Court of Federal Claims. Nonetheless, "interested person" has been interpreted to apply to only bidders and potential bidders that can meet a limited set of circumstances. See *Am. Fed'n of Gov't Emps. v. United States*, 258 F.3d 1294 (2001).

86. Schooner, *supra* note 32.

87. *Id.*

88. See *infra* note 98.

89. Schooner, *supra* note 32.

90. A similar, but separately identifiable, trend is that protest boards have a tangible, positive impact as demonstrated in Yemen and Kazakhstan, where the strengthening of protest mechanisms, including incorporating sufficient standing requirements, results in more oversight and action. See *infra* text accompanying notes 325–28, text accompanying notes 494–95.

91. See *supra* Part III.

92. See *infra* text accompanying notes 214–18.

Nonetheless, a system that affords the broadest possible standing rights may not be desirable. One possible justification for conferring more restrictive standing rights is that many countries also maintain whistleblower complaint systems that operate adjacent to their protest systems.⁹³ EU Directive 2014/24 implicitly endorses such a configuration as an option, providing that member states should maintain other mechanisms for handling complaints in the event that standing is not provided to non-bidders.⁹⁴ Under such a system, while decisions cannot be directly challenged, some level of redress for complaints is theoretically provided.⁹⁵

Notwithstanding its benefits, proponents of a more limited protest system may argue that broad protest forum access will result in some level of decreased efficiency, with protests resulting in more stays of award and requiring resources to analyze and litigate. Observers of Kazakhstan's procurement challenge mechanisms, for example, have noted that "professional complainants" historically have accounted for a significant portion of challenges raised.⁹⁶ Such parties file frivolous suits with the expectation that the awardee will have to pay the professional complainant to withdraw their complaint.⁹⁷ This example indicates that other factors, such as socioeconomic factors, cultural preferences, and regional trends, can have substantial effects on the effectiveness and use of challenge systems.

While openness can lead to frivolous protests being brought, decreases in transactional efficiency caused by challenges will be offset by successful protests enhancing overall systemic efficiency by uncovering flaws or violations.⁹⁸ An overly restrictive system can mask systemic inefficiencies in the name of preventing inefficiency in any one particular transaction.⁹⁹ To that end, both high access and moderate access systems are both preferable over low access systems.

Balancing all of these considerations, the optimal level of access for a bid protest system seems to be moderate access. A system affording moderate access to protest fora can balance the needs for effective external oversight and efficient transactional remedies while also limiting potentially frivolous litigation.

Ultimately, the existence of so many developed bid challenge systems is a promising indicator of the increasing importance of private parties in holding

93. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, 2014 O.J. (L 94) 89.

94. See *infra* note 131.

95. *Id.*

96. See *infra* text accompanying notes 325–28.

97. *Id.*

98. See Carlos Pimenta & Natalia Rezai, *Public Procurement in Latin America*, INT'L MONETARY FUND (Jan. 2016), <https://www.elibrary.imf.org/view/books/071/22577-9781597822268-en/ch08.xml>. This study by the International Monetary Fund found that procurement systems are often implemented following corruption scandals. Further, it highlights the whistleblowing/accountability aspect rather than remedy aspect and pushes back against idea of efficiency as a reason against widening standing.

99. *Id.*

governments accountable, and much remains to be learned from various systems' successes and failures. Clearly, many countries view bid protest mechanisms as useful accountability and oversight tools. The majority of countries surveyed have adopted laws that confer standing to bidders and potential bidders at minimum, and then only those under a reasonable set of circumstances, thus providing moderate access to protest fora.¹⁰⁰

IV. REVISITING *ACETRIS HEALTH* AND HOW THE UNITED STATES CAN IMPROVE ITS BID PROTEST STANDING RIGHTS TO ACHIEVE A MORE OPTIMAL BALANCE

Shifting focus to the United States, in the post-award challenge context, the United States moderately opens standing by conferring protest standing to bidders.¹⁰¹ Yet for decades, it has restricted standing by requiring bidders to show that they not only have suffered harm or a likelihood of harm, but that they would have won the award were it not for the agency's alleged violation.¹⁰² This combination places the United States in a league of its own, having adopted an overly restrictive approach as compared to other similarly situated countries.

In particular, the pre-*Acetris Health* approach prevents known issues from being adequately addressed by preventing, in many cases, interested parties from pursuing remedies, which thus limits the effectiveness of the overall U.S. bid protest system.¹⁰³ This approach does not represent an optimal balance between efficiency of transactional adjudication with the accountability and whistleblowing functions inherent to bid protest systems.

A. Comparing the United States to the World

Almost all of the countries surveyed in this Article have installed credible bid challenge mechanisms. Of those, almost all countries confer standing under a wider set of circumstances than the United States, approximately sixty of which provide standing to parties other than bidders.¹⁰⁴ This statistic alone is not dispositive and may not automatically trigger a cause for concern—for example, this concern is mitigated by the fact that United States has robust, experienced protest forums.¹⁰⁵ The underlying reasons behind this overall trend toward adopting wider standing should raise concern, however, because they suggest that the United States is denying access to participants who could otherwise benefit from the overall effectiveness of the U.S. protest system.

100. See, e.g., *infra* App. A, *supra* note 39. Of the countries evaluated for this paper, approximately sixty assign standing beyond just bidders only. Further, a slightly higher number of countries can be classified as providing either moderate or high access. See *supra* Figures 5, 6.

101. See *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009).

102. *Id.*

103. See *Acetris Health LLC v. United States*, 949 F.3d 719, 726–27 (Fed. Cir. 2020).

104. See, e.g., *infra* App. A.

105. Kovacic, *supra* note 33, at 462, 467.

The reasoning behind the implementation of wider standing in other countries seems clear: foreign protest institutions consider protests to be an effective form of oversight. Providing legitimate interested parties with access to protest mechanisms is in the best interests of both the affected parties and the government. The parties get a chance to raise issues affecting them, so that these problems can be corrected and so that harms can be redressed; the government receives an additional effective means of oversight and is better able to address more issues in public procurement.

By comparison, the more limited approach in the United States hinders oversight over procurement.¹⁰⁶ A primary reason for the Federal Circuit's *Acetris Health* decision was that the central issue was a recurring one.¹⁰⁷ Were it to be found that Acetris did not possess adequate standing, then this recurring issue would have gone unaddressed once again.

Additionally, the "substantial chance of award" requirement effectively limits standing on any given decision to only a few parties. Parties may not always possess the incentive to engage in a protest.¹⁰⁸ Before *Acetris Health*, to confront pressing issues, judges were essentially forced to wait for the "perfect" plaintiff to raise the issue on protest, despite other parties with tangible harms and actual interest in procurements being willing to pursue litigation over credible issues.¹⁰⁹

This is not to suggest that all issues and violations in the procurement process should be protestable. Still, the United States' enhanced prejudice requirement is too narrow a restriction, impeding the efficient resolution of known issues and legitimate grievances.¹¹⁰

B. Revisiting *Acetris Health* and the Future

In light of *Acetris Health* and the U.S. system's historical restrictiveness, two comparative examples offer reasonable solutions: the U.K.'s approach and the EU approach. The U.K.'s standing regime includes a similar, but less restrictive, prejudice requirement to the United States: claimants must show "sufficient interest" in the procurement.¹¹¹ This requirement functions similarly to the United States, but, significantly, the U.K. has relaxed the requirement.¹¹² In other words, the U.K. can still exclude claimants who arguably lack legitimate claims while permitting broader access for those who do possess legitimate claims.¹¹³ The United States could follow the U.K.'s example in this area and remove or lessen the strict interpretation of the substantial chance requirement.

106. Schooner, *supra* note 32, at 673.

107. David S. Gallacher et al., *What Does It Mean to Manufacture? Federal Circuit's Acetris Decision Fundamentally Alters Trade Agreements Act Compliance*, NAT'L L. REV. (Feb. 28, 2020).

108. One common incentive is that litigation is expensive and time-consuming.

109. See *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003).

110. See *Acetris Health LLC v. United States*, 949 F.3d 719, 727 (Fed. Cir. 2020).

111. See *infra* notes 483, 486, and accompanying text.

112. *Id.*

113. See *infra* note 484.

This change would immediately soften the main barrier to access that currently limits the effectiveness of the United States' protest system.

The baseline standard implemented in the EU is also a promising formulation, permitting protests by bidders and potential bidders who have suffered harm, as opposed to just bidders who have both been harmed and had a substantial chance of award.¹¹⁴ Adopting this approach would effectively involve reinstating (even if only in practice and not in name) the APA definition of interested party.

Adopting either the U.K. or EU approach would bring the United States much more in line with the “causes harm or likely causes harm” prejudice requirement in moderate access countries like Canada, Australia, and Japan.¹¹⁵ This moderate access option does not even necessarily require completely abandoning the “substantial chance” standard; instead, the United States could simply re-interpret the definition of “substantial chance” to fall more in line with the U.K. and its “sufficient interest” requirement.¹¹⁶ Ultimately, while the United States should not necessarily feel compelled to adopt the exact same standing requirements as found in any one country, the United States can and should strive to achieve a workable balance between accountability and remedy, and between oversight and efficiency.

Of additional interest, the broadest reading of *Acetris* might even suggest a future in which third party protestors may exist in the United States, which would make the United States a high access country.¹¹⁷ While perhaps not likely, it is not inconceivable that judges of the Federal Circuit and the Court of Federal Claims might permit other aggrieved parties, such as subcontractors and unions, to raise protest issues if the APA definition returned to prominence.¹¹⁸

As a final note, protests before the GAO are and would be subject to the limited standing conferred by CICA absent amending legislation from Congress, which creates the very real possibility for differing standards for standing between the Court of Federal Claims and the GAO. However, having separate standing thresholds between the GAO and the Court of Federal Claims is acceptable if the trade-off is increased accountability. Ultimately,

114. See *infra* note 127.

115. Claybrook, *supra* note 6; see *infra* text accompanying notes 160 & 319.

116. Senior Courts Act 1981, at 31 (UK), <https://www.legislation.gov.uk/ukpga/1981/54/data.pdf> [<https://perma.cc/FQD8-LU2D>].

117. See generally *Acetris Health LLC v. United States*, 949 F.3d 719, 726 (Fed. Cir. 2020). Admittedly, the Federal Circuit was focused on the potential future disadvantage that *Acetris Health* would suffer in competition, meaning that a reasonable reading of *Acetris Health* might accept a relaxation of the substantial chance of award requirement, but not an expansion of the classes of parties granted standing. As such, third parties may not be covered by *Acetris Health* because third parties do not compete or intend to compete in award competitions. Yet *Acetris Health* also signals a willingness to step away from the existing approach to bid protest standing in the United States. As such, if the Federal Circuit is willing to consider previously non-accepted rationales as a justification for finding that a party is in fact an “interested party,” then it is within the realm of possibility that interested third parties will find standing.

118. Claybrook, *supra* note 6; see *supra* text accompanying notes 15–21.

Acetris Health is a positive example of what wider standing permits—a system in which the court can address recurring problems and can give competitors more opportunities to raise issues.

V. CONCLUSION

The U.S. bid protest system has become an outlier in conferring standing rights among the wave of countries who have modified their procurement challenge systems and enhanced access to standing rights in recent years.¹¹⁹ Considering the objectives behind various challenge systems in place around the world, such as increasing oversight and government responsiveness and giving interest parties a chance to address issues and receive redress, the *Acetris Health* decision is an encouraging development. It potentially signals a future of increased accountability and larger roles for government contractors in United States government procurement protests.

The United States' bid protest system should be adjusted so as to grant more parties standing, to provide greater oversight, and to enhance accountability for government procurement. Taking a cue from the Federal Circuit's decision in *Acetris Health*, the Court of Federal Claims judges should utilize the APA definition of "interested parties" as opposed to the CICA definition, thereby allowing aggrieved parties to bring protests to the Court of Federal Claims. Further, the Federal Circuit should remove the "substantial chance requirement." These actions would make the United States a "moderate access" country at minimum and would better serve the purposes of promoting oversight and transparency while also maintaining an efficient transactional adjudication regime.

119. See *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009); see Law on Public Procurement, Law No. 9643 (Nov. 20, 2006) (last amended 2014) (Alb.).

APPENDIX A: A SURVEY OF BID CHALLENGE
STANDING REQUIREMENTS WORLDWIDE

While by no means inclusive of every country around the world, the following list of ninety-eight procurement challenge systems is intended to incorporate a diverse array of countries based on size, wealth, regional location, and cultural ties.¹²⁰ It incorporates both global giants and small island chains, as well as both prosperous regional leaders and developing states.¹²¹ Each country evaluated is paired with the rating of its overall access.¹²²

1. The European Union

The European Union's rules governing procurement and bid challenges are widely influential.¹²³ EU member states are required to implement EU requirements into their own laws and regulations.¹²⁴ In addition, many non-member states look to EU directives on public procurement as a model on which to base their own procurement rules.¹²⁵ For this reason, the bid protest challenge system of the EU is placed first on this list.

EU Directive 2014/24 includes directions on implementing bid challenge mechanisms.¹²⁶ The EU directive refrains from imposing specific

120. This list was largely made possible due to the stellar research contained within the World Bank's Global Public Procurement Database, whose list is up to date as of 2019. See *Global Public Procurement Database*, WORLD BANK (2022), <https://www.worldbank.org/en/topic/governance/brief/global-public-procurement-database> [<https://perma.cc/9WD2-8GVE>]. The database serves as an excellent starting point for learning more about a particular country's procurement laws. Other sites which were of great help with this list include the ICLC, Law Reviews (8th ed.), and the official website for the European Union. See Jonathan Davey & Amy Gatenby, *The Government Procurement Review*, L. REVS. (May 2021), <https://thelawreviews.co.uk/title/the-government-procurement-review/editors-preface> [<https://perma.cc/Y68W-B4JM>]; *Public Procurement Laws and Regulations: 2020*, ICLG (Jan. 31, 2020) <https://iclg.com/practice-areas/public-procurement-laws-and-regulations> [<https://perma.cc/2WN7-EBZT>]; *Public Procurement*, EUR. COMM'N, https://ec.europa.eu/growth/single-market/public-procurement_en [<https://perma.cc/6NV8-ALZZ>] (last visited Dec. 14, 2020).

121. This list makes use of a mixture of both official and unofficial translations made of laws and regulations, the vast majority of which were directly sourced from the websites of the relevant procurement authorities for the different countries contained in this list. For those wishing to locate the website of a particular country's respective procurement agency, Ministry of Finance, or general government website containing that country's laws, the World Bank's Global Procurement Database is an excellent starting point. WORLD BANK, GLOBAL PROCUREMENT DATABASE, <https://www.globalpublicprocurementdata.org/gppd> (last visited Nov. 30, 2021) [<https://perma.cc/FTG8-XD2A>].

122. See *id.* Be advised that each rating is meant to provide a useful starting point for comparing countries' bid protest regimes—each rating is to a large extent subjective and represents a simplification of complex factors.

123. See GOVERNMENT PROCUREMENT LAW AND POLICY: EUROPEAN UNION, LIBR. OF CONG. (July 24, 2020), <https://www.loc.gov/item/2013417417> [<https://perma.cc/LK9B-JGQZ>]; *Public Procurement*, EUR. COMM'N, https://ec.europa.eu/growth/single-market/public-procurement_en [<https://perma.cc/3MS6-27G3>] (last visited Dec. 7, 2020); Bill Gilliam et al., *The Government Procurement Review: European Union*, L. REVS. (June 2020), <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227010/european-union> [<https://perma.cc/Y68W-B4JM>].

124. Bill Gilliam et al., *supra* note 123.

125. *Id.*

126. *Id.*

requirements of member states for the governance of bid challenge standing rights. Although the directive requires that mechanisms be in place to monitor procurement systems for potential issues and improvements, the directive states that member states do not have to grant challenge standing to all monitors.¹²⁷ Instead, Directive 2014/24/EU essentially sets a minimum requirement to which member states are to adhere.¹²⁸

Broadly speaking, in the EU system, standing is conferred to “economic operators,” a term that includes a wide range of bidders and potential bidders.¹²⁹ Although this option is the typical arrangement adopted by most member states, some member states have chosen to confer standing to a wider class of entities to include public entities and industry associations like unions.¹³⁰ Given that even EU member states vary in the degree to which they afford standing, in addition to describing the EU baseline¹³¹ this list separately includes multiple member states.¹³²

2. Afghanistan (prior to the Taliban takeover in late 2021) (Low Access)

Afghanistan’s official translation of its Procurement Law of 2017 includes “The Rights for Objection and Review” under Article 50 of the law.¹³³ Under

127. See Directive 2014/24, of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC 2014/24/EU, 2014 O.J. (L 94/65) 1, 121, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024> [<https://perma.cc/DPB4-FEHY>].

128. *Id.*

129. SUPPORT FOR IMPROVEMENT IN GOVERNANCE & MGMT. PROGRAMME, PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES, at F-6 (2010).

130. For example, France has chosen to confer standing to unions.

131. Paragraph 122 of the introduction to Directive 2014/24/EU states:

“Directive 89/665/EEC provides for certain review procedures to be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement of Union law in the field of public procurement or national rules transposing that law. Those review procedures should not be affected by this Directive. However, citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to Directive 89/665/EEC do nevertheless have a legitimate interest, as taxpayers, in sound procurement procedures. They should therefore be given a possibility, otherwise than through the review system pursuant to Directive 89/665/EEC and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of this Directive to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities.”

See Council Directive 89/665/EEC, 1989 O.J. (L 395).

132. See *supra* notes 120–23 and accompanying text. EU member states included in this list contain a designation of “EU” next to their name. Further, prospective member states and EU affiliates included in this list will generally be noted within the profile for said country.

133. See Procurement Law [Afg.], Official Gazette no.1223 (Sept. 17, 2016) (English translation provided by Islamic Republic of Afghanistan, Administrative Office of the President National Procurement Authority. When discrepancies arise between the English translation and the Dari and Pashto version, the Dari and Pashto law rules.); see also *Procurement, AFGHANISTAN*

Article 50, standing is conveyed to bidders who experience loss as a result of a violation by contracting authorities.¹³⁴ Further, protests are brought before the Administrative Review Committee, whose decisions are final.¹³⁵

As noted in Part II of this Article, a state's overall standing consists of a combination of various factors, including which classes of parties may protest and under which circumstances said parties may protest. When compared to rest of the countries within this list, Afghanistan's mixture of standing rights presents a fairly common (and moderately restrictive) combination of standing rights: limiting standing to circumstances of actual harm caused to actual bidders.

3. Albania (High Access)

Albania's bid protest standing requirements are found in its "Law on Public Procurement."¹³⁶ This law was originally passed on November 20, 2006, but has since been amended multiple times, most recently by Law no 182/2014 in 2014.¹³⁷ Chapter VII, entitled "Administrative Review Procedures," contains Article 63, which concerns the "rights of interested persons."¹³⁸ Paragraph 1 of Article 62 states that "[a]ny person having or having had an interest in a procurement procedure and who has been or risks being harmed by a decision made by a CA, which infringes this law, may challenge such decision."¹³⁹

Albania's overall standing rights presents another common (and moderately open) combination of factors: granting standing to interested parties, not just bidders, and not requiring actual harm, but rather permitting challenges where the party is merely at risk of harm.¹⁴⁰

Although Albania is not a member state of the EU, its law on procurement is consistent with the EU regulations. The law adopts the EU formulation of permitting challenges by interested parties who suffer or are likely to suffer

GOVERNMENT ELECTRONIC AND OPEN PROCUREMENT SYSTEM, https://events.development.asia/system/files/materials/2020/11/202011-afghanistan-government-electronic-and-open-procurement-system-ageops_0.pdf (last visited Dec. 14, 2020) [<https://perma.cc/5H7B-H8AD>]; *Global Public Procurement Database: Afghanistan*, WORLD BANK, https://www.globalpublicprocurementdata.org/gppd/country_profile/AF [<https://perma.cc/6RNJ-QDCN>] (last visited Dec. 14, 2020).

134. Procurement Law [Afghanistan], Official Gazette no. 1223 at 26.

135. *Id.*

136. See Law on Public Procurement, L. No. 9643 (Nov. 20, 2006) (as amended by L. No. 9800, dated 10.09.2007, L. No. 9855, dated 26.12.2007, L. No. 10170, dated 22.10.2009, L. No. 10 309, dated 22.07.2010, L. No. 22/2012, L. No. 131/2012 and L. No. 182/2014), ch. VII, art. 63 (Alb.), <http://www.app.gov.al/legislation/public-procurement/law> (last visited Nov. 27, 2021) [hereinafter, Law on Public Procurement] [<https://perma.cc/3JJT-4QST>]; see also AGJENCIA E PROKURIMIT PUBLIK [Public Procurement Agency], <http://www.app.gov.al/home> (last visited Dec. 14, 2020) [<https://perma.cc/2PBQ-YV32>]; *Global Public Procurement Database: Albania*, WORLD BANK, https://www.globalpublicprocurementdata.org/gppd/country_profile/AL [<https://perma.cc/8GMF-M84Q>] (last visited Dec. 14, 2020); AGJENCIA E PROKURIMIT PUBLIK [Public Procurement Agency], ANNUAL REPORT 2020, <http://www.app.gov.al/about-us/annual-reports> [<https://perma.cc/9G4L-2GVR>].

137. Law on Public Procurement, *supra* note 136.

138. *Id.* art. 63.

139. *Id.*

140. *Id.*

harm and uses the term “economic operator” in Article 62 Paragraph 1.1, which, as stated above, is a term found in the EU regulations.¹⁴¹ Albania is in accession talks with the EU as of March 2020.¹⁴²

4. Algeria (Low Access)

Algerian bid challenge rights and procedures can be found in the Official Journal of the Algerian Republic No. 50 of September 20, 2015.¹⁴³ Section 6 of Chapter 3 concerns appeals. Article 82 provides that, in addition to the rights of appeal provided by existing legislation, bidders may challenge provisional awards of contracts to the Public Procurement Committee.¹⁴⁴ This provision suggests that bid protest standing rights in Algeria are comparable to those in Afghanistan.

5. Angola (High Access)

The “Public Procurement Law” of Angola of June 2016 contains regulations covering procurement challenge procedures.¹⁴⁵ Chapter IV, Article 15 states, “Any acts practiced by the public contracting entity are susceptible to administrative impugnation in the framework of the procedures of this Law that may violate the interests legally protected of the individuals.”¹⁴⁶ Article 17 provides further that “[t]he interested party shall explain in the claim or petition for presentation of hierarchical appeal or also inappropriate hierarchical appeal, all the grounds for impugnation and it may add the documents it deems required.”¹⁴⁷ As such, in Angola, challenge standing is conferred to “interested parties” whose legally protected interests have or may have been violated.¹⁴⁸ Angola, thus, provides standing on the same level as Albania and the EU.

6. Argentina (High Access)

The relevant procurement law in Argentina is the General Regime for Public Procurement (GRPP).¹⁴⁹ Decree 1030/16 of September 15, 2016, shaped the GRPP as it currently stands.¹⁵⁰ The GRPP provides a procedure for challenging non-binding evaluation commission decisions but does not provide a procedure for challenging the actual award.¹⁵¹ Instead, awards may be challenged

141. *Id.*

142. Albania: Current Situation, 2014–EU Candidate Country, Eur. Council, <https://www.consilium.europa.eu/en/policies/enlargement/albania> [<https://perma.cc/SUQ5-3V7W>] (last visited Dec. 14, 2020).

143. *See* Official Journal of the Algerian Republic No. 50, ch. 3, § 6 (Sept. 20, 2015) (Alg.).

144. *Id.*

145. *See* Public Procurement Law, Law No. 9/16, ch. IV (June 2016) (Angl.).

146. *Id.* art. 15.

147. *Id.* art. 17.

148. *Id.* art. 19.

149. *See* Decree 1030/16 (Sept. 15, 2016) (Arg.).

150. *Id.*

151. *Id.*

under the Administrative Procedures Act, as authorized by Law No. 19,549.¹⁵² Challenges may be raised by unsuccessful bidders either before the procuring entity or the judiciary.¹⁵³

Both legal and non-legal circumstances can be challenged.¹⁵⁴ Legal claims can include violations in procedure and incorrect evaluation of a tenderer, whereas non-legal claims can center on comparisons between the selected vendor and other vendors (e.g., arguing that the protestor has a better reputation or that protestor's goods are better quality than the awardee).¹⁵⁵ In permitting protests against non-legal claims, Argentina confers one of the widest sets of circumstances. This feature, coupled with providing challenge rights to bidders or other aggrieved persons, makes Argentina's overall conferral of standing rights one of the broadest.

7. Armenia (High Access)

The Law of the Republic of Armenia on Procurement, adopted on December 16, 2016, includes challenge rights and procedures.¹⁵⁶ Article 46 "Right to Appeal" states:

1. Every person shall have the right to appeal against the actions (inaction) and decisions of the contracting authority, the evaluation commission and the person examining procurement-related appeals.
2. Relations pertaining to the procurement, including the relations with regard to examination of appeals, shall not be regarded as administrative relations and shall be regulated by the legislation of the Republic of Armenia regulating civil law relations.
3. According to this Law, every person shall have the right to: (1) appeal against the actions (inaction) and decisions of the contracting authority and the evaluation commission to the person examining procurement-related appeals, before conclusion of the contract; (2) appeal against the actions (inaction) and decisions of the person examining procurement-related appeals, the contracting authority and the evaluation commission through judicial procedure.
4. Every person interested in concluding a specific transaction and having suffered damages caused as a result of an action or inaction of the contracting authority, evaluation commission or the person examining procurement-related appeals shall have the right to claim compensation for damages through judicial procedure.¹⁵⁷

152. See Ley de Procedimiento Administrativo, Ley No 19.549 [Law on Administrative Procedure, Law No. 19,549] (1972) (Arg.).

153. See *supra* note 149.

154. See Juan Antonio Stupenengo & Paula Omodeo, *The Government Procurement Review: Argentina*, L. REVS. (5th ed. May 2017).

155. *Id.*

156. See Law of the Republic of Armenia on Procurement, art. 46 (Dec. 16, 2016); see also *Assessing Public Procurement Practice in Armenia—2017*, INST. FOR DEV. FREEDOM INFO. (2017), www.tpp-rating.org [<https://perma.cc/9VFL-N8NH>]; *Implementation Assessment of the Armenian Public Procurement Legislation*, FREEDOM INFO. CTR. ARM. (2017).

157. *Id.*

Armenia provides one of the of the widest applications of standing for challenging procurements, in that “every person” is given the right to appeal decisions and indecisions related to a procurement.¹⁵⁸

8. Australia (Moderate Access)

Bid challenge rights and procedures in Australia are governed by the “Government Procurement (Judicial Review) Act 2018.”¹⁵⁹ The Act provides that Australian courts can grant injunctions on claims filed by “suppliers.”¹⁶⁰ Part 1 states that a supplier is “(a) a person who supplies, or could supply, goods or services; or (b) a partnership (or other group) of 2 or more persons that supplies, or could supply, goods or services.”¹⁶¹ Part 4 contains a provision for complaints made by suppliers.¹⁶² Suppliers “may make a written complaint about the conduct to the accountable authority of the entity” if either the government procuring entity has engaged in, is engaging in, or proposes to engage in, conduct in violation of the relevant procurement law, or if “the interests of the supplier are affected by the conduct.”¹⁶³

9. Austria (EU—Moderate Access)

The Federal Public Procurement Act of 2018 governs procurement in Austria.¹⁶⁴ The Austrian regulations align with EU directives, and as such standing is granted to “operators.”¹⁶⁵ Operators are defined as “legal entities such as natural or legal persons, public institutions or associations of these persons or institutions, registered partnerships or working and bidding groups who offer the execution of construction works, the delivery of goods or the rendering of services on the market.”¹⁶⁶ Under Section 342, operators can apply for review in the event that the operator asserts an interest in the conclusion of the contract and the illegal action of the procuring entity has caused

158. *Id.*

159. See Government Procurement (Judicial Review) Act 2018, No. 129 (Austl.); see also Commonwealth Procurement Rules, AUSTRAL. GOV. DEP’T OF FIN. (Dec. 14, 2020) <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules> [https://perma.cc/YB45-MG3D]. For a general sense of Australia’s procurement system, visit Geoffrey Wood et al., *The Government Procurement Review: Australia*, L. REVS. (May 27, 2021), <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227011/australia> [https://perma.cc/2K2J-PH9G].

160. Wood et al., *supra* note 159.

161. See Government Procurement (Judicial Review) Act 2018, No. 129 (Austl.).

162. *Id.*

163. *Id.*

164. BUNDESVERGABEGESETZ 2018 [FEDERAL PUBLIC PROCUREMENT ACT OF 2018] (Austria); see also AUSTRIA: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2020, ICLG (Jan. 31, 2020), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/austria> [https://perma.cc/333M-TUC6]; Philipp J. Marboe, *The Government Procurement Review: Austria*, L. REVS. (June 2020), <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227013/austria> [https://perma.cc/W59F-4UBN].

165. *Id.* This term is loosely translated from “*Unternehmer*” which could be read as either “operator” or “entrepreneur.”

166. BUNDESVERGABEGESETZ 2018 [FEDERAL PUBLIC PROCUREMENT ACT OF 2018] § 2, ¶ 38 (Austria).

or threatens to cause the operator damage.¹⁶⁷ Austria permits challenges by bidders and potential bidders, and therefore, grants moderately open standing rights.

10. Azerbaijan (Moderate Access)

The Law of the Republic of Azerbaijan on Government Procurements addresses bid challenge rights in Article 55.¹⁶⁸ Suppliers, who are defined as potential or actual parties to the procurement contract with the procuring entity, possess the right to file a complaint, provided they claim to be subject to damages because of “failure of the procuring entity to fulfill its duties defined by the law.”¹⁶⁹ Complaints can be filed administratively or through the courts.¹⁷⁰ Azerbaijan presents a good example of standing rights that fall in between Afghanistan and the EU countries, in that it confers standing to bidders and potential bidders, but not interested parties.¹⁷¹ As such, Azerbaijan grants moderate standing rights when compared to other countries.

11. Bahamas (Moderate Access)

The Public Procurement Bill of 2017 for the Bahamas includes bid challenge rights.¹⁷² Article 64, “Complaints,” states that “a potential or actual bidder who claims to have suffered, or to be likely to suffer, loss or injury due to a breach of duty imposed on a procuring entity by this Act may at any stage apply by way of complaint to the procuring entity for a review of the procurement proceedings.”¹⁷³ Unsatisfied complainants can appeal to the Procurement Review Tribunal, per Article 65.¹⁷⁴

12. Bahrain (Low Access)

Chapter Five of Bahrain’s procurement law addresses “Reconsideration and Complaints” concerning government contracts.¹⁷⁵ Article 56 states that any supplier or contractor may claim that it has suffered or may suffer damage or loss.¹⁷⁶ Complaints can be appealed, per Articles 57 and 58.¹⁷⁷ Supplier and contractor are not defined further in the law.

167. *Id.* § 342.

168. See Law of the Republic of Azerbaijan on Government Procurements, No. 245-IIQ, Art. 55 (Dec. 27, 2001) (Azer.), https://admin.etender.gov.az/email/7-Law_revised [<https://perma.cc/Z4BP-3836>].

169. *Id.*

170. *Id.* arts. 55–57, 60.

171. Azerbaijan also seems to require actual harm suffered, not likelihood of harm. See *id.* arts. 55, 57.

172. See Public Procurement Act, 2017 (Bah.).

173. *Id.*, pt. 5, § 64, at 47.

174. *Id.*, pt. 5, § 66, at 48.

175. See Legislative Decree No.36 of 2002: With Respect to Regulating Government Tenders and Purchases, No. 56, ch. 5 (2002) (Bahr.), <http://www.tenderboard.gov.bh/Laws.aspx?cms=iQRpheapYtj6pyXUGiNqpcubnRdkps> [<https://perma.cc/TVT4-L8XH>].

176. *Id.* art. 56.

177. *Id.* arts. 57–58.

13. Barbados (Low Access)

Bid challenge rights in Barbados are covered by the Bill of February 14, 2018.¹⁷⁸ Part VII, entitled “Challenge Proceedings,” includes several articles on challenge proceedings.¹⁷⁹ The relevant articles provide standing to suppliers, who can challenge and appeal violations of the Public Procurement Act that cause or are likely to cause injury to the supplier.¹⁸⁰ A “supplier” is defined as “a provider of goods, works or services” under Part I.¹⁸¹ Whether potential suppliers are also included is unclear.

14. Belarus (Moderate Access)

Article 51 of Belarusian procurement law gives standing to a participant or other legal or natural person, including an individual operator, to file a challenge of a decision violating the rights and legitimate interests of participants, other legal entities, or individuals.¹⁸² Challenge proceedings can be initially brought to the authorized state body for public procurement and can be further appealed in court.¹⁸³

15. Belgium (EU—High Access)

As an EU member state, Belgian procurement is subject to EU directives.¹⁸⁴ Challenge procedures concerning Belgian government procurement are not incorporated in its law of June 17, 2016, governing general public procurement.¹⁸⁵ Instead, challenge rights and proceedings are incorporated in the law

178. See Public Procurement Act [CAP. 153] Barbados Gazette No. 24, 19 Mar. 2018, at 329.

179. See *id.* pt. VII.

180. See *id.* pt. VII, art. 74 (Barb.) (Article 74 states that “[a] supplier may, upon payment of the prescribed fee, appeal to the Tribunal against a decision: (a) to refuse to register him or renew his registration; (b) that he is ineligible to participate in public procurement; (c) to exclude him from participation in public procurement; (d) or to remove his name from the Suppliers Register.”; *id.* art. 76; Article 76 states that “[a] supplier who participates in procurement proceedings and alleges that he has suffered or is likely to suffer loss or injury because a decision or action of a procuring entity or tenders committee in relation to the proceedings does not comply with this Act may, upon payment of such fee as may be prescribed, apply to the entity or committee to reconsider the decision or action. . . .”).

181. *Id.* pt. I, art. 2 (Barb.).

182. See *Zakon Respubliki Belarus [Law of the Republic of Belarus], Natsional'nyy Pravo-voyy Internet-portal Respubliki Belarus' [National Legal Internet Portal of the Republic of Belarus]* 2012, No. 419-3, art. 52 (Belr.), pravo.by/document/?guid=3871&p0=H11200419 [<https://perma.cc/VTZ6-STT8>].

183. *Id.* art. 56 (Belr.).

184. See also DAVID D'HOOGHE & LIESELOTTE SCHELLEKENS, INTERNATIONAL COMPARATIVE LEGAL GUIDES: PUBLIC PROCUREMENT 2020 18 (Glob. Legal Grp. ed., 12th ed. 2020), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/belgium> [<https://perma.cc/QE3X-P4QK>]; Frank Judo & Klaas Goethals, *The Government Procurement Review: Belgium*, L. REVS., <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227014/belgium>.

185. See *Loi du 17 juin 2016 relative aux marches publics [Law of 17 June 2016 on Public Procurement]* (Belg.), M.B., June 17, 2016 (last amended by Law of Apr. 7, 2019).

of June 17, 2013.¹⁸⁶ Section 5 of the June 17, 2013, law concerns recovery procedures.¹⁸⁷

Any person who has an interest in the procurement award, or who suffers or may suffer damage because of a violation of Belgian or EU public procurement law, can challenge the decisions of a procuring entity.¹⁸⁸ Parties can bring challenges to courts or the administrative law division of the Council of State.¹⁸⁹ This law is potentially broader than other previous EU states on this list, in that “interested parties” could include third parties, not just economic operators.

16. Bermuda (Unclear)

In Bermuda, government procurement and government contracts are governed by the July 2, 2018, Code of Practice for Project Management and Procurement.¹⁹⁰ Section 4 states, “All decisions, documents, quotations, tenders and contracts made, produced, submitted or executed under this Code may be subject to inspection and monitoring by the Financial Secretary or the Accountant General, the Director, the Director of Internal Audit, and the Auditor General.”¹⁹¹

In addition, Section 29 pertains to “Awarding Contracts,” and Section 41 addresses “Complaints and Disputes.”¹⁹² Section 41 states that “[c]omplaints, including protected disclosures, regarding any aspect of the procurement process must be reported to the Director.”¹⁹³ Unsatisfied complainants have the right to have the matter adjudicated by the Supreme Court of Bermuda, per Section 6(8) of the Constitution of Bermuda.¹⁹⁴ Section 41 also provides that unsatisfied complainants must escalate matters to the Permanent Secretary responsible for the Office for Project Management and Procurement or another public officer as determined by the Secretary to the Cabinet.¹⁹⁵ However, which parties may become complainants is not specified.

17. Bhutan (Low Access)

Bhutan’s 2009 Procurement Rules & Regulations, last revised in July 2015, govern procurement challenge rights and procedures.¹⁹⁶ Chapter VIII,

186. See *Loi relative à la motivation, à l’information et aux voies de recours en matière de marchés publics, de certains marchés de travaux, de fournitures et de services et de concessions* [Law Relating to Motivation, Information and Remedies Regarding Public Contracts, Certain Works Contracts, Supplies and Services and Concessions] (Belg.), M.B., June 17, 2013, § 5, arts. 14, 24–27 (last amended by Royal Decree of Dec. 20, 2019).

187. *Id.*

188. *Id.*

189. *Id.*

190. See Code of Practice for Project Management and Procurement (July 2, 2018) (Berm.); see also Office of Project Management and Procurement, GOV’T OF BERM., <https://www.gov.bm/departement/office-project-management-and-procurement> [<https://perma.cc/AV6N-4J72>] (last visited Dec. 14, 2020).

191. Code of Practice for Project Management and Procurement § 4 (July 2, 2018) (Berm.).

192. See *id.* §§ 29, 41.

193. *Id.* § 41.

194. See *id.*

195. *Id.*

196. See Procurement Rules and Regulations, (2009) (Bhutan) (last revised July 2015) (“In exercise of the power granted by section 104 of the Public Finance Act of Bhutan 2007, the

“Institutional Arrangements.” Section 8.1, “Procurement Grievance Mechanism,” states:

8.1.1 The obligations of this Procurement Rules & Regulations and imposed on Procuring Agencies are duties owed to suppliers, contractors and service providers.

8.1.2 Any supplier, contractor or service provider who has or is likely to suffer, loss or injury resulting from an alleged breach of such duty, may make a complaint or seek review in accordance with this section, provided that the complaint or review procedure shall be brought promptly and in any event within the prescribed time.

8.1.3 A supplier, contractor or service provider may, in the event of a perceived breach of a duty imposed upon a Procuring Agency in respect of a specific procurement procedure, submit a written complaint to the head of the procuring agency responsible for such procedure promptly and in any event within 10 days of the letter of intent to award the contract.¹⁹⁷

Suppliers, contractors or service providers may all have standing to bring a challenge.¹⁹⁸ Per Section 1.1.3 Definitions, Paragraph 36, “[s]upplier” is defined as “an individual or a legal entity entering into a contract for the supply of goods or services.”¹⁹⁹

18. Bolivia (Low Access)

Chapter VII of Supreme Decree 181 dated June 28, 2009, concerns challenges and appeals.²⁰⁰ Chapter VII, Article 90, indicates that bidders may challenge resolutions issues, provided that the bidder suffers harm or may suffer harm.²⁰¹ Bolivia, however, does not have a set dispute resolution mechanism, and is not a signatory to the World Trade Organization’s (WTO) Agreement on Government Procurement (GPA).²⁰²

19. Brazil (High Access)

Procurement Law No. 8,666 of June 21, 1993, includes challenge rights for bidders in Brazil.²⁰³ Article 41 provides that any citizen may challenge breaches

Ministry of Finance hereby frames the Rules and Regulations for Procurement to be implemented by Government Agencies.”)

197. See Procurement Rules and Regulations, ch. 8, § 8 (2009) (Bhutan) (last revised July 2015).

198. See *id.*

199. See *id.* ch. 1, § 1 (2009).

200. See Decreto Supremo No. 0181 [Supreme Decree No. 181], ch. VII (June. 28, 2009) (Bol.); see also SICOES, <https://www.sicoes.gob.bo/portal/normativa/decretos.php> [https://perma.cc/M6Z2-DFES] (last visited Dec. 8, 2020).

201. See Decreto Supremo No. 0181 [Supreme Decree No. 181], ch. VII (Bol.) (June 28, 2009).

202. See *Bolivia-Selling to the Government*, EXPORT.GOV (July 12, 2019), <https://www.export.gov/apex/article?id=Bolivia-Selling-to-the-Government> [https://perma.cc/4727-L62D]; *Plurinational State of Bolivia and the WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/bolivia_e.htm [https://perma.cc/VBV3-6ZTN] (last visited Nov. 28, 2021); Jorge Luis Inchauste & Alejandra Guevara, *Public Procurement in Bolivia*, LEXOLOGY (Apr. 23, 2019), <https://www.lexology.com/library/detail.aspx?g=04a4b75c-1ed7-4061-bb6d-a9df83b20bad> [https://perma.cc/JK4Q-CYLE].

203. See Procurement Law No. 8,666, art. 41 (June 21, 1993) (Brazil.); see also Teresa Arruda Alvim & David Pereira Cardoso, *The Government Procurement Review: Brazil*, L. REVS. (May

of the procurement and contracting rules contained in the Procurement Law.²⁰⁴ Similarly, Article 113 provides that any bidders, persons, or entities may challenge violations of the Procurement Law before the Court of Auditors or the agency.²⁰⁵ Other articles connected to bid challenges include Article 101 and Article 109, which address judicial procedure for reporting criminal action and administrative resources for bids, respectively.²⁰⁶

20. Burkina Faso (Moderate Access)

Law 039-2016 concerns the general regulation of public contracting in Burkina Faso.²⁰⁷ The law defines a “Candidate” as a natural or legal person who possesses an interest in participating, or who is retained by a contracting authority to participate, in a procurement or public service delegation procedure.²⁰⁸ Redress procedures concerning bid challenges are governed under Title IV.²⁰⁹ Article 38 states that candidates, bidders, and awardees may lodge a preliminary appeal before the contracting authority against decisions grieving the candidate, bidder, or awardee during the competitive bidding procedures.²¹⁰ Under Article 39, candidates, bidders, awardees, licensees, delegates, and private partners can refer matters to the “non-legal” appeal.²¹¹

Further, per Article 40, decisions of the non-judicial appeals body during the solicitation phases are binding.²¹² Chapter 2 provides for Judicial Appeal, but, as stipulated in Articles 40 and 43, this option only exists for performance disputes, and not for procurement award disputes.²¹³ In spite of the binding nature of the non-judicial appeal option, its exclusively non-judicial nature raises a concern over the efficacy of Burkina Faso’s protest system.

21. Cambodia (High Access)

The Cambodia Procurement Manual includes reference to a complaint handling mechanism under Section 4.6.²¹⁴ Section 4.6.1 outlines three distinct types of project issues:

27, 2021), <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227020/brazil>; *Ministero da Economia*, Gov.BR, <https://www.gov.br/fazenda/pt-br> (last visited Dec. 2, 2020).

204. See Procurement Law No. 8,666, art. 41 (June 21, 1993) (Braz.).

205. See *id.* art. 113.

206. See *id.* arts. 101, 109.

207. See *Portant Reglementation Generale de la Commande Publique Loi No. 039-2016/AN* [General Regulation of the Public Order], art. 1 (Dec. 2, 2016) (Burk. Faso).

208. *Id.* art. 2.

209. *Id.* art. 37.

210. *Id.* art. 38.

211. *Id.* art. 39.

212. *Id.* art. 40.

213. *Id.* arts. 40, 43.

214. See Sub-Decree on Promulgating the Updated Standard Procedures for Implementing All Externally Financed Projects/Programs, No. 74 ANK. BK, § 4.6 (June 8, 2012) (Cambodia), <https://www.pfm.gov.kh/document/publication/2.Procurement%20Manual%20Volumn%20I.pdf>; see also Ministry of Economy & Finance, <https://www.mef.gov.kh> [<https://perma.cc/J887-9HEL>].

(a) complaints concerning bid protest from aggrieved contractors, suppliers, service providers and consultants, which are addressed in this Section 4.6 of the Manual, (b) performance disputes, which are governed by the General Conditions of Contract (GCC) and Special Conditions of Contract (SCC/PCC), and, (c) non procurement related complaints from any parties, which are addressed in the SOP.²¹⁵

More directly pertaining to standing for bid challenges, Section 4.6.7 states:

Concerning bid protests, from time to time, with and without justification bidders, suppliers, contractors, service providers and consultants may choose to lodge a complaint concerning some aspect of the contract award process. In the event the contract has been awarded and a contractual relationship exists between the parties, there are established dispute mechanisms in the GCC that shall be followed, up to and including judicial review.²¹⁶

The manual also makes it clear that whistleblowing is a central focus of the Cambodian complaint handling process, as demonstrated by Section 4.6.3 which stipulates that the confidentiality of any complainant is to be ensured.²¹⁷ As such, Section 4.6.5 states, “The complainant need not be personally aggrieved or impacted, and may be acting merely in accordance with a sense of civic duty, such as an NGO or private citizen, in bringing an occurrence to the attention of project authorities.”²¹⁸ This is one of the broadest mandates provided concerning standing rights.

22. Cameroon (Low Access)

Chapters IV and V of Decree 2018/366, dated June 20, 2018, contain articles pertaining to complaint review.²¹⁹ Chapter I, Section I concerns Litigation during the Award Phase.²²⁰ Sub-section I concerns Petitions by Candidates and Bidders.²²¹ Article 170 states that any candidate or bidder who is aggrieved by public award procedures may file a petition.²²² Depending upon the stage of the procurement, complaints are to be filed with either the procurement-issuing entity or the Petitions Review Committee.²²³

23. Canada (Moderate Access)

Generally, bidders and potential bidders in federal level procurements subject to trade agreements, including the GPA to which Canada is a party, possess

215. Sub-Decree on Promulgating the Updated Standard Procedures for Implementing All Externally Financed Project/Programs, § 4.6.

216. *Id.*

217. *Id.*

218. *Id.*

219. See Decree No. 2018/366 of 20 June 2018, pt. II, chs. I, IV–V (Cameroon); see also *Ministère des Marchés Publics* [Ministry of Public Contracts], <https://minmap.cm> [<https://perma.cc/9BVF-F96Y>] (last visited Nov. 30, 2021); see also Website for Agence de Régulation des Marchés Publics [Public Contracts Procurement Agency], <https://www.armp.cm/> [<https://perma.cc/3L4A-9MNV>] (last visited Dec. 2019).

220. Decree No. 2018/366 of 20 June 2018, Part V, ch. I (Cameroon).

221. *Id.*

222. *Id.* art. 170 (Cameroon). Per Articles 171–73, what the protest is permitted to address depends on strict timing requirements; this restriction means that certain aspects cannot be protested once the bid process has progressed beyond certain stages. *Id.* arts. 171–173.

223. *Id.* arts. 171–173.

standing to bring bid challenges before the Canadian International Trade Tribunal (CITT).²²⁴ Per Section 1.35 of the Supply Manual:

CITT is authorized to receive complaints pertaining to any aspect of the procurement process up to and including contract award, and also to conduct inquiries and make determinations. In dealing with a complaint, CITT must determine whether the government institution responsible for the procurement under review has complied with the requirements of the trade agreements and such other procedural requirements, as prescribed in the Canadian International Trade Tribunal Procurement Inquiry Regulations.²²⁵

Broadly speaking, bidders and potential bidders have other options in addition to the CITT. For example, suppliers can pursue litigation in courts under Canadian common law.²²⁶ Ultimately, the overall standing granted by Canada appears to be moderate, in that those bidders and potential bidders, but not other interested parties, may file a protest in the event that the procuring entity commits a violation.

24. Chile (High Access)

Chapter V of Law 19886 contains challenge rights.²²⁷ Article 22 sets the parameters for the Court of Public Procurement.²²⁸ Article 24 states that a challenge action may be filed against any arbitrary or illegal acts (or omissions) made by public procuring entities.²²⁹ Any natural or legal person who has an interest currently in the respective administrative contracting procedure may file such a challenge.²³⁰ Such action is taken before the Court of Public Procurement.²³¹ The extent of Chilean standing therefore seems comparable to the EU standard.

25. China (High Access)

China has two laws concerning procurement, the Government Procurement Law of 2002 and the Bidding Law of the People's Republic of China from 2000.²³² Bidders and other interested parties have the right to raise objections

224. See SOR 87-402, Supply Manual, § 1-35, (Can.), <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/1/35> [<https://perma.cc/QAN2-TXV7>] (last visited Dec. 12, 2020); see also CANADA: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2020, ICLG (Jan. 31, 2020), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/canada> [<https://perma.cc/J9DF-96B3>]; see also Theo Ling et al., *The Government Procurement Review: Canada*, L. REVS. (June 2020), <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227016/canada> [<https://perma.cc/VRH4-NLCB>].

225. See SOR 87-402, Supply Manual, § 1-35(b).

226. See Ling et al., *supra* note 224.

227. See Law No. 19886, art. 22, 11 julio 2003 (Chile); see also Chile Compra, <https://www.chilecompra.cl/que-es-chilecompra> [<https://perma.cc/C9WL-SUSF>] (last visited Nov. 23, 2020); Decree No. 250, art. 1, (Mar. 9, 2004) (Chile).

228. See Law No. 19886, art. 22, 11 julio 2003 (Chile).

229. *Id.* art. 24.

230. *Id.*

231. *Id.*

232. Bidding Law of the People's Republic of China, (Jan. 1, 2000) (China), http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004749.htm [<https://perma.cc/VPL6-MBJF>]; see also National Development and Reform Committee, <https://www.ndrc.gov.cn> (last visited Nov. 3,

to the buyer, as well as raise complaints alleging a violation of the Bidding Law to an administrative supervision department.²³³

The law does not clarify what may constitute “other interested parties,” but it is clear that the scope of parties permitted to file protests goes beyond just bidders.²³⁴ The apparent lack of court access for bidders, however, calls into question the efficacy of a protest in China. Currently, two options seem to exist: an agency level protest and a protest to the “relevant administrative supervision department.”²³⁵ Whether that results in a fair and independent decision is unclear.

26. Colombia (Moderate Access)

Article 24 of Law 80 (dated October 28, 1998) states that interested parties have the opportunity to know and contest the reports, opinions, and decisions rendered of contracting authorities during the contracting process.²³⁶ As such, standing is granted to “interested parties.”²³⁷

27. Democratic Republic of the Congo (Moderate Access)

Under Law No. 10/010 of April 27, 2020, relating to public procurement, per Article 73, any candidate or tenderer may file a complaint with the procuring entity in the event that an illegal action resulted in the candidate being outbid.²³⁸ According to Article 76, unresolved disputes may be appealed and settled in court.²³⁹ “Candidates” are defined under Article 4 as natural or legal persons who express an interest in participating, or who are selected by the contracting authority to participate in a public procurement procedure.²⁴⁰ Standing is thus conferred to bidders or potential bidders in the event that a violation causes harm.²⁴¹ In the greater context of the other countries on this list, the Democratic Republic of the Congo’s standing rights are moderate

2020) [<https://perma.cc/3NE3-XCWE>]; Zhonghua Renmin Gongheguo Zhengfu Caigou Fa [People’s Republic of China Government Procurement Law] (adopted by the Standing Committee of the National People’s Congress (NPC Standing Committee) on June 29, 2002, effective on Jan. 1, 2003.

233. Bidding Law of the People’s Republic of China, ch. VI, arts. 62, 65 (Jan. 1, 2000) (China), http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004749.htm [<https://perma.cc/VPL6-MBJF>].

234. *Id.*

235. *Id.*

236. *See* L. 30, art. 24, (Octubre 28, 1993), Diaro Oficial [D.O.] (Colom.), <https://relatoria.colombiacompra.gov.co/ficha/Ley%2080%20de%201993> [<https://perma.cc/UFX8-PYMH>]; *see also* Decree 4170, (Noviembre 3, 2011), Diaro Oficial [D.O.] (Colom.), <https://relatoria.colombiacompra.gov.co/ficha/Decreto%204170%20de%202011> (last visited Dec. 1, 2020) [<https://perma.cc/7XEW-K3Q7>].

237. *See* L. 30, art. 24, (Octubre 28, 1993), Diaro Oficial [D.O.] (Colom.), <https://relatoria.colombiacompra.gov.co/ficha/Ley%2080%20de%201993> [<https://perma.cc/UFX8-PYMH>].

238. Law No. 10/010 [Dem. Rep. Congo], art. 73 (Apr. 27, 2010); *see also* Direction General du Control des Marches Publics, <http://dgcmp.cd> [<https://perma.cc/BL9R-NCGL>] (last visited Dec. 4, 2020).

239. Law No. 10/010 [Dem. Rep. Congo], art. 76 (Apr. 27, 2010).

240. *Id.* art. 4.

241. *Id.* art. 5.

in that they fall between Afghanistan (bidders only) and the EU (interested parties).

28. Republic of the Congo (Moderate Access)

Articles 141 and 142 of the Republic of Congo's 2009 procurement law indicate that candidates and tenderers may lodge appeals against procedures and decisions rendered during the procurement process.²⁴² Grounds for appeal include being unfairly excluded from competition, and decisions that caused candidates and tenderers harm.²⁴³ Appeals can be made to the procuring entity, whose decisions can be further appealed before the Dispute Resolution Committee.²⁴⁴ Further, "candidates" are defined under Article 2 as natural or legal persons who express an interest in participating in the procurement, or those who are selected by the contracting authority to participate in a procurement.²⁴⁵ Like Azerbaijan and the Democratic Republic of the Congo, the scope of standing is moderate, being conferred to bidders or potential bidders in the event that a violation causes harm.

29. Cote d'Ivoire (Moderate Access)

Article 143 of the Ivory Coast's Ordonnance 2019 provides that candidates and tenderers who demonstrate a legitimate interest or who consider themselves unfairly injured by procedures may raise a challenge.²⁴⁶ Article 1 defines a candidate as a natural or legal person expressing an interest in participating, or who is retained by the contracting authority to participate, in the procurement.²⁴⁷ Article 143 stipulates that a court appeal is available following exhaustion of administrative options.²⁴⁸ This provision is similar to Austria, albeit with a slightly more restrictive set of circumstances, as standing is granted in cases where harm occurs, not where it may occur.²⁴⁹ As such, Cote d'Ivoire falls between Austria and Azerbaijan.

30. Croatia (EU—Moderate Access)

Under Article 175 of the Croatia Procurement Law, enacted on July 20, 2011, any person who has suffered damage under the Act may obtain damages before

242. See Décret no. 2009-156 [Decree No. 2009-156], arts. 141, 142 (Congo); *see also* Autorite de Régulation de Marché Publics Congo, <http://armp.cg>.

243. See Décret no. 2009-156 [Decree No. 2009-156], art. 141 (Congo).

244. *Id.*

245. *Id.* art. 4.

246. See Ordonnance No. 2019-679 [Ordinance No. 2019-679], art. 144 (July 24, 2019) (Côte d'Ivoire); *see also* Ordonnance No. 2018-594 [Ordinance No. 2018-594], art. 27 (June 27, 2018) (Côte d'Ivoire); *see also* Autorite National de Regulation des Marches Publics, <https://www.anrmp.ci> [<https://perma.cc/LAC7-QE2Y>] (last visited Dec. 12, 2020).

247. See Ordonnance No. 2019-679 [Ordinance No. 2019-679], art. 1 (July 24, 2019) (Côte d'Ivoire).

248. See *id.* art. 143 (Côte d'Ivoire).

249. Compare *id.* art. 144 (Côte d'Ivoire), with PHILIPP J. MARBOE, GOV'T PROCUREMENT REV.: AUSTRIA, 1, 11, (May 2021), <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227013/austria>.

a competent court under the general indemnification regulations.²⁵⁰ Notably, Croatia is an EU member state and, as such, is subject to EU directives, yet its approach is distinct when compared with Austria.²⁵¹ On the one hand, Croatia potentially permits broader standing, as Article 175 refers to “any person,” not any “economic operator.”²⁵² On the other hand, it only references actual harm suffered, not a possibility of harm, which could limit standing in some cases.²⁵³ Croatia provides an excellent example of deviation within the EU and serves as a reminder that comparing standing regimes can be a difficult task given the varied components of effective standing.

31. Czech Republic (EU—Moderate Access)

Economic operators possess standing to raise challenges to procurement procedures under Czech regulations.²⁵⁴ The relevant regulations provide:

Economic operator means any person or joint group of persons that offer supply of supplies, provision of services or execution of works. A branch of a business shall be also considered an economic operator; in such case the registered office of the branch of a business shall be considered the registered office of the economic operator.²⁵⁵

Czech procurement law provides further in Section 241:

Objections may be filed by the economic operator who has been harmed or is at risk of being harmed by the practices of the contracting authority connected to the awarding of below-threshold or above-threshold public contracts including concession contracts, with the exception of small-scale concessions pursuant to Section 178, or to specific procedures defined in Book Six (hereinafter referred to as the ‘complainant’).²⁵⁶

In summation, economic operators have standing to challenge when harmed or at risk of being harmed.

It should be noted that the Czech definition of “economic operator” on its face may not include unions or public entities and instead appears to be more in line with granting protest rights to bidders and potential bidders only.²⁵⁷ This definition is largely similar to the Austrian definition, and it reflects the minimum standard required by Directive 2014/24 of the EU.²⁵⁸ Whereas

250. See Public Procurement Act [Croat.], art. 175 (July 15, 2011); see also Republika Hrvatska [Republic of Croatia], Portal of Public Procurement, Republika Hrvatska Ministarstvo gospodarstva i održivog razvoja [Ministry of Economy and Sustainable Development] (2021) <http://www.javnabava.hr/default.aspx?id=3987> (last visited Dec. 2, 2020).

251. Public Procurement Act [Croat.], art. 1 (July 15, 2011).

252. *Id.* art. 175.

253. *Id.*

254. See Act of April 19, 2016 on Public Procurement, 134/2016 Coll., §§ 5, 241 (Czech).

255. *Id.* § 5.

256. *Id.* § 241.

257. *Id.*

258. See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, 2014 O.J. (L 94) 89. See *supra* text accompanying notes 128–30.

France and Croatia have chosen to grant standing beyond the floor, the Czech Republic seems to have adopted a more reserved approach.

32. Denmark (EU—High Access)

The Public Procurement Act, No. 1564 of December 15, 2015, provides that anyone with a legal interest or otherwise entitled to appeal under the Act may bring complaints regarding breaches of the Act and procurement rules before the Danish Complaints Board for Public Procurement.²⁵⁹ The Act on the Complaints Board, Section 6, also provides that an appeal to the Danish Public Contracts Appeals Board may be submitted by anyone with a legal interest, the Danish Competition and Consumer Authority (which contains the Danish Complaints Board), in addition to other public authorities and organizations, including those in other member states.²⁶⁰ Denmark's approach is similar to Croatia's.

33. Dominica (Low Access)

Act 11 of 2012, concerning Public Procurement and Contract Administration, contains challenge and review rights and procedures.²⁶¹ Article 88 states:

88. (1) Subject to sections 87 and 104, a bidder who claims to have suffered, or is likely to suffer, loss or injury due to a breach of a duty imposed on a procuring entity or the Board by this Act may challenge the procurement proceedings at any time before the entry into force of the procurement contract.²⁶²

Moreover, Article 89 states that any supplier or contractor who suffers damage or is likely to suffer loss or injury arising out of a breach of duty of the contracting entity can seek review of a decision.²⁶³ Under Article 104, the High Court also possesses jurisdiction to review any actions of a public authority under the act.²⁶⁴

34. Dominican Republic (Low Access)

Law No. 340-06 defines “bidder” as a natural person “or legal entity legally qualified to participate by submitting bid or proposal in the procurement of goods, works, services or concessions.”²⁶⁵ Suppliers may bring an initial

259. See Public Procurement Act, Dec. 15, 2015, Act No. 1564 (Den.), <https://www.en.kfst.dk> [<https://perma.cc/5SWL-GLV8>].

260. See *Bekendtgørelse af lov om Klagenævnet for Udbud* [Act on the Complaints Board], No. 593 § 6 (Feb. 6, 2016) (Den.), <https://www.retsinformation.dk/eli/lta/2016/593> [<https://perma.cc/WW57-QQPC>].

261. See Act 11 of 2012: Public Procurement and Contract Administration Act, 2012, arts. 88–89, 104 (Dominica).

262. *Id.* art. 88.

263. *Id.* art. 89.

264. *Id.* art. 104.

265. See Ley No. 340-06 sobre Compras y Contrataciones con Modificaciones de la Ley No. 449-06 y su Reglamento de Aplicación No. 543-12 Transparencia [Law No. 340-06 on Contracts with Modifications for Law No/ 449-06 and Rules of Application No. 543-12], art. 67 (2012) (Dom. Rep.); see also *Dirección General Contrataciones Públicas* [General Directorate for Public Procurement] (Dom. Rep.), <https://www.dgcp.gob.do> [<https://perma.cc/MRC9-ZSZA>].

challenge under Article 67 to the governing body, whose decision can be appealed.²⁶⁶ Article 14 also contains a list of persons who may not be considered bidders.²⁶⁷ The list largely consists of various types of officials and those convicted of crimes related to falsehood or dishonesty.²⁶⁸

35. Estonia (EU—Moderate Access)

The Public Procurement Act of June 14, 2017, implements EU Directive 2014/24.²⁶⁹ Under Section 185,

(1) A tenderer, candidate or economic operator interested in participating in public procurement (hereinafter requester) may contest actions of the contracting authority or entity by filing a respective request for review with the Public Procurement Review Committee (hereinafter Review Committee) where it finds that an infringement of this Act by the contracting authority or entity infringes its rights or adversely affects its interests.²⁷⁰

In essence, an economic operator has standing if their interests are infringed upon, or their rights are adversely affected.²⁷¹

36. Finland (EU—Moderate Access)

The Finnish Procurement Act provides that interested parties may bring an action against the decision of a contracting entity that has an effect on the tenderer or candidate.²⁷² Certain discretionary choices cannot be contested, including the decision to divide a solicitation into smaller solicitations.²⁷³ Pursuant to Sections 145 and 146, challenges are brought before the Market Court.²⁷⁴ Finland is a member state of the EU and conducts review proceedings in accordance with EU directives.²⁷⁵ Depending on the definition of “interested party,” it is possible that standing in Finland extends to third parties.

(last visited Nov. 12, 2020); Laws and Decrees, Direccion General Contraciones Publicas [General Directorate for Public Procurement] (Dom. Rep.), <https://www.dgcp.gob.do/index.php/sobre-nosotros/marco-legal/leyes-y-decretos> [<https://perma.cc/UZ3K-WLW6>] (last visited Nov. 12, 2020).

266. *Id.* art. 67.

267. *Id.* art. 14.

268. *Id.*

269. See Public Procurement Act § 185 (June 14, 2017) (Est.), <https://www.riigiteataja.ee/en/eli/525032019011/consolide> [<https://perma.cc/684W-JJ46>]; see also *Ranandusministeerium*, <https://www.rahendusministeerium.ee/en/public-procurement-policy> [<https://perma.cc/U839-97EL>] (last visited Dec 5, 2020).

270. Public Procurement Act § 185 (Est.).

271. See *id.*

272. See Procurement Act (Fin.), No. 1397/2016, §§ 145–146 (2016); see Illkka Aalto-Setälä & Henrik Koivuniemi, *Finland*, PUBLIC PROCUREMENT 2021: A PRACTICAL CROSS-BORDER INSIGHT INTO PUBLIC PROCUREMENT 36, 41 (13th ed. 2021).

273. Laki Julkisista Hankinnoista Ja Käyttöoikeussopimuksista [Public Procurement and Concessions Act] (Act No. 1397/2016) § 146 (Fin.).

274. *Id.* § 145.

275. *Public Procurement Is Regulated*, MINISTRY OF ECON. AFFS. & EMP. OF FINLAND, <https://tem.fi/en/public-procurement> (last visited Dec 6, 2020) [<https://perma.cc/E83N-HX32>].

37. France (EU—High Access)

France codified its contracting rules into one code on April 1, 2019, effectively combining Ordinance No. 2015-899 and Decree No. 2016-360.²⁷⁶ France complies with EU Directive 2014/24 and allows challenges from unsuccessful bidders in addition to interested parties in the event that the contracting entity violates rules and procedures.²⁷⁷ Standing rights have also been conferred to third parties with an interest in administrative contracts, meaning that entities such as unions, local elected officials, and ordinary citizens may also issue challenges.²⁷⁸

The wide-ranging class of parties permitted to bring challenges makes France a particularly notable entry in this list.²⁷⁹ Most EU member states, like Austria, the Czech Republic, and Germany, have elected to only grant standing to economic operators, declining to extend it to other third parties.²⁸⁰ France demonstrates the variations that member states are permitted to pursue in implementing wider standing under EU directives. They are also a prime example of a country with a large, established procurement market utilizing broad bid protest standing rights to effectuate greater transparency and accountability.

38. Georgia (Moderate Access)

Chapter VI, Article 23, of the Georgian Law on State Procurement provides rules for appealing and reviewing disputes concerning contract solicitation and formation.²⁸¹ It states:

1. . . . [A] person interested in participating in procurement or a tenderer may appeal the actions of a contracting authority or of a tender committee to the contracting authority or with the Agency, if he/she/it believes that during the procurement proceedings the procedures prescribed by this Law and relevant normative acts have been violated and/or his/her/its rights have been infringed. The procedures and conditions for appealing a design contest shall be defined in a subordinate normative act.

276. See Ordonnance No. 2015-899 du 23 juillet 2015 relative aux marchés publics [Public Contracts Ordinance No. 2015-899 from July 23, 2015]; Décret No. 2016-360 du 25 mars 2016 relatif aux marchés publics [Decree No. 2016-360 from March 25, 2016].

277. See *Commande publique*, MINISTERIE DE L'ECONOMIE DES FINANCES ET DE LA RELANCE, <https://www.economie.gouv.fr/daj/commande-publique> (last visited Dec. 14, 2020) [<https://perma.cc/7BSC-S3R5>]; FRANCE: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2020, ICLG (Jan. 31, 2020), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/france> [<https://perma.cc/ZC7Z-JBW5>].

278. PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2020, *supra* note 277 (taking note of a French court case, *CE, 4 April 2014, Département du Tarn-et-Garonne, No. 358994*, which explicitly confirms standing rights to third parties).

279. See *supra* notes 276–77 and accompanying text.

280. See *supra* notes 164–67 and accompanying text (Austria) and notes 253–57 (Czech); see *infra* notes 285–88 (Ger.).

281. See Law of Georgia on Public Procurement, Ch. 6, art. 23 § 1 (2005) (Geor.) (entered into force on Jan. 1, 2006), https://publicprocurementinternational.com/wp-content/uploads/2019/10/Law-of-Georgia-on-PP_EN.pdf [<https://perma.cc/3N9F-MMXB>].

2. A person interested in participating in the procurement, a tenderer or a supplier may appeal at any stage the actions of the contracting authority or the tender committee to a court, if he/she/it believes that during the procurement proceedings the procedures prescribed by this Law and relevant normative acts have been violated and/or his/her/its rights have been infringed.²⁸²

Both bidders and potential bidders have standing based on the above language.²⁸³

Appeals are initially brought to the procuring agency, whose decisions can be appealed in court.²⁸⁴ Interestingly, Georgia confers rights in the event that a violation occurs *or* if a right has been infringed upon.²⁸⁵ This broad set of circumstances implies that ensuring accountability through a whistleblowing function is one of Georgia's objectives for its bid protest system, in addition to providing a remedy to adversely affected parties.

39. Germany (EU—Moderate Access)

The German bid protest system is outlined in the “Judicial Review” Chapter of its “Act Against Restraints of Competition,” which largely follows the EU guidelines.²⁸⁶ The German protest system permits economic operators to submit applications to challenge procurement decisions.²⁸⁷ “Every entity” possessing an interest in the procurement that claims to have had its rights violated by non-compliance with procurement law and can show harm or are at risk of being harmed, has the right to initiate review proceedings.²⁸⁸ In practice, this provision applies to bidders and potential bidders, but would not extend to other third parties that may be affected by decisions.²⁸⁹

40. Ghana (Low Access)

Under Article 78(1), a “supplier, contractor, or consultant that claims to have suffered, or that may suffer loss or injury due to a breach of a duty imposed on the procurement entity by this Act, may seek *redress* in accordance with

282. *Id.* §§ 1–2 (2005).

283. *Id.*

284. *Id.* §§ 4–1, 12.

285. *Id.* §§ 1–2.

286. See Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Act Against Restraints of Competition], June 26, 2013, BGBI I at 1750, §§ 155–156, 160, revised July 12, 2018, BGBI I at 1151)) (Ger.), https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html [<https://perma.cc/M9CP-QN8X>]; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/Ec, EUR. PAR. DOC. (2014), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024> [<https://perma.cc/PBA2-HZWE>]; see also GERMANY: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2020, ICLG (Jan. 31, 2020), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/germany> [<https://perma.cc/TPC2-6RJU>]; Jan Bonhage & Simone Terbrack, *The Government Procurement Review: Germany*, L. REVS. (June 2020), <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227018/germany> [<https://perma.cc/8DR5-P45R>].

287. Gesetz gegen Wettbewerbsbeschränkungen, §§ 155, 160(2).

288. *Id.* § 160(2). Article 160(2) states “jedes Unternehmen,” which translates to “every entity” or “undertaking” and likely refers to those entities that qualify as “economic operators.”

289. See GERMANY: PUBLIC PROCUREMENT LAWS AND REGULATIONS 2020, ICLG (Jan. 31, 2020), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/germany> [<https://perma.cc/967V-XK8D>].

this Part.”²⁹⁰ Complaints can be made by an application to the procurement entity, and a request for administrative review can be made by an application to the Board.²⁹¹ A tenderer, supplier, contractor, or consultant may appeal such a decision taken in administrative review in court.²⁹²

41. Greece (EU—Moderate Access)

Law 4412/2016 implements Directive 2014/24/EU and was published on August 8, 2016.²⁹³ This law created an independent review authority called the Authority for the Examination of Preliminary Recourses (AEPP), the decisions of which can be appealed in Administrative Court and, in rare cases, the Council of State.²⁹⁴ Any interested economic operator whose interests are negatively affected may file a challenge.²⁹⁵

42. Hong Kong (Moderate Access)

Hong Kong is a party to the WTO GPA and has operated an independent Review Body on Bid Challenges since December 30, 1998.²⁹⁶ Appendix III (E)(1) of the Tender Procedures provides that suppliers may challenge breaches of procurement procedures, in accordance with the Review Body rules.²⁹⁷ Paragraph 4 of the Review Body rules makes it clear that standing is granted to suppliers, stating:

The duties, functions and powers of the Review Body are to:

- (a) receive from a supplier any challenge made in respect of alleged breach of the relevant prescribed agreement by the procuring entity in respect of the relevant procurement in which the supplier has, or has had, an interest;
- (b) conduct inquiry only in respect of the challenge made by a supplier in accordance with Clause 4(a) above; and
- (c) make determination(s) and recommendations in accordance with these Rules of Operation.²⁹⁸

290. See Public Procurement Act, Act 663, arts. 78–80 (2003) (Ghana), <https://ppa.gov.gh>.

291. *Id.* art. 79.

292. *Id.* art. 80.

293. See Law 4412/2016 art. 1 (Greece), https://europam.eu/data/mechanisms/PP/PP%20Laws/Greece/1.%20Law%20No.%204412%20of%202016_ENG,%20consolidated,%20last%20amended%20in%202020.pdf [<https://perma.cc/MVJ7-DSH5>]; see also GREECE: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2021, ICLG (Apr. 2, 2021), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/greece> [<https://perma.cc/H97N-MWPL>]; see also Emmanuel J. Velegrakis, *The Government Procurement Review: Greece*, 8 GOV'T PROCUREMENT REV. 102, 102 (2020), <https://cavecon.org/ve/wp-content/uploads/2020/10/The-Government-Procurement-Review-8th-Edition.pdf> [<https://perma.cc/SU2V-JDJE>].

294. See Velegrakis, *supra* note 293, at 103.

295. *Id.* at 111.

296. See Tender Procedures for Government Procurement, App. III (E)1 41 (last revised, Sept. 28, 2020) (H.K.), https://www.fstb.gov.hk/tb/en/business/gov_procurement/docs/espr_chapter3.pdf [<https://perma.cc/E7EB-KZFU>]; Henry Gao, *The Bid Challenge Procedures Under the WTO Government Procurement Agreement: A Critical Study of the Hong Kong Experience*, 16 PUB. PROCUREMENT L. REV. 211, 216 (2007).

297. See Tender Procedures for Government Procurement, App. III (E)1 41 (H.K.).

298. Rules of Operation of the Review Body on Bid Challenges (2020) (H.K.), <https://www.tid.gov.hk/english/aboutus/advcommittee/reviewbody.html>.

Further, the Review Body rules define “supplier,” stating:

[A] “supplier” means a supplier or a potential supplier (of goods or services) of either—

- (a) a Party to the relevant prescribed agreement, or
- (b) an economy which is not a Party to the GPA but intends to provide goods or services of any Party to the GPA

who has or has had an interest in a relevant procurement.²⁹⁹

In addition, the Treasury Branch of the Hong Kong Treasury Branch Financial Services and the Treasury Bureau provides a guide that notes that “[a]ny supplier, contractor or consulting firm who feels aggrieved may lodge a complaint with the procuring entity or the relevant tender board. . . .”³⁰⁰

43. Iceland (High Access)

Iceland’s “Act on Public Procurement” states that complaints may be referred to the Public Procurement Complaints Commission by “economic operators who enjoy rights as provided for by this Act and have legitimate interests in the resolution of the complaint.”³⁰¹ The Act also provides that “organisations or federations of economic operators have the authority to refer cases to the commission, provided that it conforms to their purpose to guard such interests.”³⁰² In essence, this language confers standing rights to unions and other similar associations along with economic operators (meaning bidders and potential bidders).³⁰³ Article 2 “Definitions” provides that “economic operator” is a “[g]eneric term used in the interest of simplification and covers equally the concepts of contractor, supplier and service provider, irrespective of legal form.”³⁰⁴ Iceland is not an EU member state, but as a member of the European Economic Area is required to implement a number of EU directives and regulations.³⁰⁵

44. India (Low Access)

In India, government procurement is covered by the 2017 General Finance Rules, which do not address review procedures.³⁰⁶ However, the 2005 General Finance Rules, which were replaced by the 2017 rules, did contain review by a

299. *Id.* ¶ 1.

300. Treasury Branch Fin. Servs. & Treasury Bureau, *Guide to Procurement*, Gov’t of HONG KONG SPECIAL ADMIN. REGION (Oct. 9, 2020), <https://www.fstb.gov.hk/tb/en/guide-to-procurement.htm#topic-12> [<https://perma.cc/6XDN-P5TL>].

301. Act on Public Procurement, 2016 (Act No. 120/2016) art. 105 (Ice.).

302. *Id.*

303. *See id.*

304. *Id.* art. 2.

305. JOHANNA JONSDOTTIR, EUROPEAN AND THE EUROPEAN ECONOMIC AREA I (Federica Bichi et al. eds., 1st ed. 2013).

306. *See* General Financial Rules, 2017 (India), https://doe.gov.in/sites/default/files/GFR_2017_0.pdf.

procuring entity.³⁰⁷ Currently, India lacks an independent review procurement challenge mechanism, but aggrieved bidders may file complaints with arbitrators, the procuring entity or in court.³⁰⁸

Something that may provide a change for challenging government procurement issues in India is a Public Procurement Bill from 2012, which was proposed but did not pass.³⁰⁹ Article 40 of the proposed bill included explicit standing rights for bidders and prospective bidders.³¹⁰

45. Indonesia (Low Access)

Presidential Decree 16/2018 provides that disappointed bidders may challenge procurement awards based on unfair competition or procedural violations per Regulation 14/2012, which is promulgated by the Agency for Government Procurement of Goods or Services (LKPP).³¹¹ Upon rejection by the procuring entity, challenges can be appealed to the Commission for the Supervision of Business Competition.³¹²

46. Ireland (EU—Moderate Access)

In conforming with EU directives, S.I. 130/2010 provides that review procedures are available to an “eligible person,” defined as a person who

(a) has, or has had, an interest in obtaining the reviewable concession contract, and

(b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable concession contract, of the law of the European Union in the field of public procurement, or of a law of the State transposing that law.³¹³

307. See Devina Deshpande & Prashant Mara, *India: Procurement Rules and Trends in India*, MONDAQ (May 8, 2020), <https://www.mondaq.com/india/government-contracts-procurement-ppp/930028/procurement-rules-and-trends-in-india> [https://perma.cc/T5KN-8ZJP]; Bhabesh Hazarika & Pratap Ranjan Jena, *Public Procurement in India: Assessment of Institutional Mechanism, Challenges, and Reforms*, NAT'L INST. PUB. POL'Y & FIN. (July 31, 2017), https://www.researchgate.net/publication/318851426_Public_Procurement_in_India_Assessment_of_Institutional_Mechanism_Challenges_and_Reforms [https://perma.cc/9E78-3TQZ]; KRISHAN NEHRA, INDIA: GOVERNMENT PROCUREMENT LAW AND POLICY, LRA-D-PUB-000038 (2010), <https://www.loc.gov/item/2013417417> [https://perma.cc/L5YU-N72V].

308. See General Financial Rules, 2017 (India), https://doe.gov.in/sites/default/files/GFR2017_0.pdf.

309. See Public Procurement Bill, 2012, Bill No. 58 of 2012, art. 40 (May 14, 2012) (India).

310. *Id.*

311. See *Public Procurement and Government Contracts: Indonesia*, CHAMBERS PRACTICE GUIDES (2019); see also 22 Mar. 2018, Presidential Decree, Reg. No. 16/2018 art. 80 (Indon.), <https://jdih.lkpp.go.id/regulation/peraturan-presiden/peraturan-presiden-nomor-16-tahun-2018> [https://perma.cc/2RXZ-95B9].

312. See Law No. 5 of 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition, art. 38 (Indon.); Law No. 51 of 2009 on Administrative Courts.

313. See European Union (Award of Public Authority Contracts) Regulations 2016 (S.I. 284/2016) (Ir.) (transposing Directive 2014/24/EU), <http://www.irishstatutebook.ie/eli/2016/si/284/made/en/print> [https://perma.cc/7F33-R5WX]; European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (SI 130/2010) (Ir.), <http://www.irishstatutebook.ie/eli/2010/si/130/made/en/print> [https://perma.cc/HFP2-WGZ3]; European Union (Award of Concession Contracts) (Review Procedures) Regulations 2017 (SI 326/2017) (Ir.), <https://www.irishstatutebook.ie/eli/2017/si/326/made/en/print?q=326> [https://perma.cc/93TQ

lenge procurement decisions through this system.³²¹ In most cases, the term “supplier” refers to agents that supply, or are capable of supplying, the product or service solicited during procurement.³²² However, in some cases, the term “supplier” possesses a more limited meaning, and standing is limited to “eligible agents,” meaning those entities who registered to confirm their eligibility to participate in bidding.³²³ This definition places Japan’s bid challenge standing rights in line with countries like Canada, allowing bidders and potential bidders to file challenges, but not other interested parties.

49. Jordan (Low Access)

Article 3 of Jordan’s Bid Challenge System Rules provides standing to bidders (defined as “goods suppliers, service providers and contractors, etc.”) to file a protest before the Challenge Review Committee.³²⁴ Bidders may not file a challenge in court until a protest has been filed and a decision rendered by the Bid Challenge Tribunal.³²⁵ Absent an interpretation widening the definition of “bidder” to include potential suppliers, service providers, and contractors, Jordan appears to provide bid challenge standing rights to an extent similar to Afghanistan.

50. Kazakhstan (Moderate Access)

Suppliers and potential suppliers are able to submit complaints related to procurement procedures in Kazakhstan.³²⁶ Reviews are conducted by the Internal Audit Committee, which is located under the Ministry of Finance. Decisions of the Committee can be appealed in the court system.³²⁷

According to a 2019 Organization for Economic Co-operation and Development (OECD) report, the number of complaints has risen five-fold following the adoption of amendments to reform public procurement in December 2018.³²⁸ However, it is believed that a significant number of these complaints are brought by “professional complainers,” who seek to disadvantage

A Comparative Introduction, 32 BROOKLYN J. INT’L L. 523, 541–42 (2007); *Challenging Systems*, EU-JAPAN CTR. FOR INDUS. COOPERATION, <https://www.eu-japan.eu/government-procurement/tendering-process/challenging-systems> [<https://perma.cc/L3AE-JHLR>] (last visited Dec. 14, 2020).

321. See Government Procurement Challenge System Regulation, *supra* note 320.

322. Office for Government Procurement Challenge System, Government Procurement Challenge System Pamphlet, Office for Government Procurement Cabinet Office, Government of Japan, <https://www5.cao.go.jp/access/english/pdf/pamphlet-e.pdf> [<https://perma.cc/879J-CS23>] (last visited Dec. 4, 2021).

323. See Government Procurement Challenge System Regulation, *supra* note 320.

324. See Bid Challenge System Rules, art. 3.2 (Jordan), <http://www.gtd.gov.jo/en/index> [<https://perma.cc/D8NF-XWEQ>].

325. *Id.* Art.1.

326. See Law of the Republic of Kazakhstan, Feb. 18, 2001, No. 407-IV, <https://adilet.zan.kz/eng/docs/Z1100000407> [<https://perma.cc/KZ6B-XUKJ>] (unofficial translation); see also Public Procurement in Kazakhstan: Reforming for Efficiency, OECD (2019), <https://www.oecd-ilibrary.org/sites/c11183ae-en/index.html?itemId=/content/publication/c11183ae-en> [<https://perma.cc/8PKN-3ZTF>] [hereinafter OECD Kazakhstan].

327. See OECD Kazakhstan, *supra* note 326.

328. See *id.*

and blackmail competitors.³²⁹ Thus, Kazakhstan demonstrates the trade-off between heightened transparency and decreased efficiency. Determining the efficacy of Kazakhstan's challenge system and increased standing rights depends on the extent to which complaints either reveal actual corruption or mistakes in awarding public contracts or are instead used to target economic rivals.

51. Kenya (Low Access)

Kenya's Public Procurement Act, Part XV, addresses administrative review of procurement.³³⁰ Section 167 provides standing to candidates or tenderers, which are respectively defined as "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity" and "a person who submitted a tender pursuant to an invitation by a public entity."³³¹ In short, potential bidders are likely excluded because both definitions are predicated on having actually submitted bids.³³²

Moreover, bidders must claim to have suffered, or to be at risk of suffering, loss or damage due to the breach of a duty imposed on a procuring entity.³³³ Curiously, Kenya's regulations require a refundable deposit (worth no less than 10% of the contract) to be submitted by bidders seeking to appeal a decision.³³⁴ Reviews are required to be heard in an "open forum" unless it would compromise national security, which suggests that transparency is an important consideration.³³⁵ In addition, the choice of procurement method is not reviewable.³³⁶

52. South Korea (Low Access)

South Korea's Public Procurement Service states that bidders who consider themselves disadvantaged may raise a protest to cancel or correct the decision within fifteen days after a potential cause for protest arises, or within ten days after a bidder first becomes aware of a potential cause for protest.³³⁷ Thus,

329. *See id.*

330. *See* Public Procurement and Assets Disposal Act, No. 33 (2015) KENYA GAZETTE SUPP. No. 207 § 167, <http://ppra.go.ke/ppda/> [<https://perma.cc/KRD8-RQS3>]. Section 167 states:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, 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 this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. *Id.*

331. *Id.* § 2.

332. *See id.*

333. *See id.* § 167 ¶ 1.

334. *Id.* § 167 ¶ 2.

335. *Id.* § 167 ¶ 3.

336. *See id.* § 167 ¶ 4.

337. *See* General Instructions, Public Procurement Service (June 18, 2008) (S. Kor.), <https://www.pps.go.kr/eng/index.do> [<https://perma.cc/R7EW-W5J8>]. The respective rules on

disadvantaged bidders possess standing to raise challenges.³³⁸ Absent legislation widening the definition of bidder, South Korea would appear to confer standing in a fashion similar to Afghanistan.

53. Kuwait (High Access)

Law No. 49 for 2016 addresses public tender procedures for Kuwait.³³⁹ Part 8, Article 77 confers standing to tenderers and interested parties.³⁴⁰ It states:

1- Any tenderer suffered from loss or damage as a result of breach of any of the authorities competent in the procurement or tenders of any obligation under the provisions of this law or the regulation issued accordingly, may submit, in accordance with the provisions of this law, a complaint at any stage of the procurement, requesting to reconsider procedure from which he is affected him, or non-taking action, if the damage resulted from it.

2- Any interested party shall have a right to submit a complaint with the competent procurement authority of any shortcoming that afflicts the preparation of technical documents of the tender or its general conditions in breach of the rules of equality, justice and equal opportunities until the closure of the bidding³⁴¹

Kuwait thus confers fairly broad standing, albeit it in a unique manner.³⁴² Kuwait confers standing to bidders when a breach causes harm, yet also confers standing to “any interested party” to submit complaints about shortcomings in the procurement process.³⁴³

54. Kyrgyz Republic (Moderate Access)

Article 48 of the Kyrgyz Republic Law on Public Procurement states that suppliers and consultants have the right to file a complaint before the Independent Interagency Commission at any stage of the procurement proceedings.³⁴⁴ Suppliers can also bring disputes arising in procurement proceedings

“domestic” and “foreign” (meaning subject to GPA requirements) can be found in subpages under the PPS website at Public Procurement Service, Overview-Domestic Procurement, PPS, <https://www.pps.go.kr/eng/content.do?key=01156> [<https://perma.cc/EKS4-PB8J>] (last visited Nov. 30, 2021), and Public Procurement Service, Overview-Foreign Procurement, PPS, <https://www.pps.go.kr/eng/content.do?key=01157> [<https://perma.cc/FK24-ZNHA>] (last visited Nov. 30, 2021). Whee-Un You et al., *Public Procurement in South Korea*, LEXOLOGY (June 11, 2019), <https://www.lexology.com/library/detail.aspx?g=9e39c3ae-8893-45d0-969f-e9de75c5d550> [<https://perma.cc/3USN-B6PL>]; KOREA— SELLING TO THE GOVERNMENT, INT’L TRADE ADMIN. (Aug. 29, 2019), <https://www.export.gov/apex/article2?id=Korea-Selling-to-the-Government> [<https://perma.cc/YK9D-B323>].

338. See SOUTH KOREA COUNTRY COMMERCIAL GUIDE: SELLING TO THE PUBLIC SECTOR, INT’L TRADE ADMIN. (Dec. 1, 2021), <https://www.trade.gov/country-commercial-guides/south-korea-selling-public-sector> [<https://perma.cc/HXS9-QATZ>].

339. See Public Tenders Law, L. No. 49, pt. 8, art. 77 (Kuwait).

340. *Id.*

341. *Id.*

342. *See id.*

343. *Id.*

344. See Kyrgyz Republic Law on Public Procurement, No. 72, arts. 48–49 (Apr. 3, 2015), <http://zakupki.gov.kg/popp> [<https://perma.cc/WF3U-M4YQ>].

to the courts and can appeal the decision of the Independent Interagency Commission.³⁴⁵

55. Laos (Moderate Access)

Bid challenge rights are included within the January 4, 2004, Decree of the Prime Minister on Government Procurement of Goods, Construction, Maintenance and Services.³⁴⁶ The decree defines “bidder” as “an individual, companies, enterprises, joint venture or international enterprises meeting the selection criteria and participating in competitive bidding under a procedure selected by the procuring entity or project owner.”³⁴⁷ This definition makes it clear that standing is contingent upon “participating in competitive bidding,” and thus potential bidders are excluded.³⁴⁸

Article 40 provides that bidders may submit written complaints to the chairperson of the tender committee regarding improper actions by the procuring entity.³⁴⁹ While Article 39 includes reference to court proceedings in the event of improper actions by the bidder, Article 40 contains no such reference for court proceedings against improper actions by the procuring entity.³⁵⁰ Further, it does not seem that a nationwide bid challenge system exists.³⁵¹

56. Latvia (EU—Moderate Access)

Latvia’s Public Procurement Law of 2017 implements the 2014 EU directive and grants standing to a person who has, or has had, an interest in acquiring the right to enter into a procurement contract.³⁵² The law also grants standing

345. *Id.* arts. 49–50.

346. *See* Decree of the Prime Minister on Government Procurement of Goods, Construction, Maintenance and Services, No. 03/PM (Jan. 4, 2004) (Laos).

347. *Id.* art. 2.

348. *Id.* (emphasis added).

349. *Id.* art. 40.

350. *Id.*

351. *Id.* art. 39.

352. *See* Public Procurement Law of 2017 § 68, *Latvijas V stnesis 254* [Latvian Journal 254], <https://likumi.lv/ta/id/287760-publisko-iepirkumu-likums> [<https://perma.cc/Z2M9-RY52>]; *see also* Procurement Monitoring Bureau, <https://www.iub.gov.lv/lv/sudzibas> [<https://perma.cc/9WV9-TMEM>] (last visited Dec. 6, 2020). Paragraph (1) of Section 68 “Right to Submit a Complaint Regarding Infringements of the Procurement Procedure” states:

A person who is or has been interested in being awarded a procurement contract or framework agreement, or who is qualifying for procurement contract award and who, in relation to the specific procurement procedure to which this Law applies, believes that his or her rights have been infringed upon or infringement of these rights is possible, and it may be caused by a potential infringement of the legal acts of the European Union or other laws and regulations, is entitled to submit a complaint regarding the provisions for selection of candidates or tenderers, technical specifications and other requirements which relate to the specific procurement procedure, or regarding the activities of the contracting authority or the procurement commission during the course of the procurement procedure. Within the meaning of this Chapter, the procedures for carrying out the procurement referred to in Section 10 of this Law and the design contest shall also be regarded as the procurement procedures.

to those applying for the award of a procurement contract.³⁵³ Latvia grants standing to bidders and potential bidders, but not other interested third parties like unions, local governments, or other potentially affected entities.³⁵⁴ This law stands in contrast with France, which elected to confer standing rights to third parties.³⁵⁵ As such, Latvia's standing rights are largely in line with other EU countries like Germany and Austria.

57. Liberia (High Access)

Liberia's procurement law of 2005 provides:

Right to Review

125. (1) The following shall have the right to lodge a complaint in pursuit of this Act.

(a) Any bidder who has suffered or is at the risk of suffering a loss or damage as a result of the breach of this Act or in any procurement process;

(b) Any person who has grounds to believe that he or she or the Entity he or she represents has been prevented from becoming a bidder;

(c) Any person who has reason to believe that there has been a breach of this Act;

Shall have a right to lodge a complaint to the Procuring or Concession Entity and may seek review or redress from the Entity in the first instance or from the Commission if he or she is dissatisfied with the Entity's decision or its failure to decide within the time stipulated in subsection (4) of this section.³⁵⁶

Complaints are initially filed with the Procurement and Concessions Commission, whose decision can be appealed to the Complaints, Appeals and Review Panel.³⁵⁷ The decision of the Complaints, Appeals and Review Panel can only be appealed in a "[c]ourt of competent jurisdiction."³⁵⁸ Liberia's bid protest rights include both bidders and potential bidders suffering harm per Section 125.³⁵⁹ Yet, Liberia also seems to leave the door open to general complaints attesting to breaches of Liberian procurement law, *without* any need to show harm or risk of harm.³⁶⁰ Moreover, paragraph (c) of Section 125 makes it clear that pursuing the latter option entitles a challenger to a full review, including escalating the complaint on appeal.³⁶¹ Taking all of Liberia's standing elements together, this makes Liberia one of the most generous countries evaluated in this list.

353. *Id.* arts. 67–68.

354. *Id.*

355. Eitenne Amblard & Kévyng Gillet, *France, PUBLIC PROCUREMENT 2021: A PRACTICAL CROSS-BORDER INSIGHT INTO PUBLIC PROCUREMENT* 49 (13th ed. 2021).

356. Law, Act 2005, Public Procurement & Concessions Act, Sept. 8, 2005, Liberia Official Gazette/2005 (LR.), art. 125(1).

357. *See id.* arts. 125–126.

358. *Id.* art. 128.

359. *See id.* art. 125.

360. *Id.*

361. *Id.*

58. Lithuania (EU—Moderate Access)

Lithuania's procurement law (LPP) provides that suppliers possess the right to challenge the contracting authority in the event that the contracting authority has failed to comply with procurement regulations.³⁶² Suppliers are further defined as “economic operators” under Article 2 of the LPP, meaning “a natural person, a private or public legal person, other organisation and their division or group of such persons, including temporary associations of economic operators, which offer to perform works, supply goods or provide services on the market.”³⁶³ Challenges can be brought to court after a claim has been submitted to the contracting authority in writing.³⁶⁴

59. Luxembourg (EU—Moderate Access)

Luxembourg's Law of November 10, 2010 institutes appeals concerning public procurement.³⁶⁵ Article 1 states, “[t]he appeal procedures are accessible to any person having or having had an interest in obtaining a given contract and having been or likely to be harmed by an alleged violation of Community law or of national law transposing Community law on public contracts.”³⁶⁶ This provides standing to bidders and potential bidders.³⁶⁷ Remedies can be sought in Administrative Court and those decisions can be appealed to the Administrative Court of Appeals.³⁶⁸

60. Macau (Moderate Access)

Interested parties whose rights are affected may challenge government procurement decisions under Article 113 of the Administrative Litigation Procedure Code of Macau (CPAC).³⁶⁹ To raise the challenge in court, bidders must first submit an administrative claim to the contracting entity.³⁷⁰ Unlike Hong Kong, Macau is not a party nor an observer to the WTO GPA.³⁷¹

362. Republic of Lithuania Law on Public Procurement [No. I-1491] art. 101; *see also* Disputes and Claims, Lithuania Public Procurement Office (Sept. 17, 2020), <https://vpt.lrv.lt/en/legal-information/disputes-and-claims> [<https://perma.cc/S4CE-F9PA>].

363. Republic of Lithuania Law on Public Procurement [No. I-1491] art. 2.

364. *Id.* art. 101.

365. *See* Loi du 10 novembre 2010 instituant les recours en matière de marchés publics [Law of Nov. 10, 2010 Establishing Remedies in Public Procurement Matters], JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG [OFF. J. OF THE GRAND-DUCHY OF LUX.], Nov. 12, 2010, art. 1; *see also* Benjamin Marthoz, *Public Procurement 2020: Luxembourg*, INT'L COMPAR. LEGAL J. 1, 5 (2020).

366. Law of Nov. 10, 2010 (Lux.), art. 1.

367. *Id.*

368. *See id.* art. 3.

369. *See* Code of Administrative Litigation Procedure, art. 113 (Mac.), <https://bo.io.gov.mo/bo/i/99/50/codpacpt/> [<https://perma.cc/Q23L-GCYJ>].

370. *See id.*; *see also* Bruno Almeida et al., *Public Procurement & Government Contracts 2021: Macao*, CHAMBERS AND PARTNERS (Apr. 6, 2020), <https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2021/macau> [<https://perma.cc/P7LG-92SW>].

371. *See* Parties, Observers and Accessions, WTO, https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm [<https://perma.cc/R7YG-Q5B3>] (last visited Jan 21, 2021).

61. Malawi (Low Access)

Malawi's Act No. 27 of 2017 defines "bidder" as any participant who has expressed interest in procurement proceedings by submitting a bid.³⁷² Further, Part IX of the Act, which concerns administrative review and appeals, states that standing is provided to bidders who claim to have suffered damages or may suffer damages due to a breach of duty by the procuring entity.³⁷³

Review applications are first submitted to the procuring entity or by a Review Committee under the Public Procurement and Disposal of Assets Authority.³⁷⁴ Decisions of the entity can be appealed to the Director General, whereas decisions of the Review Committee shall be subject to review by the High Court.³⁷⁵

62. Malaysia (Low Access)

Malaysia does not have any specific legislation for public procurement; its two main acts on the subject are the Financial Procedure Act of 1957 and the Government Contract Act of 1949.³⁷⁶ Bidders, nonetheless, possess options for lodging complaints. These options include the Government Procurement Division, the Malaysian Anti-Corruption Commission, the Prime Minister's Department, and the National Audit Department.³⁷⁷ Further, decisions by public authorities are subject to judicial review by the High Court per Order 53 of the 2012 Rules of Court.³⁷⁸

63. Malta (EU—High Access)

Article 262 of Malta's procurement law, S.L. 174.04, provides standing to prospective candidates and tenderers to bring challenges prior to the closing date of a call for competition.³⁷⁹ However, any tenderer, candidate, or interested party who has been harmed, or may suffer harm, may file an appeal of objection to the Public Contracts Review Board after the closing of competition, and the decision is subject to judicial review.³⁸⁰ This provision would place

372. See Act No. 27 of 2017 § 2 (Aug. 22, 2017) (Malawi).

373. *Id.* § 59.

374. *Id.* § 60.

375. *Id.*

376. See Kamilah Kasim, *Public Procurement 2020: Malaysia*, 12 INT'L COMPAR. LEGAL J. 135, 135 (2020); *Malaysia: Country Profile for 2018*, WORLD BANK: GLOBAL PUBLIC PROCUREMENT DATABASE, https://www.globalpublicprocurementdata.org/gppd/country_profile/MY/2018 [<https://perma.cc/T86B-WJ3S>] (last visited Nov. 27, 2021) [hereinafter *Malaysia Country Profile*].

377. *Malaysia Country Profile*, *supra* note 376.

378. Federal Government Gazette, Rules of Court 2021, P.U. (A), Order 53 (July 2, 2012) (Malay.), https://www.malaysianbar.org.my/cms/upload_files/document/Rules%20of%20Court%202012.01.07.2012.pdf [<https://perma.cc/7JX5-XSKD>].

379. See S.L. 174.04 Financial Administration and Audit Act, art. 262 (Malta), <https://contracts.gov.mt/en/Pages/Home-DepartmentOfContracts.aspx> [<https://perma.cc/9SUU-UGJ5>].

380. *Id.* art. 270; see also MALTA: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2020, ICLG (Jan. 31, 2020), <https://web.archive.org/web/20200808093222/https://iclg.com/practice-areas/public-procurement-laws-and-regulations/malta>.

Malta closer to Denmark's and Iceland's implementation of bid challenge rights, as the inclusion of "any interested party" in Article 270 suggests that standing is intentionally conferred to third parties and not just bidders and potential bidders.³⁸¹

64. Mexico (Low Access)

In Mexico, determining which entities have standing to file complaints challenging federal procurement decisions depends on what is being challenged.³⁸² Actions concerning the call for bids and clarification meeting can only be challenged by participants that had officially expressed an interest in taking part.³⁸³ Acts concerning official restricted invitations can only be challenged by those who were invited to bid.³⁸⁴ Acts concerning the presentation and opening of bid proposals, as well as the cancellation of a procurement, can only be challenged by those who submitted a bid.³⁸⁵ Further, only the awarded bidder can challenge acts or omissions that prevented the execution of the contract.³⁸⁶ In general, Mexico grants protest rights to participants only, and not to non-participants or potential bidders.

65. Netherlands (EU—Moderate Access)

The Public Procurement Act of 2012 (as amended on July 1, 2014 to comply with directive 2014/24/EU) stipulates that operators considering themselves disadvantaged by an award decision may bring a claim for annulment.³⁸⁷ As such, the Netherlands is in line with most EU member states in providing bid challenge standing rights to bidders and potential bidders, but not to other third parties.

66. New Zealand (Moderate Access)

Rule 50 of New Zealand's government procurement rules confers bid challenge standing rights to suppliers in the event of a perceived violation.³⁸⁸ New Zealand's guide to supplier feedback and complaints defines a "supplier" as a "person, business, company or organisation that supplies or can supply goods or services or works to an agency."³⁸⁹ Therefore, New Zealand provides standing rights to

381. See S.L. 174.04 Financial Administration and Audit Act, art. 262 (Malta).

382. See Fernando Mejia Mendez et al., *Mexico: Public Procurement & Government Contracts 2020*, CHAMBERS AND PARTNERS (Apr. 6, 2020), <https://web.archive.org/web/20210122064741/https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2020/exico/trends-and-developments>; Federico Hernandez Arroyo et al., *Mexico*, LAW REVIEW: THE GOVERNMENT PROCUREMENT REVIEW 143 (June 2020).

383. Arroyo et al., *supra* note 382.

384. *Id.*

385. *Id.*

386. *Id.*

387. See Aanbestedingswet 2012 [Procurement Act 2012] Stb. art. 2 (Neth.), <https://zoek.officielebekendmakingen.nl/stb-2012-542.html> [<https://perma.cc/ERV7-6YJY>].

388. Government Procurement Rules, r. 50, (N.Z.), <https://www.procurement.govt.nz/procurement/principles-charter-and-rules/government-procurement-rules/awarding-the-contract/supplier-complaints> [<https://perma.cc/FTA6-CFL3>].

389. GUIDE TO SUPPLIER FEEDBACK AND COMPLAINTS 93 (4th ed. 2019), <https://www.procurement.govt.nz/procurement/principles-charter-and-rules/government-procurement-rules/awarding-the-contract/supplier-complaints/> [<https://perma.cc/2PLU-PE6R>].

bidders and potential bidders. Following complaint to an agency, unsatisfied suppliers, or potential suppliers possess several options. These options include litigation in court or an investigation by the Auditor-General, the Ombudsman, the State Services Commission, or the Commerce Commission.³⁹⁰

67. Nigeria (Moderate Access)

Nigeria's Public Procurement Act of 2007 provides that a bidder may seek administrative review for any omissions or breaches of procurement regulations.³⁹¹ Complaints are first submitted to the Bureau of Public Procurement and, following exhaustion of administrative remedies, can be appealed in federal court.³⁹²

68. Norway (Moderate Access)

Section 10 of the Public Procurement Act of June 17, 2016, no. 73, states that suppliers are entitled to compensation for losses suffered due to a breach of law or regulation.³⁹³ Section 8 allows suppliers to bring cases before the Complaints Board, or suppliers can file a complaint in court.³⁹⁴ Norway is not a member state of the EU but is closely affiliated with the EU and subject to most of the EU's economic policies.³⁹⁵ As such it is likely that "supplier" includes potential suppliers as well.

69. Pakistan (Low Access)

Section 48 of Pakistan's Public Procurement Rules of 2004 provides that bidders may lodge a written complaint with a procurement review committee if they feel aggrieved by a procuring entity's actions.³⁹⁶ Procurement review committees are run by the procuring entity.³⁹⁷ Bidders unsatisfied with the decision of the committee may appeal in court.³⁹⁸

70. Panama (High Access)

Articles 146 and 153 of Panama's Law 22 of 2006 confer standing to challenge procurement decisions to interested parties.³⁹⁹ While neither article contains

390. See *id.* at 61.

391. See Public Procurement Act, No. (65) (2007) 94:54 O.G., A205-49 § 54(1) (Nigeria), <https://www.bpp.gov.ng/> [<https://perma.cc/L9ZG-ZM8E>].

392. *Id.* § 54.

393. See Lov om offentlige anskaffelser [Public Procurement Act] 17 June 2016, No. 73, §§ 8–11 (Nor.), <https://lovdata.no/dokument/NL/lov/2016-06-17-73/%C2%A72#§2> [<https://perma.cc/4XF3-PA2N>]; see also Direktoratet for forvaltning og økonomistyring [Government Agency for Public and Financial Management] (Nor.), <https://www.anskaffelser.no/> [<https://perma.cc/LN33-V4ZL>].

394. See Lov om offentlige anskaffelser [Public Procurement Act], No. 73 § 8 (Nor.).

395. See *Norway—Trade Picture*, EUR. COMM'N (2021), <https://ec.europa.eu/trade/policy/countries-and-regions/countries/norway/> [<https://perma.cc/RV9D-T9NL>].

396. See Public Procurement Rules (2004), 432 S.R. & O. § 48(2) (Pak.).

397. *Id.* § 48(1).

398. *Id.* § 48(5).

399. See Ley 22 de 27 de junio de 2006, que regula la contratación pública, ordenado por la Ley 153 de 2020 [Law 22 of June 27, 2006, which regulates public procurement, ordered by Law 153 of May 8, 2020], arts. 146, 153 (Pan.), <https://www.dgcp.gob.pa/leyes> [<https://perma.cc>

a definition for “interested parties,” Article 30, which addresses advertising principles of procuring entities, includes reference to “bidders, contractors and other interested parties.”⁴⁰⁰

All unlawful or arbitrary actions may be contested.⁴⁰¹ Interested parties may bring challenges to the General Directorate of Public Procurement or to the Public Contracting Administrative Tribunal, which has exclusive authority to hear bid challenges.⁴⁰²

71. Peru (Low Access)

Article 41 in Peru’s Legislative Decree on public procurement confers standing to participants and bidders to challenge government actions taken during procurement development and bidder selection proceedings.⁴⁰³ Third parties and potential bidders are not addressed.⁴⁰⁴ Appeals are heard by the Court of Contracting and can only be filed after the award results have been published.⁴⁰⁵

72. Philippines (Unclear)

Republic Act No. 9184 contains the Philippine’s protest mechanisms.⁴⁰⁶ Section 55 states that decisions of the Bids and Awards Committee (BAC) can be protested, after which court action can be pursued.⁴⁰⁷ Section 12 states that the BAC’s functions are to “advertise and/or post the invitation to bid, conduct pre-procurement and pre-bid conferences, determine the eligibility of prospective bidders, receive bids, conduct the evaluation of bids, undertake post-qualification proceedings, [and] recommend award of contracts to the Head of the Procuring Entity or his duly authorized representative.”⁴⁰⁸ Section 58 states that appeals are governed by Rule 65 of the 1997 Rules of Civil Procedure and are initially made to the regional trial court.⁴⁰⁹ Rule 65 grants standing before the courts to a person aggrieved.⁴¹⁰ Whether such standing includes potential bidders and/or third parties is unspecified.

/FXV5-GHGJ]; see also Texto Único de la Ley 22 de 27 de Junio de 2006 [Unique Text of Law 22 from June 27, 2006], arts. 146, 153 (Pan.).

400. Ley 22 de 27 de junio de 2006, art. 30, May 8, 2020 (Pan.).

401. See *id.* art. 153.

402. See *id.* arts. 146, 153.

403. See Legislative Decree No. 1444, art. 41.1 (Sept. 16, 2018) (Peru); see also PERU COUNTRY PROFILE: GLOBAL PUBLIC PROCUREMENT DATABASE, WORLD BANK, https://www.globalpublicprocurementdata.org/gppd/country_profile/PE [<https://perma.cc/HD9P-5XJX>] (last visited Dec. 2, 2020).

404. See Legislative Decree No. 1444, art. 41.

405. *Id.*

406. See Government Procurement Reform Act, Rep. Act No. 9184, §§ 55–58 (July 22, 2002) (Phil.), <http://www.ps-philgeps.gov.ph/welcome/> [<https://perma.cc/GEP6-U4VT>].

407. *Id.* §§ 55, 58.

408. *Id.* § 12.

409. See *id.* § 58.

410. 1997 Rules of Civil Procedure, As Amended, r. 65, ARELLANO LAW FOUND., https://lawphil.net/courts/rules/rc_1-71_civil.html [<https://perma.cc/32GE-8QET>].

73. Poland (EU—Moderate Access)

Under Poland's 2018 rules on public procurement, economic operators and participants of design contests possess standing to lodge an appeal to the National Appeal Chamber if the procuring entity violated the law.⁴¹¹ Parties may appeal the decision of the National Appeal Chamber in court.⁴¹² This rule is in line with the minimum standards set by EU directive 2014/24 and on par with Austria, Germany, and the majority of EU member states.⁴¹³

74. Portugal (EU—High Access)

Articles 269 to 271 of Portugal's Public Procurement Code provide standing for interested parties to challenge adverse administrative decisions concerning both public contract formation and the procedures themselves.⁴¹⁴ Alternative dispute resolution (ADR) is also available, subject to acceptance by all interested parties and competitors in disputes over procedure related to formation of government contracts.⁴¹⁵ Whereas the article addressing ADR procedures mentions interested parties, candidates, and competitors, Article 271 only mentions "interested parties."⁴¹⁶ As such, it is possible that Portugal extends standing rights beyond bidders and potential bidders.

75. Qatar (Low Access?)

Law No. 24 of 2015 governs government procurement in Qatar.⁴¹⁷ While Articles 37 and 38 introduce the President's ability to create ad hoc Dispute Settlement Committees for contractual disputes, Law No. 24 does not include any mention of an ability to challenge the award decision itself.⁴¹⁸ Article 38 states that all administrative disputes prior to the conclusion of the contract can be adjudicated by the Committee, but it is unclear whether the Committee can adjudicate formation issues.⁴¹⁹ Moreover, Article 34 states that parties

411. See Act of 29 January 2004 Public Procurement Law, art. 180 (since amended to correspond to the requirements of the 2014 EU directive) (Pol.), <https://www.uzp.gov.pl> [<https://perma.cc/7SEN-TR6T>]. Poland expanded its bid protest standing regime while this Article was undergoing pre-publication edits, and, as such, this Article's profile on Poland may not be current.

412. *Id.* art. 194(1).

413. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, 2014 O.J. (L 94/65).

414. See Decreto-Lei n. 111-B/2017 de 31 de Agosto [Law Decree no. 111-B/2017 of August 31], arts. 269–71 (Port.), <https://dre.pt/dre/en/decree-law/111-b-2017-108086621> [<https://perma.cc/93F4-2CKF>]; see also PORTUGAL: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2021, ICLG 176, 181 (2021), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/portugal> [<https://perma.cc/H93P-XSX3>].

415. See Decreto-Lei No. 111-B/2017 de 31 de Agosto [Law Decree no. 111-B/2017 of 31 August], art. 476 (Port.), <https://dre.pt/dre/en/decree-law/111-b-2017-108086621> [<https://perma.cc/93F4-2CKF>].

416. See *id.* art. 271.

417. See Law No. 24 of 2015 Promulgating the Law Regulating Tenders and Auctions, art. 1 (Qatar), <https://www.almeezan.qa/LawPage.aspx?id=6812&language=ar> [<https://perma.cc/6YVK-JYGM>].

418. *Id.* arts. 37–38.

419. *Id.* art. 38; see also Julian Bailey & Michael Turrini, *New Qatar Public Procurement Law*, WHITE & CASE (June 18, 2016), <https://www.whitecase.com/publications/alert/new-qatar-public>

who entered into a contract may seek arbitration to resolve a dispute, but there is no mention of disputes concerning contract formation.⁴²⁰

Article 12 includes appeal rights when a bidder withdraws a bid that results in the government penalizing the bidder by confiscating the bidder's bond or by barring the bidder from future solicitations.⁴²¹ However, no other mention of a formation-specific remedy process is included in the law. Further, the previous law governing public procurement in Qatar, Law No. 26 of 2005, gave contractors a limited appeal right for decisions related to government contract formation.⁴²² Article 22 of Law No. 26 provided that contractors could appeal decisions pertaining to qualifying and classifying contractors to the Minister of Finance.⁴²³ No mention was made of any other ability to contest or otherwise challenge contract-formation-related issues.

As such, it is unclear whether Qatar confers bid challenge rights under its current law. Based on its past law, it would appear Qatar only permits bidders to challenge a mistake involving their classification by the Ministry of Finance.⁴²⁴

76. Russia (Moderate Access)

Federal Law No. 44-FZ on the Contract System in State and Municipal Procurement of Goods, Works and Services provides two key procedures for reviewing complaints concerning perceived violations of procurement law.⁴²⁵ Those seeking review can seek administrative review by the Federal Antimonopoly Service or the Federal Service on Defense Orders. They can also seek court review.⁴²⁶ Bidders in the procurement process are provided standing in utilizing these options.⁴²⁷

77. Saudi Arabia (Moderate Access)

Articles 86 and 87 of the Government Tenders and Procurement Law, dated July 16, 2019, confers standing to competitors in the procurement to challenge

-procurement-law [https://perma.cc/X37M-JP3E] (Note that the summary of the new Dispute Settlement Committee provided in this blog is similarly nondescriptive regarding bid protest rights.)

420. Law No. 24 of 2015 Promulgating the Law Regulating Tenders and Auctions, art. 34 (Qatar).

421. *Id.* art. 12.

422. *See* Law No. 26 of 2005 Promulgating the Tenders and Bids Regulatory Law, art. 22 (Qatar), <https://www.almeezan.qa/LawView.aspx?opt&LawID=3974&language=en> [https://perma.cc/GGZ6-EGRZ].

423. *Id.*

424. *Id.*

425. *See* Federal Law No. 44-FZ on the Contract System in State and Municipal Procurement of Goods, Works and Services, arts. 105, 106 (Russ.), <http://publication.pravo.gov.ru/Document/View/0001201304080023> [https://perma.cc/RM76-2Y2A].

426. *See* Federal Law No. 44-FZ on the Contract System in State and Municipal Procurement of Goods, Works and Services (Russ.); *see also* Olga Revzina et al., *Russia, in* GOV'T PROCUREMENT REVIEW 144, 156 (8th ed. 2020).

427. *See* Federal Law No. 44-FZ on the Contract System in State and Municipal Procurement of Goods, Works and Services, art. 105 (Russ.); Revzina et al., *supra* note 426.

procurement proceedings.⁴²⁸ As such, potential bidders and third parties are excluded. Challenges are brought before a specially designated committee, whose decisions are binding on the government entity.⁴²⁹ Article 87(1) states that competitors are entitled to complain to the government regarding any decision taken.⁴³⁰

78. Senegal (High Access)

Irregularities in the procurement process may be brought by “interested parties” or any other person that have knowledge.⁴³¹ Articles 18 and 20 of Senegal’s procurement law of April 25, 2007, stipulates that challenges are brought before the Dispute Settlement Committee.⁴³² Decisions are binding unless appealed in administrative or judicial court.⁴³³

79. Serbia (Moderate Access)

Serbia’s Law on Public Procurement of 2012 confers standing to bidders, applicants, candidates, and interested persons, provided that they have an interest in the award of the contract and suffer, or may suffer, damage due to contracting authority decisions that violate the law.⁴³⁴ Depending on how “interest in the award of the contract” is interpreted, it is possible that third parties are able to bring challenges; however, it seems more likely that such right is typically limited to bidders and potentially bidders only.⁴³⁵ Challenges are brought to the Republic Commission for Protection of Rights in Public Procurement Procedures.⁴³⁶ The Republic Commission’s decisions are binding and non-appealable, although a party can raise an administrative dispute.⁴³⁷

80. Singapore (Low Access)

Singapore’s Government Procurement Act provides for a bid protest mechanism, in accordance with its place as a party to the GPA.⁴³⁸ Suppliers who suffer loss, or risk suffering loss, can bring a claim to the Government Procurement

428. See Government Tenders and Procurement Law, Royal Decree No. M/128 of 1440 H, arts. 86–87 (2019) (Saudi Arabia), <https://www.mof.gov.sa/en/docslibrary/RegulationsInstructions/Pages/default.aspx> [<https://perma.cc/JTG7-Z43C>].

429. *Id.* art. 86.

430. *Id.* art. 87(1).

431. Decret No. 2007-546 du 25 avril 2007 [Decree No. 2007-546 of April 25, 2007], art. 20 (Sen.), <http://www.armp.sn> [<https://perma.cc/LC2C-SDN9>].

432. See *id.* arts. 18, 21.

433. *Id.* art. 21.

434. See Law on Public Procurement of 2012, arts. 148–50, 159 (Serbia) (since amended, including in 2015), <http://www.pravno-informacioni-sistem.rs/SIGlasnikPortal/eli/rep/sgrs/skupstina/zakon/2012/124/1/reg> [<https://perma.cc/A7LG-3CWS>]; see also SERBIA: PUBLIC PROCUREMENT LAWS AND REGULATIONS 2020, ICLG (Jan. 31, 2020), <https://web.archive.org/web/20210119214618/https://iclg.com/practice-areas/public-procurement-laws-and-regulations/serbia>.

435. Law on Public Procurement of 2012, art. 148 (Serb.).

436. *Id.* arts. 138–39.

437. *Id.* art. 159.

438. See Government Procurement Act §§ 7–8, 12 (Sing.); see also SINGAPORE: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2020, ICLG (Jan. 31, 2020), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/singapore> [<https://perma.cc/DT7E-L8DP>].

Adjudication Tribunal if the procuring entity breaches a duty.⁴³⁹ However, the law expressly prohibits bringing an action concerning a public procurement breach before the court.⁴⁴⁰ As such, Singapore is a good example of limits on standing arising from constrained forum options. This restriction is not to suggest that Singapore's tribunal is inadequate or fails to remedy procurement issues, but the lack of appellate possibilities or remedy in court is not ideal. It may also signal a distrust in challenging the government.

81. Slovenia (EU—Moderate Access)

Slovenia's Public Procurement Act confers standing to seek legal protection against infringements of public procurement procedures to economic operators.⁴⁴¹ As noted in previous profiles on this list, this conferring of rights to bidders and potential bidders is in line with most EU member states. Operators can bring challenges before the National Commission for Reviewing Public Procurement Award Procedures or before a district court.⁴⁴²

82. Somalia (Moderate Access)

The 2015 Public Procurement, Concessions and Disposal Act regulates procurement in Somalia.⁴⁴³ Article 163 confers standing to potential or actual bidders who claim to have suffered, or are likely to suffer, loss or injury due to a breach.⁴⁴⁴ Applications for review are brought before the Independent Procurement Review Panel, per Article 165.⁴⁴⁵ The Panel's decisions may be appealed only in a court of law pursuant to Article 161 of the Act.⁴⁴⁶

83. South Africa (Moderate Access)

Section 33 of South Africa's constitution states that every person has a right to administrative action.⁴⁴⁷ Further, the Promotion of Administrative Justice Act (PAJA) of 2000 includes under Section 6(2) various grounds for when the award of a tender (as a type of administrative action) can be challenged by

439. See Government Procurement Act § 7 (Sing.).

440. *Id.* ("A breach of a duty referred to in subsection (1) shall not be the subject of any proceedings in any court but may be the subject of a challenge brought before the Tribunal by a supplier to whom the duty is owed and who has suffered, or reasonably risks suffering, loss or damage as a result of the breach.")

441. See Public Procurement Act, arts. 2–3 (Slovn.), <https://ejn.gov.si/sistem/pravno-varstvo.html> [<https://perma.cc/Q45T-VSCR>]; see also *System Change in Slovenia: Making Public Procurement More Effective*, OECD, <https://www.oecd-ilibrary.org/sites/ffb347c9-en/index.html?itemId=/content/component/ffb347c9-en> [<https://perma.cc/D9FF-8M7Z>] (last visited Dec 14, 2020); SLOVENIA: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2020, ICLG (Jan. 31, 2020), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/slovenia> [<https://perma.cc/BX8P-BPZX>].

442. See Public Procurement Act, art. 114 (Slovn.).

443. See Public Procurement, Concessions and Disposal Act, art. 2 (2015) (Som.), <https://mof.gov.so/sites/default/files/2018-09/Public%20Procurement%2C%20Concession%20and%20Disposal%20Act%202015.pdf> [<https://perma.cc/HF9Z-GNGK>].

444. *Id.* art. 163.

445. *Id.* art. 165.

446. *Id.* sched. 2(13).

447. S. AFR. CONST. § 33, 1996.

an unsuccessful bidder.⁴⁴⁸ Section 5 of PAJA reiterates that any person whose rights have been materially and adversely affected by administrative action may pursue judicial review.⁴⁴⁹

As indicated by the constitutional right to administrative action, South Africa represents a somewhat different approach to conferring bid protest rights in that it is considered under administrative action in general. In other countries (such as the United States), bid challenges occur outside the framework of other agency challenges.⁴⁵⁰ Based on this general constitutional right, it would appear that bidders, potential bidders, and third parties possessing an interest are able to challenge procurement decisions.

84. South Sudan (Low Access)

South Sudan's "interim" procurement rules of 2006 provide any supplier, contractor, or consultant that claims to have suffered, or may suffer, loss or injury because of a breach of duty a right to review.⁴⁵¹ This rule would appear to constrain standing to bidders only. Challenges are first submitted to the procuring entity, and then to the Procurement Policy Unit, which possesses final authority, per Section 57.⁴⁵²

85. Sweden (EU—Moderate Access)

The Procurement Act of 2016 provides that suppliers may seek review in general administrative court, provided that the supplier considers that it has suffered, or may suffer, harm.⁴⁵³ Notably, Chapter 4, Section 4, states that suppliers, who have rights as determined by the state in which the supplier conducts activities, may not be excluded from participation.⁴⁵⁴ Taken in the context of Sweden's placement within the EU, Sweden confers standing rights to bidders and potential bidders.

Section 20, under the heading "Skadestånd" ("Damages"), states that the contracting authority who has not complied with the provisions of this Act shall compensate the supplier for the damages.⁴⁵⁵ Section 20 further states that the right to damages includes compensation to a supplier who has participated in a procurement for costs incurred in preparing tenders and otherwise

448. See Promotion of Administrative Justice Act 3 of 2000, § 6 (S. Afr.), <https://justice.gov.za/legislation/acts/2000-003.pdf> [<https://perma.cc/ERE3-QBXX>].

449. *Id.* § 5.

450. See, e.g., 48 C.F.R. 33.1.

451. See Interim Public Procurement and Disposal Regulation 2006, arts. 56–57 (S. Afr.), <https://justice.gov.za/legislation/acts/2000-003.pdf> [<https://perma.cc/ERE3-QBXX>].

452. *Id.*

453. See Procurement Act of 2016, SFS 2016:1145 §§ 4–6 (Swed.), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-20161145-om-offentlig-upphandling_sfs-2016-1145 [<https://perma.cc/F3NC-9FZZ>]; see also SWEDEN: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2020, ICLG (Jan. 31, 2020), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/sweden> [<https://perma.cc/5NPA-YQ7H>]; Fredrik Linder et al., *Public Procurement & Government Contracts: Sweden*, CHAMBERS AND PARTNERS (2020).

454. See Procurement Act of 2016 § 4 (Swed.).

455. *Id.* §20.

participating if the violation of the Procurement Act has adversely affected the supplier's ability to be awarded the contract.⁴⁵⁶

86. Switzerland (Moderate Access)

Until January 2021, the Federal Act on Public Procurement of 1994 (last updated in 2011) provided rights for legal action for bid protests.⁴⁵⁷ Switzerland adopted a revised procurement regime in June 2019, which went into effect on January 1, 2021.⁴⁵⁸ The new act (referred to as the rPPA) moderately expanded scope of review by lowering the minimum threshold to be met by challengers (for non-construction federal contracts, the threshold is at or over CHF (Swiss franc) 150,000; for construction, the threshold is CHF 2 million).⁴⁵⁹

Per Article 52, the tenderer may file an application for damages to the contracting authority, with appeals being sent to the Federal Administrative Court.⁴⁶⁰ Article 3 defines a tenderer as “an individual or legal entity under private or public law, or a group of such persons or entities, which supplies goods, work or services or which applies to participate in a public tender, the delegation of a public task or the granting of a concession.”⁴⁶¹ However, Article 56 states that “[o]nly those that can prove that they can and wish to provide the goods, work or services requested or equivalent goods, work or services may appeal against awards in the direct award procedure.”⁴⁶² As such, standing is conferred to bidders and potential bidders.

No standing is conferred until a contracting decision has been made.⁴⁶³ Challenges may be filed only on the grounds that a violation of award procedures occurred or if the “contract was awarded based on corruption.”⁴⁶⁴

456. *Id.*

457. See Federal Act on Public Procurement of 1994 (Switz.), https://www.simap.ch/shab/forms/COMMON/application/applicationGrid.jsp?template=1&view=1&page=/MULTI_LANGUAGE/simap/content/start.jsp&language=EN [<https://perma.cc/89PH-68WY>]; see also Astrid Waser & Benoît Merkt, *Switzerland*, in *THE GOVERNMENT PROCUREMENT REVIEW* 158–59 (Jonathan Davey & Amy Gatenby eds., 8th ed. 2020); Marcel Dietrich et al., *Switzerland: Public Procurement & Government Contracts 2021*, CHAMBERS AND PARTNERS (Apr. 7, 2021), <https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2021/switzerland/trends-and-developments> [<https://perma.cc/5JDV-F9JB>].

458. See Federal Act on Public Procurement of 2021, classified compilation (SR) 172.056.1 (Switz.), <https://www.fedlex.admin.ch/eli/cc/2020/126/en> [<https://perma.cc/JXE6-5G3T>]; Dietrich et al., *supra* note 457. While Switzerland provides an English translation of its law, it notes that the English translation does not carry legal force and is for informational purposes only. The official versions are in German, French, and Italian.

459. See Ramona Weiss et al., *Switzerland: Public Procurement & Government Contracts 2020*, CHAMBERS AND PARTNERS (Apr. 7, 2021), <https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2021/switzerland/trends-and-developments> [<https://perma.cc/2RSA-NPV9>].

460. See Federal Act on Public Procurement of 2021, arts. 52, 58, classified compilation (SR) 172.056.1 (Switz.). The 2021 update to Switzerland's procurement regime did not change standing requirements. See Federal Act on Public Procurement of 1994, arts. 26–29, 35.

461. Federal Act on Public Procurement of 2021, art. 3 (Switz.).

462. *Id.* art. 56.

463. See *id.* art. 51.

464. *Id.* art. 56.

87. Taiwan (Moderate Access)

Chapter IV, titled “Dispute Settlement,” of Taiwan’s government procurement law confers standing to challenge procurement decisions.⁴⁶⁵ Article 76, in conjunction with Articles 74 and 75, states that a supplier may file a protest with the Complaint Review Board for Government Procurement in the event that a breach impairs a supplier’s rights or interests in the procurement.⁴⁶⁶ Under Article 8, a supplier is “any company, industrial or commercial firm under partnership or sole proprietorship, or any natural person, juridical person, institution or organization that may offer construction work, property or service to the entity.”⁴⁶⁷ Thus, standing to raise a bid protest in Taiwan is conferred to suppliers and potential suppliers. This provision places Taiwan in a similar situation to Canada and most EU member states.

88. Thailand (Low Access)

Thailand’s Public Procurement and Supplies Administration Act of 2017 contains a chapter on appeals.⁴⁶⁸ Section 114 provides that a person having tendered a proposal to a state agency for the procurement of supplies has the right to submit an appeal regarding any action taken by the procuring entity in violation of procurement law that disadvantages the bidder.⁴⁶⁹ Thus, bidders are conferred standing rights. Review petitions are initially directed to the procuring agency; those decisions can be appealed to the Appeals Committee whose decisions are final.⁴⁷⁰

89. Tunisia (Moderate Access)

Article 180 of Tunisia’s public procurement law confers standing to any person with an interest in the award of a public procurement contract, provided that an unlawful decision was issued that caused the party prejudice.⁴⁷¹ Challenges are initially reviewed by the procuring entity, and then a party can appeal to the Monitoring and Investigation Committee of Public Contracts.⁴⁷²

465. See Government Procurement Act, arts. 74–75 (Taiwan), <https://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030057> [<https://perma.cc/38EB-DZ65>]; see also Pauline Wang & Benoit Feng, *Taiwan: Public Procurement Laws and Regulations 2020*, ICLG (Jan. 31, 2020), <https://web.archive.org/web/20200810060633/https://iclg.com/practice-areas/public-procurement-laws-and-regulations/taiwan>.

466. See Government Procurement Act, arts. 74–76.

467. See *id.* art. 8.

468. See Procurement and Supplies Administration Act of 2017, B.E. 2560 § 114 (Thai.), http://www.gprocurement.go.th/new_index.html [<https://perma.cc/8ZMA-VVPW>].

469. *Id.*

470. *Id.* §§ 117–119.

471. See Décret no. 2014-1039 du 13 mars 2014, portant réglementation des marchés publics [Decree no. 2014-1039 of March 13, 2014, Pertaining to the Regulation of Public Contracts] (Tunis.), <http://www.marchespublics.gov.tn/onmp/documents/document.php?id=456&lang=fr> [<https://perma.cc/S8Y3-4CJB>].

472. *Id.* arts. 147, 181.

90. Turkey (Moderate Access)

Section Two, Article 54, of the Public Procurement Law confers bid challenge standing to candidates, tenderers, or potential tenderers who claim they have suffered, or are likely to suffer, a loss of right or damage due to unlawful procedures or actions.⁴⁷³ Complaints are submitted to the Public Procurement Authority, per Article 56.⁴⁷⁴ Final decisions of the Public Procurement Authority may be appealed in court, per Article 57.⁴⁷⁵

91. Uganda (Low Access)

Uganda's procurement law of 2003 (the most recent amendment, at the time of writing, went into effect in 2014) contains procedures and rights concerning administrative review.⁴⁷⁶ "Bidder" is defined as "a physical or artificial person intending to participate or participating in public procurement or disposal proceedings."⁴⁷⁷ Under Part VII, "Administrative Review," bidders are conferred standing to bring challenges to the Accounting Office, whose decisions may be appealed to a Tribunal.⁴⁷⁸ Bidders may raise challenges when aggrieved by a decision taken by the procuring entity.⁴⁷⁹ The Decisions of the Tribunal are appealable to the High Court.⁴⁸⁰

92. Ukraine (Moderate Access)

The Law of Ukraine on Public Procurement, last amended on November 22, 2020, provides protection for the rights and legitimate interests of persons participating in procurement procedures.⁴⁸¹ "Participant" means those who submitted offers or were involved in negotiations, and the term includes natural persons (meaning operators or legal entities), encompassing residents and non-residents and associations of participants.⁴⁸² As such, Ukraine grants standing to bidders and participants, but not potential bidders or third parties. The Antimonopoly Committee of Ukraine serves as the reviewing authority for complaints concerning violations of procurement law, and the Committee's decisions can be appealed to the district administrative court.⁴⁸³

473. See Public Procurement Law No: 4734, art. 54 (Turk.) (Jan. 22, 2002), <http://www.lawsturkey.com/law/public-procurement-law-4734> [<https://perma.cc/V6SC-YXRE>].

474. *Id.* art. 56.

475. *Id.* art. 57.

476. See Public Procurement and Disposal of Public Assets Act, 2003 §§ 89–90 (amended Feb. 28, 2014) (Uganda), <https://www.ppda.go.ug> [<https://perma.cc/3EAQ-NGHP>]. It should be noted that this law was amended on July 1, 2021, following preparation of this Article.

477. *Id.* § 3.

478. See *id.* §§ 90–91.

479. *Id.* § 90.

480. *Id.* § 91M.

481. See Law of Ukraine on Public Procurement, No. 9, art. 18 (2020).

482. *Id.* art. 1, ¶ 37.

483. *Id.* art. 18, ¶¶ 22–23.

93. United Kingdom (England, Wales, and Northern Ireland) (Moderate Access)

As of December 2020, procurement in England, Wales, and Northern Ireland is governed by Public Contracts Regulations (2015).⁴⁸⁴ Under Section 91 of the regulations, any economic operator who suffers or risks suffering loss or damage may challenge procurement proceedings in the High Court.⁴⁸⁵ Section 2-1 defines economic operator as “any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market.”⁴⁸⁶

Claimants must show “sufficient interest,” a term which has been broadly construed.⁴⁸⁷ For the purposes of analyzing standing, the sufficient interest standard is notable because of its similarity to the prejudice requirement in the United States. The United Kingdom’s sufficient interest standard is the closest that another state in this survey comes to the “substantial chance of award” requirement established in the United States.

94. Uruguay (Unclear)

Article 73 of Decree No. 150/012 provides that an “interested party” may challenge administrative acts during procurement proceedings.⁴⁸⁸ This term is not defined further in the Decree. Challenges may be submitted to the Tribunal de Cuentas (Court of Accounts).⁴⁸⁹

95. Venezuela (No Access)

Decree No. 1,399 of November 13, 2014, states that bidders have the right to request a review of the file following selection of a contractor.⁴⁹⁰ However, non-bidders, including those parties precluded from submitting a bid, have no

484. See Public Contracts Regulations 2015, SI 2015/102, art. 7 (U.K.), <https://www.legislation.gov.uk/uksi/2015/102/contents/made> [<https://perma.cc/8SBM-77C5>]. The Public Contracts Regulation notably implements EU directives. Note that Scotland has its own system per Section 53 of the Scotland Act and implements EU directives on its own (although in a largely similar manner to the rest of the UK); see Louise Dobson et al., *The Government Procurement Review: United Kingdom*, LAW REVS. (May 27, 2021), <https://thelawreviews.co.uk/edition/the-government-procurement-review-edition-8/1227029/united-kingdom> [<https://perma.cc/AG3U-U3GQ>]. How the United Kingdom will proceed post-Brexit is beyond the scope of this paper, yet it should be noted that the United Kingdom could decide to may decide to deviate from EU directives post-Brexit.

485. See Public Contracts Regulations 2015, SI 2015/102, art. 91 (U.K.); Dobson et al., *supra* note 484.

486. Public Contracts Regulations 2015, No. 102 § 2-1 (U.K.).

487. See ENGLAND & WALES: PUBLIC PROCUREMENT LAWS AND REGULATIONS: 2020, ICLG (Jan. 31, 2020), <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/england-and-wales> [<https://perma.cc/B545-T3EC>].

488. See Decreto, 11 de mayo 2012, 150/012, 17 de mayo 2012 No. 150/012 art. 73 (Uru.).

489. See *id.*

490. See Decreto con Rango Valor y Fuerza de Ley de Contraciones Publicas (Decreto No. 1,399), No. 6.154 Extraordinaire art. 20 (Venez.), <http://www.snc.gob.ve/sobre-el-snc/base-legal> [<https://perma.cc/577H-T622>].

right to access files or to request a review.⁴⁹¹ It is doubtful that this limited ability to request a review of the procurement file qualifies as a bid protest system.

96. Vietnam (Low Access)

Government procurement in Vietnam is governed by Law on Bidding No. 43/2013/QH13 and Decree No. 63/2014/Nd-CP.⁴⁹² Article 92 of the Decree provides that a contractor (bidder) may submit a written petition to the procuring entity on issues affecting the rights and interests of the bidder in the contractor selection process.⁴⁹³ Unsatisfied bidders can appeal the procuring entity's decision, or lack of a decision, to the Advisory Council.⁴⁹⁴

97. Yemen (Low Access)

Law No. 23 of 2007 on Government Tenders, Auctions and Stores Law confers standing under Article 77 to anyone who submits a bid.⁴⁹⁵ As such, bidders, but not potential bidders or third parties, are permitted to file a challenge. Reviews are initially heard by the High Authority, after which parties can appeal the issue in court.⁴⁹⁶

98. Zimbabwe (Unclear)

Zimbabwe's 2018 law on procurement confers standing to "challengers," which the law defines as "a bidder or other person that challenges procurement proceedings in terms of Part X of the Act."⁴⁹⁷ Accordingly, Part X contains references to "challengers" and "applicants" and appears to use the terms interchangeably.⁴⁹⁸ While not restricted only to bidders, it is unclear what other parties may be considered as applicants. Review is initially undertaken by a panel, after which appeals can be sought before courts such as the Administrative Court.⁴⁹⁹

491. See Daniel Rosas Rivero, *Venezuelan Public Procurement: A Great Challenge Lies Ahead*, TRANSPARENT PUB. PROCUREMENT RATING (Apr. 16, 2020), <https://www.tpp-rating.org/page/eng/publications/33> [<https://perma.cc/LCP9-452K>].

492. See Law on Bidding, No. 43/2013/QH13, art. 1 (Nov. 26, 2013) (Viet.) (implemented by Decree No. 63/2014/Nd-CP (June, 26, 2014) (Viet.)); see also PUBLIC PROCUREMENT IN VIETNAM: WHAT SWISS COMPANIES NEED TO KNOW, SWITZERLAND GLOB. ENTER. (Dec. 3, 2019), <https://www.s-ge.com/en/article/export-knowhow/20194-c3-vietnam-public-procurement>.) Both laws are accessible online in Vietnamese, <http://muasamcong.mpi.gov.vn/csdll/van-ban> [<https://perma.cc/U465-DGC6>].

493. See Decree No. 63/2014/Nd-CP, arts. 90, 94 (Viet.).

494. *Id.*

495. See Government Tenders, Auctions and Stores Law No. 23 of 2007, art. 77 (Yemen), <https://hatcyemen.org/documents/law/document.php?ID=975> [<https://perma.cc/36LH-RU68>]; see also Public Tender and Auctions Law No. 23, 2007, art. 77 (Yemen), <https://www.scribd.com/document/73466426/Public-Tenders-and-Auctions-Law-No-23-2007> [<https://perma.cc/3HQH-6D4Y>].

496. Public Tender and Auctions Law No. 23 of 2007, arts. 77–78.

497. Public Procurement and Disposal of Public Assets (General) Regulations, 2018, Statutory Instrument 5 of 2018, art. 2 (Zim.).

498. See *id.* arts. 65–67.

499. *Id.* arts. 43–44, 61.

A Note on Other Countries

The preceding list of country profiles is not inclusive of every country in the world. An additional thirty-five countries were surveyed while researching this Article but were ultimately not included in this Article for a variety of reasons including, in some cases, research obstacles, and, in other cases, the absences in the country of any easily identifiable protest system.⁵⁰⁰ Countries in the latter category include Cuba, Iran, Libya, North Korea, and Syria, although further research is likely needed to confirm the lack of a protest mechanism in each.⁵⁰¹

500. Another reason concerns the existence of language barriers in translating and locating relevant legislation. In some cases, some legislation could be located on the subject of public contracts or even a protest system, but not on protest standing. See Council for Development and Reconstruction (Leb.), <https://www.cdr.gov.lb/en-US/Procurement.aspx> [<https://perma.cc/EPD9-JTZT>] (last visited Dec. 27, 2020); see also Bernard Hoekman et al., *Bolstering SME Participation in Public Procurement: Policy Options for Lebanon*, IGC (2020), <https://www.theigc.org/publication/bolstering-sme-participation-in-public-procurement-policy-options-for-lebanon> [<https://perma.cc/QG52-FCYB>].

501. This statement is difficult to fully substantiate because of the difficulty in proving the absence of something's existence. However, research into the aforementioned countries did not reveal respective locatable protest systems. For example, Iran's website for its Ministry of Industry, Mine and Trade does not contain any reference to procurement codes or regulations, let alone a protest system. See Ministry of Industry, Mine and Trade (Iran) (last visited Jan. 2, 2021), <https://irandataportal.syr.edu/ministry-of-industry-mine-and-trade> [<https://perma.cc/69TT-75N3>]; see also Public Procurement Law (Law 51/2004) (Syria); Syrian Ministry of Finance, <http://syrianfinance.gov.sy> (last visited Jan. 4, 2021); Ministerio Finanzas y Precios [Ministry of Finance and Prices] (Cuba), <http://www.mfp.gob.cu/inicio/portada.php> [<https://perma.cc/67FS-T469>] (last visited Dec 30, 2020).

APPENDIX B. TABLE OF COUNTRY ABBREVIATIONS

Afghanistan	AF	France	FR	Peru	PE
Albania	AL	United Kingdom	GB	Philippines	PH
Armenia	AM	Georgia	GE	Pakistan	PK
Angola	AO	Ghana	GH	Poland	PL
Argentina	AR	Greece	GR	Portugal	PT
Austria	AT	Hong Kong	HK	Qatar	QA
Australia	AU	Croatia	HR	Serbia	RS
Azerbaijan	AZ	Indonesia	ID	Russia	RU
Barbados	BB	Ireland	IE	Saudi Arabia	SA
Belgium	BE	India	IN	Sweden	SE
Burkina Faso	BF	Iceland	IS	Singapore	SG
Bahrain	BH	Italy	IT	Slovenia	SI
Bermuda	BM	Jordan	JO	Senegal	SN
Bolivia	BO	Japan	JP	Somalia	SO
Brazil	BR	Kenya	KE	South Sudan	SS
Bahamas	BS	Kyrgyz Rep.	KG	Thailand	TH
Bhutan	BT	Cambodia	KH	Tunisia	TN
Belarus	BY	South Korea	KR	Turkey	TR
Canada	CA	Kuwait	KW	Taiwan	TW
Dem. Rep. Congo	CD	Kazakhstan	KZ	Ukraine	UA
Rep. Congo	CG	Laos	LA	Uganda	UG
Switzerland	CH	Liberia	LR	Uruguay	UY
Cote d'Ivoire	CI	Lithuania	LT	Venezuela	VE
Chile	CL	Luxembourg	LU	Vietnam	VN
Cameroon	CM	Latvia	LV	Yemen	YE
China	CN	Macau	MO	South Africa	ZA
Colombia	CO	Malta	MT	Zimbabwe	ZW
Czech Rep.	CZ	Malawi	MW		
Germany	DE	Mexico	MX	Cuba	CU
Denmark	DK	Malaysia	MY	Iran	IR
Dominica	DM	Nigeria	NG	North Korea	KP
Dominican Rep.	DO	Netherlands	NL	Libya	LY
Algeria	DZ	Norway	NO	Syria	SY
Estonia	EE	New Zealand	NZ		
Finland	FI	Panama	PA	United States	US