

Belgium

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THE CONSTRUCTION SECTOR

1. Please briefly describe the main trends in the construction market in your jurisdiction. What have been the most significant deals?

The global financial and economic crisis has had a significant impact on the construction industry in Belgium. Home construction has seen its role as a driving force dwindle and office construction, which is sensitive to economic fluctuations, has been dealt an even more severe blow. New development has been particularly hard hit.

The construction industry has been forced to adapt to a market with fewer financing options.

As part of its economic recovery plan, the government introduced a temporary reduced VAT rate for new development.

Energy-saving investments are encouraged by tax benefits and so-called “green” loans (where the government bears part of the interest cost).

With the exception of the contract for the construction of the Liefkenshoek railway tunnel under the river Scheldt in the port of Antwerp, no major project deals were made in Belgium over the past year.

PPP contracts remain very important for all public works contracts.

Some significant projects are expected to begin in the near future. These are mostly in the northern part of Belgium, and particularly in the following sectors:

- School accommodation (such as the construction of 211 new schools).
- Port infrastructure (for example, the construction of new sea locks for the ports of Antwerp, Ghent and Seabruge).
- Public transport (for instance, the construction of various storage lots for public transport company De Lijn, the construction of tramways and so on).
- The addition of links to the road network (such as the R4 around Ghent and the Kempen North-South junction).

The proposed construction of the Antwerp Oosterweel link (which should complete the ring road around Antwerp) is a large project that faces strong public objection and is currently the subject of fierce debate. This is holding its construction up.

At a federal level, substantial investment is planned in the prison system for the construction of 2,500 new cells.

TRANSACTION STRUCTURES AND FINANCE

2. What transactional structures and corporate vehicles are most commonly used in construction projects in your jurisdiction?

If a special purpose vehicle or a joint venture is being established for a construction project, it is commonly structured either:

- Through an incorporated partnership such as a temporary commercial association (*tijdelijke handelsvennootschap* or *société momentanée*).
- Through the creation of a company as a special purpose vehicle. In this case, the limited liability company (*naamloze vennootschap* or *société anonyme*) is most frequently used.
- Through other joint venture structures such as associations without legal personality.

A temporary commercial association is an association without legal personality in which the members agree to jointly pursue a commercial purpose (that is, a construction project). The members of a temporary commercial association are jointly and severally liable in relation to third parties.

For both temporary commercial associations and limited liability companies, as well as other joint venture structures, the partnership agreement or the articles of association is usually accompanied by agreements between the partners regarding, for instance:

- The financing of the construction project.
- Exit strategies.
- Voting rights for reserved matters.
- Share transfer restrictions.
- Distribution of the profits or losses.
- Conflict resolution mechanisms.

3. How are construction projects generally financed?

A wide variety of financing mechanisms are used to finance construction projects (the mechanism that is ultimately opted for largely depends on the nature and scope of the relevant project). While for certain (public and private) construction projects government subsidies are granted, even for public construction projects, some (pre) financing must be sought (for example, in PPP projects).

The most common way of financing a construction project is with funds borrowed from construction financiers (most commonly banks). Multi-tranche loans are only used to finance larger projects. Mezzanine tranches are sometimes required, but are not very common.

For tax as well as financing reasons, leasing constructions are often put in place. In that case, the funder (most commonly a bank) becomes the owner of or has a right in rem on the construction to be erected.

4. What forms of security and contractual protections do funders typically require to protect their investments?

All normal forms of security are used to finance construction projects.

Most commonly, a first ranking mortgage (on the property as well as on the structures to be erected) is granted to the funder to secure part of the financing. In addition, a large part of the financing is often secured by a power of attorney in favour of the funder, which allows it to take a mortgage if and when necessary.

Other forms of security used are parent company guarantees, pledges on shares or bank accounts and rights over the amounts to be received by the builder.

If more complex financing methods (for example, leasing constructions) are used, funders often acquire a right in rem (see *Question 3*).

Most funding agreements contain step-in rights for the funder to allow it to take over the rights and obligations of the builder if it defaults on the loan.

Loans for construction projects are only disbursed once the funder receives an invoice, often only after prior approval by an independent architect.

MAIN PARTIES

5. What are the main parties involved in a construction project in your jurisdiction? What are the most common procurement arrangements between them?

The main parties involved in a construction project are:

- Principal (the owner or developer).
- Contractor or general contractor.
- Subcontractor.
- Architect.
- Consulting engineers (for instance, stability, special techniques and acoustics).
- Others. This may include suppliers, a project manager, a security co-ordinator, an energy performance reporter, technical control engineers, quantity surveyors, quality surveyors, funders and so on.

Procurement in public works is regulated by the Belgian laws on public procurement, which incorporate EU directives into Belgian law (see *Question 39*). Public works are awarded by tender (either to the lowest priced tender or to the most economically advantageous tender).

Private contracts can be procured freely although particular regulations govern the construction of houses. The main procurement options are:

- Turnkey contracts, in large construction projects.
- The award of the contract to a general contractor who in turn engages several subcontractors.
- Direct engagement of several contractors by the principal. The principal also usually appoints a project manager to co-ordinate the execution of the works, or designates one of the contractors as co-ordinator.

The most common contractual pricing arrangements are:

- Absolute fixed price (lump sum).
- Relative fixed price (changes can be unilaterally made by the principal).
- Price per unit.
- Cost plus fee, alternatively capped or combined with profit sharing.

STANDARD FORMS OF CONTRACTS

6. What standard forms of contracts are used for large construction projects in your jurisdiction? Which construction organisations typically produce them?

The execution of public works is regulated by the General Contracting Conditions of 26 September 1996 (*Algemene aannemingsvoorwaarden* or *Cahier général des charges*).

Contracts for large private construction projects are usually custom made. Professional associations such as the Building Confederation (www.confederationconstruction.be) and the Real Estate Confederation (www.cib.be) provide standard contracts for registered members. However, developers tend to radically modify these standard contracts on large projects.

The construction of houses is regulated by the Law of 9 July 1971, amended in 1993, on the construction of houses and on the sale of houses that have yet to be built or that are in the process of being built (*Wet/Loi Breyné*). This law imposes several contractual conditions (concerning liability, the transfer of property, required information, the guarantee period, payment and advances, and so on).

7. Do construction contracts for international projects differ from the standard forms of contract set out in *Question 6*? If yes, please give brief details.

Belgian parties can use international standard form contracts such as those provided by the International Federation of Consulting En-

gineers (*Fédération Internationale des Ingénieurs-Conseils*) (FIDIC). Parties can also use the rules established in the Draft Common Frame of Reference (book four, part C, chapter three). This is not mandatory and the rules are not commonly used.

8. Do contracts for engineering projects differ from the contracts set out in Questions 6 and 7? If yes, please give brief details.

Engineering and design contracts for public works are regulated as services by the General Contracting Conditions (*see Question 6*).

Engineering contracts for large private construction projects are most commonly custom made. Standard contracts are provided for registered members by professional associations such as the Flemish Organisation of Architects (www.nav.be) (*Vlaamse Architectenorganisatie* or *Organisation flamande des architectes*). These standard contracts are usually radically modified when used for large projects.

The Code of Conduct of the Belgian Order of Architects imposes several conditions on architects working in Belgium. The Code has the force of law. These conditions regulate, among other things: payment, insurance, publicity and attention to the (financial) limits of the project. The architect can only enter into a design contract if he either also agrees to supervise the execution of the works by the contractor or if he knows that another registered architect will supervise the works.

CONTRACTUAL ISSUES

9. What risks are typically allocated to the contractor? How are these risks (such as material price escalation and ground conditions) offset or managed?

The main risks for the contractor are usually:

- Insolvency of the client.
- Loss of the structure.
- Certain circumstances or events occurring during the execution of the works that increase its obligations.

In an attempt to limit the risks associated with insolvency of the client, the contract often provides that the contractor is entitled to advances that can be charged as the works progress.

The contractor usually must bear the risk of loss of the structure until the date of acceptance of the works by the principal. If the principal supplies the materials, the contractor is, in principle, only liable for its own errors. The contractor can take out insurance to cover this particular risk.

Certain circumstances or events occurring during the execution of the works may cause the balance between the assessment of the work to be done and its cost, on the one hand, and the contract price, on the other, to be disrupted. A contractor who is faced with unforeseen circumstances that significantly hamper the material execution of the work may be entitled to an adjustment of the price. Unforeseen circumstances are those that a normal, prudent and competent contractor does not have to take into account at the time of the conclusion of the contract. At present,

this right exists for work done under public works contracts, but is still under discussion in relation to private contracts.

The parties have a great deal of freedom when negotiating private contracts and can largely determine how the works are to be done. In relation to public works contracts, the execution of the works is governed by the General Contracting Conditions, which the relevant public authority can only deviate from to a limited extent.

10. How can liability be excluded? For example, can the contractor exclude liability for indirect or consequential loss, and loss of business or profits?

An exemption clause allows the contractor to insulate itself from the consequences of its possible errors. This applies even in relation to grave errors, but not where there is malicious intent.

The content of the clause must be clear and unambiguous. If there is any doubt, the clause will be interpreted to the detriment of the party whose liability is limited. The exemption clause is invalid if it deprives the agreement of any sense or meaning.

In addition, the clause cannot contravene mandatory statutory provisions. For example, a contractor cannot validly release itself from its ten-year liability for the entire or partial demolition of the construction (*see Question 13*).

11. Do the parties usually agree a cap on liability? If yes, how is this usually fixed?

Although possible (*see Question 10*), liability caps are not customary in building contracts. Contractors are not typically in a strong enough negotiating position to obtain such caps from the principal at the time of the conclusion of the contract.

12. Are force majeure exclusions available and enforceable in your jurisdiction?

Force majeure exclusions are available and enforceable. Only an unforeseeable and unavoidable event beyond the control of the parties constitutes force majeure. In this case, the contractor cannot, in principle, be held liable.

13. How are construction professionals usually appointed? How are their liabilities dealt with in the contract?

Civil construction projects in Belgium must be designed by a licensed architect who must be independent of the contractor (*Law of 20 February 1939 on the protection of the title and the profession of the architect*). As a result, contractors do not assume design responsibility.

The contractors and architect are usually appointed by the principal. The architect cannot be selected or paid by the contractor: he must remain independent. The subcontractors are appointed by the general contractor. The main contract can require that the principal be allowed to pre-approve subcontractors.

The contractor remains liable for the work of its subcontractor. The architect and the contractor remain liable for the entire or partial demolition of the construction due to faults or defects or the unsuitability of the ground, for a period of ten years. They can be held jointly liable.

In public works, the tendered developer must take out insurance for the contractors and the architect. The contractor must take out insurance for employee accidents and for third party liability.

In private contracts, the architect must have professional indemnity insurance, as well as insurance covering his liability for the entire or partial demolition of the construction (see above). On large construction projects, the principal or the general contractor takes out construction or contractors' all risks insurance (CAR insurance).

14. What are the usual methods of payment for construction work? Are there ways to secure payment or mitigate risks of non-payment?

In public works contracts, payment is regulated by the General Contracting Conditions. The contractor can invoice executed works after payment of the amount has been authorised by the public authority, based on the contractor's declaration of claim for payment and its statement of the executed works. The contractor must be paid within 60 calendar days of receipt of the declaration.

In private contracts, the method of payment is freely agreed between the parties. The contractor can normally only invoice executed works once the architect or project manager has approved its statement of executed works. If the contractor has not provided surety for the execution of the works, the contract generally provides that an amount of 10% of the contractor's invoices be retained. This amount is released at two stages: on provisional acceptance and final acceptance of the works. In relation to the building of houses, specific legislation may come into force if advance payment is requested before the actual delivery of the construction.

Under certain conditions, contractors and architects have a preferential right over the principal's immovable property for the value that they have added to that property. An unpaid subcontractor has a direct right of claim against the principal if that subcontractor has not been paid by the contractor. This right allows an unpaid subcontractor to prevent the contractor being paid by the principal. An unpaid subcontractor also has a preferential right in relation to any claim for payment made by the contractor against the principal.

Belgian courts only rarely require principals to provide bank guarantees and other surety to unpaid contractors once construction has started, if this is not provided for in the contract. It is therefore advisable that any surety for the benefit of the contractor be agreed in the contract itself.

15. What contractual provisions are typically negotiated to cover material delays to the project?

If material delays occur, the principal is entitled to compensation for the resulting loss. In this regard, the building contract usually specifies a lump sum damages amount for each day of delay. To be valid, such damages must correspond to the potential loss; if not, a court can amend the amount.

If the material delay is caused by the principal, the contractor can usually seek damages for loss of profit and higher overhead costs.

In relation to public works, a "delay fine" imposed on a contractor cannot exceed more than 5% of the total contract amount (*General Contracting Conditions*). In addition:

- The contractor must indemnify the public authority against any damages due to third parties because of the delay.
- A public authority can also opt for a different price revision formula.

16. How are material variations to the works usually dealt with in the contract (for example, the effect on timing and cost)?

The parties are free to deal with material variations in the contract as they see fit. For modifications to the work, a statement is usually drawn up, which settles the price and timing consequences.

There is often discussion between the parties about whether particular work amounts to a modification or additional work, or is part of the original work assignment. Depending on the contract and the dispute, the contractor may not have the right to refuse to execute this work. Such a dispute can then only be resolved after the works have been executed.

In public works contracts, a special arrangement applies (*General Contracting Conditions*). First, the contractor can refuse to do additional work if its total value is more than 50% of the initial amount of the contract assignment. If, as a result, the original contract payment amount is reduced, the contractor is entitled to damages amounting to 10% of that reduction. If certain conditions are satisfied, the parties can agree to revise unit prices. If no agreement is reached on the amount of new unit prices, the government sets them itself, with the contractor retaining all of its original rights. The contractor must continue with the works without interruption, despite any disputes that may arise in relation to the setting of new prices.

In the case of additional work or modifications to the planned work on public works projects, the contractor may be entitled to an extension on timing of the project.

17. How do the parties typically manage their relationships with subcontractors?

Subcontracts are usually set out in writing. However, on smaller subcontracting jobs (mostly concerning private residences), short written orders and even oral agreements are quite common.

At present there is no up to date standard form subcontract. The standard form of subcontract published several decades ago by the contractors' association (VBA-ADEB) is being revised to bring it into compliance with industry changes, as well as with social, tax and other laws and regulations. As a result, major contractors use their own standard form contracts, which tend to be one-sided and may need to be negotiated.

Traditionally, the main contractor delegates to the subcontractor its duties in relation to those specifications and drawings of the

main contract that are relevant to the subcontracted works. In addition, the contractor usually includes relevant obligations that it has under the main contract in relation to, for example:

- Milestones.
- Warranties.
- The allocation of all kinds of risks (sub-soil and climate conditions, force majeure, change of law and so on).
- Liabilities.
- Indemnities.
- Insurances.

“Pay when paid” clauses are not forbidden in arrangements between contractors and subcontractors. Such clauses stipulate that the subcontractor gets paid when the contractor does

Subcontracts do not affect the responsibilities of the main contractor to the principal. In addition, the subcontractor is not responsible to the principal for its work. However, the subcontractor can bring a claim for payment against the contractor (*article 1798, Civil Code*). The law is unclear on whether the subcontractor can waive this right.

In relation to direct claims by the principal, while the Court of Cassation has acknowledged that the principal can bring a direct claim against its contractor's supplier, under case law it is not yet determined whether the principal can bring a direct claim against a subcontractor (*Cass., 18 May 2006, R.W., 2007-2008, p. 147*).

The laws and regulations governing public works impose, or allow the imposition of, certain restrictions with respect to the use of subcontractors. This can relate to, for instance:

- Requirements for a special licence (or proof of equivalent experience that would entitle foreign subcontractors to such a licence).
- The exclusion of subcontractors from public work sites who are bankrupt, blacklisted and so on.

In addition, a price revision formula is mandatory for subcontracts that are concluded under any public works main contract, provided the main contract includes a price revision clause (*article 6, Royal Decree of 26 September 1996 setting out the general performance rules for public works*).

18. What other main contractual provisions do the parties usually heavily negotiate?

Pricing issues are usually heavily negotiated. All kinds of pricing variations are possible in relation to concepts such as lump sum payments, the reassessment of prices and day rates. Price revision clauses are increasingly negotiated by the parties, even on short contracts, particularly in light of recent changes to prices of steel materials, and fuel and its derivatives.

In cases where projects are undertaken by a special purpose vehicle (SPV) with unsecured project finance, negotiations are often protracted. This is especially true in cases where the contractor is asked to waive liens to which he is ordinarily entitled by law (under the Civil Code and the Mortgage Law).

On public works contracts, performance security is in principle procured in the form of a bond. As more public projects are assigned to agencies and companies that are separate entities (with financing coming from private banking sources), guarantees are increasingly being demanded by principals although contractors and subcontractors tend to resist such demands especially when these are of the first demand type and the credit rating of the beneficiary (that is, the principal) causes concerns for an unfair call on the guarantee.

If the contractor cannot provide a bond as performance security, principals typically retain part of the contractor's invoiced payments (*see Question 14*).

A principal is liable for damages that are the unavoidable result of the execution of certain works at its premises (under long standing case law on the interpretation of article 544 of the Civil Code). Principals normally try to shift liability onto the contractor, who in turn will try to shift that risk onto its subcontractors. To avoid heavy insurance expenses or a bad track record, most contractors and subcontractors refuse to assume responsibility for “damages without fault”, especially when this was not explicitly requested at the time of tender.

Lengthy negotiations also tend to take place in relation to issues such as:

- Unforeseen (sub-)soil conditions.
- Claims procedures.
- Variation orders and valuation procedures.
- Responsibility for payment of local taxes.
- Termination for convenience without reimbursement of lost profits.

LICENSING REQUIREMENTS

19. What licences and other consents must contractors have to carry out construction work in your jurisdiction?

The Belgian regions regulate the areas of environmental law and town and country planning (*see Questions 25 and 26*). Each region has adopted specific permit requirements for construction works.

Construction works are usually subject to a building permit being obtained from the competent building authority. Certain construction activities require an environmental permit.

In relation to private contracts, it is advisable (but not compulsory) for a contractor to be registered with the Belgian authority as a builder (*registratie als aannemer* or *enregistrement comme entrepreneur*). Registered builders benefit, under certain circumstances, from a reduced (6%) VAT rate.

In relation to public works, national and foreign contractors must be licensed to build (*erkenning der aannemers* or *agr ation des entrepreneurs*) or prove that they have equivalent and sufficient experience and skills to entitle them to a licence. A licence is granted if the contractor proves his professional skills, financial stability and professional integrity (*Law of the 20 March 1991 on the recognition of constructors*).

Licences can be granted in different grades (depending on the size of the construction works) and in different categories and subcategories (depending on the nature of the construction works). The conditions applicable to the licence differ depending on the grade and (sub)category of works undertaken.

INSURANCE

20. What types of construction-related insurance must be maintained by law? Are other non-compulsory types of insurance maintained under contract?

Construction-related insurance includes:

- Civil liability insurance (*Burgerlijke aansprakelijkheid*), which may cover damage to the property, life or health of a third party.
- CAR insurance (*Alle bouwplaats risico's*) covering all risks normally associated with a project in the course of construction.
- Ten-year liability insurance (*Tienjarige aansprakelijkheid*) (see Question 13), which may cover the costs to rectify a total or partial collapse of the construction.

LABOUR LAWS

21. Are there any labour law requirements for hiring (domestic and foreign) construction employees?

In relation to the employment of Belgian nationals or nationals of the first 15 EU member states, Belgian labour law does not set any specific requirements for hiring construction workers other than those that apply to the conclusion of any contract (valid consent, legal capacity to conclude contracts, and that the contract has a valid object and reason for its conclusion). Temporary employment, however, is only possible under strict conditions. Medical screening may be required for drivers. Certain types of employees may require specific training so that the company can obtain certification regarding the safety aspects of its business.

Nationals of the EU member states that joined on 1 May 2004 have, from 1 May 2009 onwards, enjoyed the benefits of the free movement of workers in the EU. Nationals of these countries can validly enter into contracts relating to employment on Belgian territory.

For citizens of Romania and Bulgaria (EU member states since 1 January 2007), a transitional period applies until 1 January 2012. During this period, nationals from these two countries must apply for work cards (*arbeidskaart*) to work in Belgium as employers of such nationals must in principal also apply for work permits (*arbeidsvergunning*). However, for most professions in the construction sector, the necessary documents can be obtained swiftly and easily.

The work permit and work card system applies to employers who intend to hire citizens of "third countries" (that is, countries other than those in the EU, as well as Norway, Iceland and Liechtenstein).

22. Which labour laws are relevant to construction projects?

Belgian labour law contains mandatory provisions on:

- The content of employment agreements.
- Dismissal and liability of employees.
- Holiday and holiday pay.
- Working time.
- Temporary employment.
- Secondment of employees.
- Minimum wages.
- Social documents and work regulations.
- Health and safety regulations.
- Protection of workers' pay (forms of payment, compensation and so on).
- Workers' representation and protected employees.
- Informing and consulting employees on the restructuring a company.

Collective bargaining agreements concluded at the national level and in the building sector contain additional mandatory provisions. The content of such collective bargaining agreements cannot conflict with labour law.

Foreign employers that send out employees to Belgium must observe those Belgian rules on employment matters that are subject to a criminal penalty for breach (such as working conditions and salary). All data relevant to such employees (including their identity and the term and scope of their work) must be reported by their foreign employer to the competent Belgian authorities.

23. Does an employer have to pay statutory redundancy or other payments at the end of a construction project? Are all employees eligible?

Generally, labour contracts are concluded for an indefinite period. As a result, such contracts do not end when a construction project is completed. If the employer intends to end the employment, then a notice period or severance payment is due.

However, it is legally possible to conclude a labour contract:

- For a specific length (calendar term).
- For the proposed length of a specific construction project.

In this case the labour contract will automatically end after the calendar term has expired or after a construction project is terminated and consequently no notice period nor severance payment is due.

HEALTH AND SAFETY LAWS

24. What health and safety legislation applies to construction projects in your jurisdiction?

General principles regarding health and safety issues are set out in the Law of 6 August 1996 (*Welzijnswet*) and other specific regulations (*ARAB/Welzijnscoдекс*). This legislation contains measures on co-operation, co-ordination and prevention, which are designed to minimise the occurrence of work-related accidents. Specific provisions apply for construction sites.

ENVIRONMENTAL ISSUES

25. Please briefly set out local legislation regulating the effect of construction projects on the environment, in particular in the areas of:

- **Air.**
- **Water.**
- **Waste.**
- **Environmental impact assessments.**
- **Sustainable development.**

Air

The federal Law of 28 December 1964 on the control of air pollution gives the government power to take all necessary measures to prevent and control air pollution.

The Belgian regions have executed European Directive 2001/81/EC on national emission ceilings for certain atmospheric pollutants. The emission ceilings are set out in:

- Resolution of the Flemish Government of 14 March 2003 (*Besluit van 14 maart 2003 van de Vlaamse regering tot wijziging van het besluit van de Vlaamse regering van 1 juni 1995 houdende algemene en sectorale bepalingen inzake milieuhygiëne*).
- Brussels Ordinance of 3 June 2003 (*Besluit van 3 juni 2003 van de Brusselse Hoofdstedelijke Regering tot vaststelling van emissieplafonds voor bepaalde luchtverontreinigende stoffen*).
- Resolution of the Walloon Government of 13 November 2002 (*Arrêté du 13 novembre 2002 du Gouvernement wallon fixant des plafonds d'émission pour certains polluants atmosphériques*).

Water

The following impose requirements regarding the discharge of water and the construction and maintenance of sewer systems:

- Flemish Decree of 18 July 2003 (*Decreet van 18 juli 2003 betreffende het integraal waterbeleid*).

- Walloon Water Code (*Livre II du Code de l'Environnement constituant le code de l'Eau*).
- Brussels Ordinance of 20 October 2006 (*Ordonnantie van 20 oktober 2006 tot opstelling van een kader voor het waterbeleid*).

The aims of the legislation are to ensure that the ground and surface water are in good condition and to promote the sustainable use of water.

The Flemish region's building permit procedure subjects construction projects to a water test (*watertoets*). The building authority can include specific conditions and obligations in building permits to prevent harmful effects on the water. Authorities in the Walloon Region and the Brussels-Capital Region can do the same.

Waste

The waste legislation aims to protect human beings and the environment against the harmful effects of waste products, and to prevent waste in the use of energy and raw materials. Its ultimate aim is to prevent waste where possible. Where waste is unavoidable it should be reused and recycled.

The legal framework governing waste is:

- Flemish Decree of 2 July 1981 (*Decreet van 2 juli 1981 betreffende de voorkoming en het beheer van afvalstoffen*).
- Brussels Ordinance of 7 March 1991 (*Ordonnantie van 7 maart 1991 betreffende de preventie en het beheer van afvalstoffen*).
- Walloon Decree of 27 June 1996 (*Décret du 27 juin 1996 relatif aux déchets*).

Construction projects must comply with these regulations.

Environmental impact assessments (EIAs)

Public and private projects that may have a significant effect on the environment are subject to an environmental impact assessment. This assessment forms part of the authority's permit procedure. The general rules are set out in:

- Flemish Decree of 18 December 2002 (*Decreet van 18 december 2002 tot aanvulling van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid met een titel betreffende de milieueffect- en veiligheidsrapportage*).
- Walloon Environmental Code (*Code de l'Environnement*).
- Brussels Ordinance of 18 March 2004 (*Ordonnantie van 18 maart 2004 betreffende de milieueffectenbeoordeling van bepaalde plannen en programma's*).

Sustainable development

The federal Law of 7 May 1997 (*Wet van 7 mei 1997 betreffende de coördinatie van het federale beleid inzake duurzame ontwikkeling*) requires that the federal government draws up a national plan on sustainable development every four years. The plan is based on a federal report and contains measures necessary for realising the goals of sustainable development.

Sustainable development is also the aim of various other environmental regulations. It is usually an important consideration in the drawing up of zoning plans, the delivery of building permits, and water and waste management.

26. Must buildings meet carbon emissions or climate change targets?

Each region has established its own regulation aimed at increasing the energy efficiency of buildings and thus reducing carbon emissions:

- The Flemish region has issued the Decree of 22 December 2006 (*Decreet van 22 december 2006 houdende eisen en handhavingsmaatregelen op het vlak van de energieprestaties en het binnenklimaat van gebouwen en tot invoering van een energieprestatiecertificaat en tot wijziging van artikel 22 van het REG-decreet*).
- Buildings in the Brussels-Capital region are subject to the Brussels Ordinance of 7 June 2007 (*Ordonnantie van 7 juni 2007 houdende de energieprestatie en het binnenklimaat van gebouwen*).
- In the Walloon region, buildings must comply with the Decree of 19 April 19 2007 (*Décret-cadre du 19 avril 2007 modifiant le Code wallon de l'Aménagement du Territoire, de l'Urbanisme et du Patrimoine en vue de promouvoir la performance énergétique des bâtiments*).

CORRUPT PRACTICES**27. Are there any rules prohibiting corrupt business practices and bribery (particularly affecting construction projects)? Please set out any applicable civil or criminal penalties.**

Belgian law recognises two types of bribery: public and private bribery. Both types of bribery include active and passive bribery. All persons engaging or engaged in an act constituting bribery are criminally liable (*Articles 246-253, 504 bis and 504 ter, Belgian Criminal Code*). Attempts at bribery will also result in criminal liability. Legal and natural persons may be held liable.

Penalties for both public and private bribery include imprisonment and/or fines. Specific circumstances may lead to the application of more severe penalties. In addition, contractors may lose their ranking and may also have their licence suspended or revoked.

Certain types of bribery offences occurring outside Belgian territory can be prosecuted in Belgium.

In relation to public works contracts, there are two specific penalties that can be imposed for bribery article 17, 3° and 4° of the Royal Decree of January 8, 1996 concerning procurement procedures of public works contracts, public supply contracts, public service contracts and concessions of public works:

- A contractor who has been convicted of committing a bribery is explicitly excluded from tendering for public work.
- A contracting authority can exclude a contractor from tendering for work if it has made a grave error with regard to the execution of its professional duties. The contracting authority can base its decision on any ground when plausible arguments exist. A judgment by the Belgian high administrative court (*Raad van State or Conseil d'Etat*) has held that evidence of bribery constitutes amounts to a grave error and can result in the contractor being excluded from tendering (judgment nr. 189.108). The contracting authority does not have to ensure due process.

INSOLVENCY**28. What rights do the client and funder typically require on the contractor's insolvency?**

On a contractor's bankruptcy, the trustee can either decide that the construction contract will continue to be performed or that the contract will be terminated.

Most construction agreements provide for the possibility of the principal unilaterally terminating the contract (without notice period) if the contractor is declared bankrupt, or even suspends payments and files a request for bankruptcy.

If a termination clause exists and is invoked by the principal, the bankruptcy trustee normally cannot continue to perform the contract. Reliance by the principal on such a termination clause must be effected in "good faith". If the trustee offers the principal adequate guarantees for the subsequent performance of the contract, reliance on the termination clause may be considered as having been executed in bad faith.

Funding agreements often also contain step-in rights which allow the funder to take over the rights and obligations of the contractor if it is in default, for example, because of bankruptcy.

In January 2009, a new procedure was established to protect a company in financial difficulties against third-party claims. When there is reason to believe that the continuation of the debtor can be guaranteed, it can file a request for judicial reorganisation (*gerechtelijke reorganisatie or réorganisation judiciaire*). A company that is granted a judicial reorganisation is protected against third party claims. Unlike the situation under the bankruptcy procedure, contractual clauses aimed at granting the principal the right to terminate the contract on the judicial reorganisation of the contractor are null and void.

For government contracts, the relevant public authority can terminate a contract in the case of bankruptcy of the contractor or any other similar situation that has affected the contractor (*General Contracting Conditions*).

PPPs/PROJECTS**29. Are public private partnerships (PPPs) common in construction projects in your jurisdiction? If yes, which sectors commonly use PPPs?**

Despite the financial crisis and its effects on the construction industry (*see Question 1*), PPPs continue to become more popular Belgium. Generally, PPPs have been used or are in the course of being used in the following sectors:

- Transportation, particularly road and rail transportation including bridges and tunnels.
- School buildings and facilities.
- Sports buildings and facilities.
- Housing, including residential housing that provides care as well (for example, serviced flats for the elderly).

- Commercial real estate (shopping malls and offices as well as hotels and seminar facilities).
- Prison buildings.
- Soil remediation.
- Waste disposal.
- Public transport.

The scope of PPPs is generally broad and includes design, financing, construction and/or renovation, management, operation and maintenance. These activities are implemented either by a purely contractual framework or through a joint stock company with a mixture of public and private shareholders and/or directors. The types of contracts that are concluded, are:

- Public works concession contracts, which give the contractor the right to operate the works on completion.
- Build, own, operate and transfer (BOOT) contracts
- Design, build, finance and maintain (DBFM) contracts.

The values of PPP contracts typically range from EUR5 million (about US\$6.7 million) up to EUR2.2 billion (about US\$3 billion).

30. What legislation applies to PPPs in your jurisdiction?

Flemish PPS Decree of 19 July 2003 provides a legislative framework that is designed to promote and facilitate PPP projects. In particular, the legislation allows the use of public land for PPP purposes as well as allowing the participation of different types of local government as separate legal persons in PPP projects.

The Walloon region does not have similar legislation. However, PPPs are allowed, promoted and facilitated in sectors such as:

- Housing (see article 78bis of the Walloon Housing Code, and decrees of 24 November 2005, 30 November 2006 and 19 June 2008 which facilitate the study, set-up and development of PPP projects in the sector).
- Waste disposal (see article 5bis which has been inserted in the 1996 Decree to oblige local authorities to set up PPPs).
- Urban rehabilitation (see the Walloon Code of Town and Country Planning, Urban Development and Heritage).
- School buildings (see the Decree of 14 November 2008).
- Soil remediation (see article 76§2 of the Decree on Soil Treatment providing for a state aid system)
- Air transport facilities (see the decree of 23 June 1994 facilitating the establishment of PPPs).

The rules governing public procurement and public works contracts are also applicable to PPPs involving construction or services.

31. Please briefly outline the typical procurement/tender process in a PPP transaction.

PPPs in Belgium are typically tendered for by way of a negotiated procedure. The justification for this is the size and complexity of PPP projects.

MAIN CONSTRUCTION ORGANISATIONS

Building Confederation (*Confederatie Bouw* or *Confédération Construction*)

Main activities. The Building Confederation is the largest nationwide employers' organisation for contractors. It represents its members and provides information and services to them.

W www.confederationconstruction.be

Building Union (*Bouwunie*)

Main activities. The Building Union represents small and medium-sized (SME) construction enterprises in the Dutch-speaking part of Belgium. It represents SME contractors and provides information and services.

W www.bouwunie.be

There is no set procedure. However, the process typically involves three phases:

- **Pre-qualification period.** Assessment by the authorities as to which contractors are to be invited to tender.
- **Offer period.** In principle, the offers of at least three candidate contractors are retained. They are invited to one or more negotiation rounds. At the conclusion of this phase, the contractors submit their best and final offer (Bafo).
- **Contract conclusion.** A preferred bidder emerges from the second phase and the contract is concluded, either immediately or following another contract fine-tuning round. The contract with the preferred bidder is generally concluded at the same time as the project's finances are finalised.

The tender process for a PPP project is often an expensive exercise. Public partners sometimes acknowledge in their tender documentation that this may discourage potential bidders. Such public partners may provide for the payment of a (limited) calculation and/or design fee to unsuccessful bidders.

CONSTRUCTION DISPUTE RESOLUTION

32. What are the most common dispute resolution methods used in your jurisdiction?

The most common dispute resolution methods are

- Litigation before the Belgian courts.
- Arbitration, which may be ad hoc or institutional (for example, parties may choose to arbitration through the Belgian arbitration and mediation centre (*Centre belge d'arbitrage et de médiation*) (Cepani)).

33. What are the most common alternative dispute resolution (ADR) methods used?

Arbitration is the most commonly used alternative dispute resolution method. Few disputes are solved through mediation for

various reasons, for instance, because there are often too many parties involved in the dispute. In addition, the technical aspects of a dispute may make mediation difficult.

34. Which courts usually deal with construction disputes in your jurisdiction? Are there any specific construction courts or tribunals?

Construction disputes between private parties and in relation to the execution of public works contracts are usually dealt with by the ordinary civil or commercial courts.

Administrative courts or local government administrative boards can suspend or annul irregular administrative acts such as decisions concerning the award of public works contracts and building permits.

35. Which organisations are usually used to arbitrate construction disputes in your jurisdiction (please include their website address)?

Cepani (www.cepani.be) is often used to arbitrate construction disputes.

CONSTRUCTION TAX

36. What are the main tax issues arising on construction projects in your jurisdiction? For example:

- Value added tax (VAT)?
- Stamp duty/transfer tax (or equivalent)?

Transfer of real property is taxed at 10% in the Flemish and Walloon regions and 12.5% in the Brussels-Capital region. Under certain circumstances this percentage can be reduced (for example, for real property with a low rateable value) or a partial exemption from taxation may be granted.

The establishment or transfer and under certain circumstances the termination of rights in rem (for example, emphyteotic lease (*erfpacht* or *droit d'emphytéose*)) is subject to registration taxes. The applicable rate varies.

The contractor's income is subject to Belgian personal or corporate income tax if the contractor is a resident in Belgium. The corporate tax rate in principle amounts to a maximum of 33.99%. In relation to personal income, progressive rates up to 50% apply.

Construction projects are subject to VAT at the rate of 21%. At least until the end of 2010 a reduced rate of 6% is applicable to the first EUR50,000 (about US\$67,424) portion on the construction or purchase of a new house. If an existing house is demolished and rebuilt, the 6% rate applies without limitation as to the amount.

37. Are any methods commonly used to mitigate tax liability on construction projects? Are there any tax incentives to carry out construction regeneration projects?

Several different approaches are used to mitigate tax liability, such as (without limitation):

- Using a share deal (and establishing an SPV) to transfer real property, to avoid transfer taxes.
- Leasing or sale-and-leaseback structures to optimise VAT reduction.
- The establishment of certain rights in rem other than proprietary rights to reduce registration taxes.
- Reducing the corporate tax rate basis by obtaining a loan.

The federal government, as well as the regional governments, offer different tax incentives to encourage investment and development, including tax rate reductions (for example, a 6% VAT regime) and partial tax exemptions (for example, on the first purchase of a home). However, tax regimes vary widely between the three regions (that is the Flemish, Brussels-Capital and Walloon regions).

CROSS-BORDER ISSUES

38. Please outline any special considerations for foreign contractors operating in your jurisdiction. For example:

- Special licensing or other requirements for foreign contractors.
- Legal or practical considerations that may restrict foreign contractors.

There are no special licensing or legal requirements directed at foreign contractors.

Foreign contractors should be aware that companies that carry out activities in the construction sector must register with the social security administration and obtain an enterprise number. This is a unique number that government bodies use to identify companies.

In relation to licensing requirements in general, see *Question 19*.

REFORM

39. Are there any proposals to reform construction law in your jurisdiction?

The Belgian government is late in incorporating substantial EC directives on public works. Directive 2007/66/EC, on improving the effectiveness of review procedures concerning the award of public contracts, has been incorporated. Directives 2004/17/EC and 2004/18/EC, on the co-ordination of procedures for the award of public works contracts, have been incorporated in several laws and council orders. However, only a few of the laws incorporating EC directives have come into force. It is unclear when the others will come into force.

There are no other significant proposals to reform Belgian construction law at present.

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While steadily receiving market recognition as a full service law firm, the key pillars for the firm's growth and prime player role are construction and real estate law, as well as public-private partnerships and public procurements.

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