

# THE GOVERNMENT PROCUREMENT REVIEW

FIFTH EDITION

**Editors**

Jonathan Davey and Amy Gatenby

THE LAW REVIEWS

# THE GOVERNMENT PROCUREMENT LAW REVIEW

The Government Procurement Law Review

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Government Procurement Law Review, -  
Edition 5

(published in May 2017 – editor Jonathan Davey and Amy Gatenby)

For further information please email

[Nick.Barette@thelawreviews.co.uk](mailto:Nick.Barette@thelawreviews.co.uk)

# THE GOVERNMENT PROCUREMENT REVIEW

FIFTH EDITION

**Editors**

Jonathan Davey and Amy Gatenby

THE LAW REVIEWS

PUBLISHER  
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER  
Nick Barette

BUSINESS DEVELOPMENT MANAGERS  
Felicity Bown, Thomas Lee

SENIOR ACCOUNT MANAGER  
Joel Woods

ACCOUNT MANAGERS  
Pere Aspinall, Jack Bagnall, Sophie Emberson,  
Sian Jones, Laura Lynas

MARKETING AND READERSHIP COORDINATOR  
Rebecca Mogridge

RESEARCHER  
Arthur Hunter

EDITORIAL COORDINATOR  
Gavin Jordan

HEAD OF PRODUCTION  
Adam Myers

PRODUCTION EDITOR  
Caroline Herbert

SUBEDITOR  
Janina Godowska

CHIEF EXECUTIVE OFFICER  
Paul Howarth

Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
© 2017 Law Business Research Ltd  
[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of May 2017, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.  
Enquiries concerning editorial content should be directed  
to the Publisher – [gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

ISBN 978-1-910813-59-1

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND  
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND  
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW  
THE LIFE SCIENCES LAW REVIEW  
THE INSURANCE AND REINSURANCE LAW REVIEW  
THE GOVERNMENT PROCUREMENT REVIEW  
THE DOMINANCE AND MONOPOLIES REVIEW  
THE AVIATION LAW REVIEW  
THE FOREIGN INVESTMENT REGULATION REVIEW  
THE ASSET TRACING AND RECOVERY REVIEW  
THE INSOLVENCY REVIEW  
THE OIL AND GAS LAW REVIEW  
THE FRANCHISE LAW REVIEW  
THE PRODUCT REGULATION AND LIABILITY REVIEW  
THE SHIPPING LAW REVIEW  
THE ACQUISITION AND LEVERAGED FINANCE REVIEW  
THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW  
THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW  
THE TRANSPORT FINANCE LAW REVIEW  
THE SECURITIES LITIGATION REVIEW  
THE LENDING AND SECURED FINANCE REVIEW  
THE INTERNATIONAL TRADE LAW REVIEW  
THE SPORTS LAW REVIEW  
THE INVESTMENT TREATY ARBITRATION REVIEW  
THE GAMBLING LAW REVIEW  
THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW  
THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW  
THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW  
THE ISLAMIC FINANCE AND MARKETS LAW REVIEW  
THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW  
THE CONSUMER FINANCE LAW REVIEW  
THE INITIAL PUBLIC OFFERINGS REVIEW

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADAMS & ADAMS

ADDLESHAW GODDARD LLP

ALLEN & OVERY LLP

AUGUST DEBOUZY

BAKER McKENZIE

BENTSI-ENCHILL, LETSA & ANKOMAH

BIRD & BIRD (INTERNATIONAL) LLP

CASTRÉN & SNELLMAN ATTORNEYS LTD

DE BRAUW BLACKSTONE WESTBROEK

ESTUDIO BECCAR VARELA

HERBERT SMITH FREEHILLS CIS LLP

LEGANCE – AVVOCATI ASSOCIATI

LIEDEKERKE

NADER, HAYAUX & GOEBEL, SC

PHILIPPI, PRIETOCARRIZOSA FERRERO DU & URIA

SETH DUA & ASSOCIATES

VDA VIEIRA DE ALMEIDA

VEIRANO ADVOGADOS

WOLF THEISS ATTORNEYS-AT-LAW

# CONTENTS

PREFACE.....	v
<i>Jonathan Davey and Amy Gatenby</i>	
Chapter 1 ARGENTINA.....	1
<i>Juan Antonio Stupenengo and Paula Omodeo</i>	
Chapter 2 AUSTRALIA.....	12
<i>Geoff Wood and Anne Petterd</i>	
Chapter 3 AUSTRIA.....	24
<i>Philip J Marboe</i>	
Chapter 4 BELGIUM .....	35
<i>Frank Judo, Dirk Lindemans, Aurélien Vandebrue, Stijn Maeyaert and Kenan Schatten</i>	
Chapter 5 BRAZIL.....	48
<i>Michele Lyra da Cunha Tostes, Filipe Scherer Oliveira, Julia Batistella Machado and Victor Aguiar Jacuru</i>	
Chapter 6 CANADA.....	58
<i>Theo Ling, Daniel Logan and Jonathan Tam</i>	
Chapter 7 CHILE.....	72
<i>José Luis Lara and Antonia Schneider</i>	
Chapter 8 EUROPEAN UNION .....	83
<i>Clare Dwyer, Michael Rainey and Kina Sinclair</i>	
Chapter 9 FINLAND.....	96
<i>Anna Kuusniemi-Laine, Johanna Lähde, Laura Nordenstreng-Sarkamo and Marjut Kaariste</i>	
Chapter 10 FRANCE.....	108
<i>Vincent Brenot and Emmanuelle Mignon</i>	

Chapter 11	GERMANY.....	121
	<i>Olaf Otting, Udo H Olgemöller and Christoph Zinger</i>	
Chapter 12	GHANA .....	132
	<i>Divine Kwaku Duwose Letsa and Elizabeth Ashun</i>	
Chapter 13	INDIA .....	148
	<i>Sunil Seth and Vasanth Rajasekaran</i>	
Chapter 14	ITALY .....	158
	<i>Filippo Pacciani and Luca Morichetti Franchi</i>	
Chapter 15	MEXICO .....	170
	<i>Javier Arreola E and Vanessa Franyutti J</i>	
Chapter 16	NETHERLANDS.....	181
	<i>Bregje Korthals Altes and Mathieu Schimmel</i>	
Chapter 17	PORTUGAL.....	188
	<i>Paulo Pinheiro, Rodrigo Esteves de Oliveira, Catarina Pinto Correia and Ana Marta Castro</i>	
Chapter 18	RUSSIA .....	200
	<i>Olga Revzina, Lola Shamirzayeva and Olga Vasilyeva</i>	
Chapter 19	SOUTH AFRICA .....	212
	<i>Andrew Molver and Gavin Noeth</i>	
Chapter 20	SPAIN.....	229
	<i>Raquel Ballesteros</i>	
Chapter 21	UNITED KINGDOM .....	240
	<i>Amy Gatenby, Bill Gilliam and Louise Dobson</i>	
Appendix 1	ABOUT THE AUTHORS.....	255
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	273

# PREFACE

Welcome to the fifth edition of *The Government Procurement Review*.

We noted in last year's preface the potentially momentous nature of a UK vote in favour of 'Brexit' (the UK's vote to exit the European Union) though at the time a 'leave' vote seemed the less likely outcome. Indeed, the past year has been one of momentous political events in the US and Europe. And, while the UK has voted to leave the EU, elections in France and Germany this year, involving populist contenders, have the potential to force further reform and reshaping of the EU.

Brexit will have significant consequences for the laws of the UK, with 10 per cent of all UK secondary legislation being derived from the EU, and procurement law is no exception: while the status quo on exit will be maintained for a period after that exit takes effect, procurement law reform is already in the sights of the UK's Prime Minister and Chancellor of the Exchequer, with both having referred to procurement law as a focus post-Brexit, pointing to a balance between encouraging the UK supply chain while not propping up uncompetitive domestic industries. Given the fact that the UK will seemingly not be signing up to the single market, it remains to be seen what accommodation (if any) the UK will make with the EU on procurement law. However, it must be remembered that, even if the UK were instead to opt to sign up to the WTO's Government Procurement Agreement (GPA), much of what many EU lawyers might consider the basic nuts and bolts of EU procurement law are actually also enshrined in the GPA, examples being the obligations to run a transparent, impartial and non-discriminatory process.

Last year's preface also contemplated ratification of the Trans-Pacific Partnership (TPP), involving 12 nations (including the US) responsible in aggregate for 40 per cent of global economic output, but the US withdrawal from the agreement, announced in January, has left the remaining TPP partners struggling to keep it alive. President Trump has also signalled the end of TTIP, the proposed trade deal between the EU and the US.

Elsewhere in the world, changes continue apace. While EU Member States have been adopting new national laws to give effect to the 2014 EU Directives, legislative changes have been made or are pending in many other countries. Among these, Mexico is introducing major reforms, particularly on combating corruption, and Australia is making changes in anticipation of joining the GPA. Meanwhile in Brazil, another country rocked by political upheaval, the government has been unable to pursue its procurement objectives in full, while in South Africa public procurement has been used as a policy tool to address economic and socio-economic issues.

When reading the chapters regarding European Union Member States, it is worth remembering that the underlying EU rules are set out at EU level. Readers may accordingly find it helpful to read the EU chapter first and then to read the relevant country chapter so as to gain a comprehensive understanding of the issues.

Last but not least, we would like to take this opportunity to acknowledge the efforts of all of the contributors to this edition as well as the tireless work of the publishers in ensuring that this work is published in good order and to time. We hope that you will find this edition a useful resource that adds value to your business or organisation.

**Jonathan Davey and Amy Gatenby**

Addleshaw Goddard LLP

London

May 2017

# PORTUGAL

*Paulo Pinheiro, Rodrigo Esteves de Oliveira, Catarina Pinto Correia and Ana Marta Castro<sup>1</sup>*

## I INTRODUCTION

Portugal is a signatory to the World Trade Organization's (WTO) Government Procurement Agreement (GPA), which provides for reciprocal market access commitments in procurement between the EC and other WTO members that are also signatories to the GPA.

As an EU Member State, Portugal has implemented Directive 2004/17/EC (Utilities Directive) and Directive 2004/18/EC (the Public Sector Directive).

These Directives were transposed into the Portuguese legal system through the Public Contracts Code (PCC), approved by Decree-Law No. 18/2008, of 29 January 2008 (subsequently amended).

In Portugal, the award of contracts is subject to compliance with the principles of the TFEU, in particular the free movement of goods, freedom of establishment and freedom to provide services, as well as with the principles deriving therefrom, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

The coordination of procedures for the award of contracts in the fields of defence and security is ruled by Directive 2009/81/EC (the Defence Directive). Through Decree-Law No. 104/2011, of 6 October 2011, Portugal implemented the Defence Directive into its legal system, which allows more flexibility in procurement procedures in these sectors. This Decree-Law also stipulates that, in line with Article 296 of the EC Treaty, certain contracts regarding both the defence and security sectors are excluded from its scope of application.

## II YEAR IN REVIEW

In 2015 and 2016, draft legislation regarding the implementation of the new Public Procurement Directives (Directives 2014/24/EU, 2014/25/EU and 2014/23/EU) was under discussion. Portugal has already partially implemented these directives into its legal system, namely through Law No. 96/2015, of 17 August 2015, and Regional Legislative Decree No. 27/2015/A, of 29 December.

Law No. 96/2015, of 17 August 2015, establishes the legal framework for the access and use of electronic platforms for public procurement, which replaces the previous legal framework in force set forth in Law No. 143-A/2008, of 25 July, and Ordinance No. 701-G/2008, of 29 July. The Regional Legislative Decree entered into force on 16 October 2015.

---

<sup>1</sup> Paulo Pinheiro and Rodrigo Esteves de Oliveira are partners and Catarina Pinto Correia and Ana Marta Castro are managing associates at VdA Vieira de Almeida.

Regional Legislative Decree No. 27/2015/A, of 29 December, approved the public procurement regime in the Autonomous Region of the Azores, which updates the references to the Community thresholds and stipulates several procedural and substantive innovations arising from European Union law. The Regional Legislative Decree entered into force on 1 January 2016.

Furthermore, the Administrative Courts Procedure Code was changed by Decree-Law No. 214-G/2015, of 2 October 2015. The most relevant changes with an impact on the public procurement framework are mentioned in Section IX.i, *infra*. These changes entered into force on December 2015 and are applicable to new judicial procedures.

2016 witnessed no rulings likely to change the case law paradigm, only case law related to the regular interpretation of the Portuguese rules.

### **III SCOPE OF PROCUREMENT REGULATION**

#### **i Regulated authorities**

The PCC identifies the entities subject to government procurement rules as follows:

- a* the traditional public sector, including the central, regional and local authorities (Article 2/1), including:
  - the state;
  - autonomous regions;
  - municipalities;
  - public institutes;
  - public foundations;
  - public associations; and
  - associations financed for the most part by the entities above, or subject to their management control, or where the majority of the members of the administrative, managerial or supervisory board are, directly or indirectly, appointed by the entities above;
- b* bodies governed by public law, of a public or private nature, as included in both the Utilities Directive and the Public Sector Directive (Article 2/2); and
- c* utilities within the special sectors – the transport, energy, water and postal sectors (Article 7):
  - public undertakings (i.e., those subject to the dominant influence, either directly or indirectly, of the entities referred to in (a) and (b), including by means of holding the majority of the share capital or the majority of the voting rights, or holding the management control; or the right to appoint the majority of the members of the administrative, managerial or supervisory board;
  - entities holding special or exclusive rights that have not been granted within the scope of an internationally advertised pre-contractual procedure; that aim to limit the exercise of activities included in the special sectors; and that substantially affect the ability of other entities to carry out such activities; and
  - companies that are incorporated exclusively by utilities referred to in Clause 7/1 (point (c)) or financed by the same; subject to their management control, or whose administrative, managerial or supervisory board members are appointed by the said entities; and dedicated to the common pursuit of activities in the water, energy, transport or postal sectors.

Some procurement rules may also apply to contracts executed by public works concessionaires or by entities holding special or exclusive rights for the undertaking of public service activities, under certain circumstances expressly defined in Articles 276 and 277 of the PCC.

## **ii      Regulated contracts**

The nature of contracts subject to public procurement rules is determined by the nature of the awarding entity that concludes the contract.

For purposes of contracts executed by entities belonging to the traditional public sector, public procurement rules apply to any contracts, regardless of their name or nature, the scope of which is subject to competition in the market. This is a vague concept that is not determined or defined by the law. It has been interpreted in a very broad manner. The PCC determines that it includes, *inter alia*:

- a*    public works contracts;
- b*    public works concessions;
- c*    public service concessions;
- d*    acquisition or lease of goods;
- e*    acquisition of services; and
- f*    company contracts.

As to contracts being executed between public sector entities or by bodies governed by public law (Article 2/2), public procurement rules apply only to the contracts referred to in points (a) to (e).

Some specific contracts are expressly excluded from the scope of public procurement rules, such as those contracts that are excluded from the scope of both the Utilities Directive and the Public Sector Directive, and contracts for the acquisition of real estate.

Special rules are established concerning the procurement procedures adopted for the award of utilities contracts. The PCC adopts more flexible rules, such as the possibility to freely choose from a broader range of types of procedure, including an open procedure, restricted procedure with pre-qualification or negotiation procedure; the lower minimum delays for submission of bids; or the applicability of special procedures such as the qualification systems.

As to defence procurement contracts, Decree-Law No. 104/2011, of 6 October 2011, established more flexible rules concerning, for example, the adoption of special procedures, such as:

- a*    a negotiation procedure without publication of a notice;
- b*    rules concerning qualitative selection including quality or environment management;
- c*    confidential proceedings;
- d*    protection of confidential information or security of supplies;
- e*    an extension to a seven-year term of duration for framework agreements; and
- f*    publicity and transparency rules.

As a general rule, the above-mentioned contracts are subject to the applicable procurement rules regardless of the contract value. However, contracts under the special utilities sectors are only subject to the rules if the relevant contract values equal or exceed the thresholds set forth in the Utilities Directive, Article 16(a) and (b).

The awarding entities may award contracts by means of a direct award procedure (not advertised and non-competitive) regardless of the contract value, if some material criteria are met. These material criteria concern:

- a for all kinds of contracts:
  - failed procurement (under certain conditions);
  - extreme urgency arising from unforeseeable events not imputable to the awarding entity;
  - contracts for the provision of telecommunication services;
  - existence of an exclusive co-contractor because of technical, artistic or exclusive rights reasons; and
  - contracts under secrecy or under special security measures;
- b for public works contracts:
  - new repeated works similar to works previously awarded, subject to the conditions set forth in the law; and
  - works contracts under a determined threshold for research and development (R&D), not-for-profit study or experimental purposes only;
- c for contracts for the acquisition or lease of goods:
  - goods intended to replace or broaden previous supplies awarded to the same entity, provided different goods would cause incompatibility or disproportionate technical difficulties of use or maintenance;
  - goods produced for R&D, not-for-profit study or experimental purposes only;
  - goods quoted in the Raw Materials and Commodities Exchange;
  - special advantageous acquisitions;
  - goods acquired under a framework agreement executed with one entity; and
  - the acquisition of water or energy by a utility acting in the water or energy special sectors; and
- d regarding services contracts:
  - new repeated services similar to services previously awarded, subject to the conditions set forth in the law;
  - some services of an intellectual or financial nature indicated in category 6 of Annex ii.A of the Public Sector Directive;
  - services related to a real estate acquisition or lease;
  - arbitral or conciliation services;
  - certain R&D services;
  - contracts executed following a concept tender for the selection of design works, pursuant to the terms of reference; and
  - services acquired under a framework agreement executed with one entity.

Regarding variations of contracts, a contract may be amended without the need to submit the amended contract to a competitive tender whenever the amendment does not affect the main scope of the contract and does not prevent, restrict or distort competition. Thus, an amendment shall be allowed only when it is objectively verifiable that the order of the evaluated bids in the tender procedure for the award of the initial contract would not be altered had the tender specifications contemplated this amendment.

Whenever the amendments breach the above-mentioned legal limits, the awarding authority must competitively tender the amended contract.

On the other hand, changing the contracting parties will not require the launching of a competitive tender if such an alteration is provided for in the existing contract, or when it is authorised during the performance of the contract by the contracting authority and the new entity complies with all capacity, technical and financial qualification criteria required under the original tender.

## **IV SPECIAL CONTRACTUAL FORMS**

### **i Framework agreements and central purchasing**

The public procurement regime set forth in the PCC deals with all special procedures – framework agreements and central purchasing, but also concept tenders, dynamic purchasing or qualification systems – and special rules set forth for the utilities sectors.

Framework agreements may be executed with one entity only or with several entities, depending on whether the tender specifications have been all or partially set forth in the tender documents respectively.

The award of a framework agreement is subject to the adoption of competitive procedures, considering the global amount of contracts to be executed under the agreement.

A framework agreement binds the private contractor to the contracts executed under the agreement. However, the contracting authority may execute contracts outside the scope of the framework agreement.

The term of a framework agreement must not exceed four years.

Central purchasing may be created by contracting authorities other than utilities acting in the special sectors (i.e., only entities included in the traditional public sector and bodies governed by public law).

Central purchasing may be created for the purpose of awarding bids, leasing or acquiring goods or services, or executing framework agreements and centralising the procurement of several entities. Central purchasing shall comply with the rules applicable to each contracting authority. Procurement through central purchasing is purely optional.

The PCC also sets forth the special proceedings instruments, which include concept tenders; dynamic acquisition systems intended to execute contracts for the acquisition or lease of goods or for the acquisition of services of current use by means of a totally electronic system; and qualification systems. The latter may only be adopted in the context of executing contracts designed for activities in the special utilities sectors.

### **ii Joint ventures**

The public procurement rules do not apply to in-house relations between contracting authorities and publicly owned undertakings. The PCC has laid down the requirements for exclusion (in relation to in-house entities) in accordance with European Court of Justice case law: it requires the existence of control exercised by the contracting authority over the contracted party similar to the control exercised by the contracting authority over its own departments; and the carrying out of the essential part of the contracted party's activity to the benefit of the contracting authority.

Accordingly, if a public-public JV complies with the above criteria, it may be contracted by its parent companies without being subject to the public procurement rules.

Also excluded from the scope of public procurement rules is the award by a contracting authority of a public service contract to an undertaking that stands as a contracting authority itself, given the existence of an exclusive right.

The PCC and Decree-Law No. 111/2012, of 23 May 2012, provide for a special legal framework for public-private partnerships. The private sector partner has to be competitively tendered and duly advertised. Only reasons related to public interest (as well as those mentioned in Section III.ii, *supra*) may justify the adoption of a direct award procedure.

Special rules are set forth for special utilities sectors. JV companies may be deemed contracting entities provided they are incorporated exclusively by utilities referred to in Clause 7/1 of the PCC or comply with the requirements set forth in Section III.i, *supra*.

## **V THE BIDDING PROCESS**

### **i Notice**

Prior to the formal opening of the pre-contractual procedures, and in accordance with the transparency principle, the contracting authorities should disclose their annual procurement plan in a prior information notice that complies with the model provided in Appendix I of EC Regulation No. 842/2011, of 19 August 2011, for publication in the Official Journal of the European Union (OJEU).

Regarding agreements concerning utilities, the same must submit a periodic indicative notice, in accordance with the model in Appendix IV of Regulation 842/2011, for publication in the OJEU.

Moreover, all competitive tenders must be launched through publication of a tender notice, which may be at a national level – published in the Portuguese Official Gazette – or the European level if the contract's value exceeds Community thresholds.

Contract award notices are also mandatory and are to be effected within 30 days following the award, in accordance with the model present in Appendix III, VI or XVII (as applicable) of Regulation 842/2011. As to utilities, the said notice obligation applies for contracts that amount to values that equal or exceed European thresholds.

Even if the notice of an award is not a requirement at the European level, the contracting authority may nonetheless submit a voluntary transparency notice disclosing its intention to execute the contract, pursuant to the model present in Appendix XIV of Regulation No. 842/2011, for publication in the OJEU.

Contract award information shall also be made available by means of publication on the public procurement platform, for the purposes of control by the competent national authorities.

### **ii Procedures**

The PCC provides for the following procurement procedures:

- a* direct award: one or several bidders will be invited to submit bids;
- b* open procedure: any interested entity is free to submit bids after the publication of a tender notice;
- c* restricted procedure with pre-qualification: similar to (b), but comprises two stages: one for submitting technical and financial qualification documents and selecting candidates, and one for submitting bids;
- d* negotiated procedure: including the same two phases as the procedure in (c) and a third phase for the negotiation of bids; and
- e* competitive dialogue: whenever a contracting authority is not able to specify a definitive and concrete solution for the contract and launches a tender to which bidders submit solutions.

In general, awarding authorities may freely choose to adopt an open procedure or a restricted procedure with pre-qualification. For contracts designed for the utilities sector, awarding authorities may freely choose between those two procedures or the negotiation procedure.

The only special procedure applicable to the utilities sector is the qualification system.

Regarding the defence and security sector, Decree-Law No. 104/2011 provides for three procedures: competitive dialogue, a restricted procedure with pre-qualification (both governed by the rules of the PCC) and a third special procedure, the negotiation procedure, which may or may not be preceded by a contract notice.

Further to the European directives stating the importance of simplifying and dematerialising procurement procedures with a view to ensuring greater efficiency and transparency, the PCC opts unequivocally for electronic procurement, and the awarding authorities are bound to adopt electronic procurement procedures. General PCC provisions on electronic procurement are contained in the legal texts of Law No. 96/2015, of 17 August 2015.

### **iii Amending bids**

The general rule that applies to all cases is that tender documents and bids shall not be altered during the whole procedure. Exceptions are, however, expressly foreseen.

The tender documents may be rectified by the contracting authority within the time limit for the presentation of bids. Interested parties are given the opportunity to identify, until five-sixths of the deadline for the submission of bids has elapsed, errors and omissions in the tender specifications, which shall subsequently be subject to approval by the contracting authority.

Any rectification regarding errors and omissions shall not imply amendments to any of the tender documents' essential aspects. Whenever such amendments occur, the deadline for presentation of bids should be extended.

Furthermore, after the award decision and before the signing of the contract, the contracting authority may propose changes to the contract content, as long as such changes are imposed in the public interest and it is objectively demonstrated that the bid ranking would remain unchanged should the proposed adjustments be reflected in the bids. Nonetheless, such proposed changes cannot violate any of the tender documents' imperative settings nor reflect the adoption of another bidder's bid.

Likewise, there are certain situations in which bids may be subject to amendments. Such is the case whenever bid negotiation occurs or, in the case of direct award with one bid, whenever the bidder is requested to improve its bid.

## **VI ELIGIBILITY**

### **i Qualification to bid**

Public procurement law sets forth conditions for interested parties to participate in tenders, and if a bidder does not comply with these requirements, it will be disqualified and excluded from the tender. These requirements certify the professional and personal suitability of bidders, and are distinct from the technical and financial capacity requirements whereby candidates' technical and financial capacity are assessed.

Parties will be excluded if they do not meet eligibility criteria for reasons that include:

- a* insolvency or similar;
- b* conviction for crimes affecting professional reputation;

- c* administrative sanction for a serious professional breach;
- d* non-payment of tax obligations;
- e* non-payment of social security obligations;
- f* sanction for a breach of labour law;
- g* sanction for a breach of legal obligations in respect of employees subject to payment of taxes and social security obligations;
- h* conviction for crimes concerning criminal organisations, corruption, fraud or money laundering; or
- i* direct or indirect participation in the preparation of tender documents, thus obtaining a special advantage.

Besides these eligibility criteria, in procedures allowing for a pre-qualification phase, contracting authorities may establish criteria to evaluate bidders' technical and financial capacity. These criteria may include factors linked to the bidder and not to the bid to be presented, as in the European directives.

## **ii Conflicts of interest**

Contracting authorities are strictly prevented from awarding a public tender should a conflict of interest arise. All public entities must comply with general rules regarding conflicts of interest, as established in the Administrative Procedure Code.

In general, such rules address situations where a member of the administrative authority has a special interest in the decision-making process, and comprise the following situations: cases of special interest in a given decision or tender as a result of some kind of involvement with a given bidder; family ties; and a business interest in a matter similar to the one under assessment.

For the reasons referred to above, bidders who have participated, directly or indirectly, in the preparation of tender documents may participate in the tender that will be launched, provided that the contracting authority takes appropriate measures to ensure that competition is not distorted by the participation of such bidder.

## **iii Foreign suppliers**

Both foreign and national suppliers can and shall bid on the same level playing field. Moreover, the free movement principle determines that foreign EU suppliers cannot be obliged to set up a local branch or subsidiary, or have local tax residence.

# **VII AWARD**

## **i Evaluating tenders**

There is a general provision in the PCC that demands the absolute disclosure, at the beginning of the procedure, of all features of the evaluation methodology that cannot be altered during its course. Thus, the relevant criteria and their corresponding weight, as well as the evaluation methodology, the scoring system for every single criterion and factors concerning the contract's execution, must be clearly specified.

The obligation to disclose the evaluation model in advance must be observed in all procurement procedures, with two exceptions: when the adopted criterion is the lowest price;

and in the case of a direct award, even when several bidders are invited to participate in a given procurement procedure and the award criterion is the most economically advantageous tender. In this later case, only the evaluation criteria shall be previously discussed.

According to the PCC, contracting authorities can award public contracts based on two criteria: the lowest price and the most economically advantageous tender.

According to the first criterion, only the price of the proposals is evaluated. Regarding the latter, as far as there is a connection to the subject matter of the public contract in question, various factors can be taken into consideration, namely quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

Once the proposals are submitted, the jury begins its evaluation and issues a preliminary evaluation report, which shall include a description of their analysis, an assessment of the legality of the proposals submitted, namely in relation to their absolute compliance with the tender specifications, as well as to the concrete application of the approved evaluation criteria.

All bidders that submit a proposal are notified and informed of the preliminary evaluation report, including the unsuccessful bidders.

At this stage, bidders are granted a brief period, usually of five working days, to comment on the analysis made by the jury. They have the opportunity to present a formal request asking for the modification of the preliminary report if they do not agree with its content.

Upon analysis of the request presented by the bidders, the jury has the opportunity to review its previous decision. In cases where changes are introduced that modify the proposals' ranking, or if the jury decides to reject a proposal previously admitted and evaluated, a new preliminary evaluation report shall be issued and the bidders will be granted a new opportunity to review it.

However, if the jury decides to maintain its previous decision, or if only minor changes are introduced to the content of the preliminary report, the jury issues a final evaluation report with its final decision regarding the analysis and evaluation of the proposals submitted.

Once the final evaluation report is concluded, the jury transmits it along with all the documentation issued during the procedure to the competent department of the contracting authority, which, in most cases, confirms and approves the content of the jury's final evaluation report.

Nevertheless, although such situations are rare, the contracting authority may also conclude that the final evaluation report lacks information; for instance, if the report is insufficiently grounded. In such cases, it can either address these insufficiencies itself, or return the report to the jury to be rectified.

Another possibility is to deem the procedure well instructed but its conclusions illegal, in which case the contracting authority can alter them accordingly.

Finally, the contracting authority will award the contract to the successful bidder that has presented the best bid in light of the adopted criteria. The act of award shall be written and duly grounded (the specific factual and legal grounds on which the act is based shall be clearly stated) and, if the call for bids has been advertised in the OJEU, the act of award will also have to be advertised in this publication.

At this point, the selected bidder is requested to present to the contracting authority all the necessary documents that duly confirm that his or her personal situation does not prevent him or her from entering into a public contract.

## **ii National interest and public policy considerations**

Procurement procedures may comprise criteria aiming to address certain social and environmental considerations, provided they are linked to the subject matter of the public contract, are clearly stated in the procedure documents, do not confer unrestricted freedom of choice on the contracting authority and comply with the fundamental principles of the EU (such as the principle of non-discrimination).

Such requirements must be fulfilled in the award phase, and some shall be observed during performance of the contract. These can include fostering employment, fulfilment of health and safety requirements at work, social inclusion and human rights protection.

Contracting authorities cannot specify the provenance of goods and services, and thus must accept products that are of ‘equivalent quality’. In fact, according to the principle of equal treatment, no bidder shall be discriminated against on the basis of its nationality (or on the location of its headquarters), and procurement procedures exclusively aimed at national bidders are strictly prohibited.

Accordingly, any criterion aimed at directly or indirectly favouring products or services of national origin, national bidders or the national market (e.g., favouring bidders with their headquarters in Portugal) will be deemed illegal. The principle of non-discrimination plays a key role both in Portuguese and EU public procurement law.

As previously indicated, procurement legislation specific to the defence sector has been introduced by Decree-Law No. 104/2011, which is compliant with the standard Portuguese public procurement regime regarding the evaluation procedure and the national interest, as well as public policy considerations.

According to what is specifically stipulated in this Decree-Law, contracting authorities in the defence sector must also award contracts based on the two above-mentioned criteria. Furthermore, the Decree-Law in question specifically refers to the duty to comply with the basic public procurement principles, namely the principle of non-discrimination, extending to the defence sector the general prohibition on favouring national interests.

Nevertheless, the Decree-Law shall not apply to some specific contracts in the defence sector, namely the ones that are declared to be secret or that call for the protection of critical interests of the state. For this reason, the secrecy associated with the entering into force of these contracts may also lead to the conclusion that it would be preferable to buy national products to maintain national security.

## **VIII INFORMATION FLOW**

According to the PCC and both the Utilities Directive and the Public Sector Directive, contracting authorities shall act in a transparent way. This general obligation is enshrined in the requirement to properly publicise public tender proceedings, and to make public all procedure documents, which shall have a clear content, thereby ensuring a level playing field among bidders.

In addition, any relevant decisions by the jury or contracting authority shall be notified to all interested parties, including unsuccessful bidders.

Special attention is given in the PCC to the importance of the notification regarding the decision to award the contract. Besides the duty to notify this final decision to all bidders that submitted a proposal, the PCC also stipulates a standstill period of 10 days between the

time of notification of the award decision in writing to all tenderers and the conclusion of the contract, so that unsuccessful bidders are allowed to challenge the decision before the contract has been signed.

Further to the compulsory measure implemented by the PCC obliging all public contracting authorities to use electronic platforms when launching public procurement procedures, transparency regarding this type of procedure has become absolute. The bidders have the opportunity to view and analyse competitors' requests to participate as well as their bids on the day after the deadline for its submission, and before the preliminary evaluation report of the jury is issued.

This obligation to disclose the content of the requests to participate or of the bids will be effective in most cases. Nonetheless, in certain situations – namely when candidates or tenderers request those documents to be treated as confidential – non-disclosure may be allowed.

The request for the confidentiality of documents must be fully grounded. The candidate or tenderer concerned must demonstrate the need to protect the secrecy of the commercial, industrial, military or other type of information contained therein.

However, if after analysis of the classified documents the contracting authorities consider there to be no grounds for classification, they may decide to disclose the documents.

Another situation where the PCC safeguards confidentiality is the competitive dialogue, where the proposed solutions may not be revealed by contracting authorities to other participants without prior agreement, to prevent bidders from being deterred from participating for fear that the entity might reveal confidential information and, in particular, details of its proposed solution that might be used by other tenderers.

Confidentiality rules are stricter in procedures concerning the defence sector, especially where classified and strategic information is at stake. Indeed, in such situations contracting authorities should impose special requirements on bidders and on the jury to guarantee the confidentiality of certain information conveyed throughout the procedure.

In addition, when considered contrary to public interest or even contrary to the legitimate commercial interests of the tenderers, it may be thought preferable not to publicise certain information on the contract notice or the contract notice itself, provided such a decision is duly grounded.

## **IX CHALLENGING AWARDS**

### **i Procedures**

In Portugal, it is possible to challenge all decisions issued in public procurement procedures through review procedures that are regulated by the contracting authorities or through judicial review proceedings under the jurisdiction of administrative courts.

The review procedure concerning pre-contractual procedures is characterised by its pressing urgency, aimed at avoiding excessive delays in the procurement procedure, and it must be brought within five days. Furthermore, whenever the review concerns the award, the qualification decision or the rejection of a complaint regarding any of these decisions, the contracting authority shall invite other bidders to submit their views.

Judicial reviews can be initiated before the contract is formally concluded, and also after its conclusion.

Judicial proceedings regarding pre-contractual litigation must be filed within one month after the relevant decision has been issued and notified to the bidder. After the conclusion of the contract, any unsuccessful bidder can also seek remedies within six months of the conclusion of the contract or of its notice.

As a general rule, judicial proceedings on pre-contractual litigation regarding proceedings for the award of public works contracts and concessions, public service concessions, acquisition or rental of moveable property and public service contracts follow a special proceeding laid down in Article 100 et seq. of the Procedural Code of Administrative Courts. Because of the importance of obtaining a swift ruling, this kind of proceeding usually takes no less than six months to obtain the first instance decision.

Accordingly, with the recent revision of the Procedural Code of Administrative Courts, the judicial proceedings on pre-contractual litigation are now applicable to the public service concessions.

Furthermore, the judicial proceedings on pre-contractual litigation filed to challenge the award decision of the contracting authority now have an automatic suspensive effect on the decision or on the contract's execution, although the court may decide to lift the suspensive effect of said decision for public interest reasons and after a balanced consideration of all interests involved.

In what concerns judicial proceedings that are not filed for challenging an award decision, Portuguese law provides for administrative courts to grant interim measures.

## **ii      Grounds for challenge**

Decisions of contracting authorities as well as procedure documents can be challenged on grounds of illegality or of breach of the applicable procurement rules, namely the PCC.

Challenges can address substantive or procedural matters. Furthermore, procedure documents can be challenged for, *inter alia*, violation of the principles of non-discrimination, transparency and competition, as well as for failure to fully comply with PCC rules.

Challenges concerning procurement procedures are frequently brought before the contracting authorities and courts by unsuccessful bidders. Chances of success will mainly depend on the grounds invoked by the challenge.

## **iii     Remedies**

Courts can award damages and even terminate a contract in some circumstances as long as the contract has not been fully performed. However, in such case, it is still possible to award damages (e.g., costs for filing the protest and the bid's preparation costs).

Finally, courts can impose fines for breaches of the procurement procedure's rules.

## **X      OUTLOOK**

EU procurement law already strongly influences Portuguese procurement law.

The new Public Procurement Directives were published in the OJEU on 28 March 2014. They entered into force on 17 April 2014, and Portugal, as other EU Member States, had 24 months to implement the provisions of the new rules into national law, which have already elapsed. Portugal has not fully implemented the provisions of the 2014 Directives yet (see Section II, *supra*). It is expected that a revision of the Public Contracts Code will be enacted in the near future, fully implementing the said Directives.

## **Appendix 1**

# **ABOUT THE AUTHORS**

### **PAULO PINHEIRO**

*VdA Vieira de Almeida*

Paulo Pinheiro has a law degree from the University of Lisbon faculty of law and a postgraduate degree in European legal studies from the College of Europe in Bruges, Belgium.

He is an assistant professor at the University of Lisbon school of law and at the School of Management, Lisbon.

He joined VdA in 1998. He is currently the partner in charge of the public law and health practice. In this capacity, he has been involved in several transactions and projects in the following sectors: health, telecoms, energy and natural gas, transport, water and waste. He has also been actively working in regulation and public procurement matters involving these sectors, and in establishing public-private partnerships.

Paulo is the author of various articles and publications on matters within his fields of expertise.

### **RODRIGO ESTEVES DE OLIVEIRA**

*VdA Vieira de Almeida*

Rodrigo Esteves de Oliveira has a law degree and a master's degree (LLM) in administrative law, both from the University of Coimbra faculty of law, where he was also admitted to a PhD.

He is an assistant professor at the University of Coimbra faculty of law, and is a lecturer there in postgraduate studies in law and at the University of Lisbon faculty of law, the Catholic University of Portugal, Lisbon and the Catholic University of Portugal, Oporto. He also lectures regularly at the Centre for Judicial Studies (for the training of judges and public prosecutors).

He joined VdA in 2006 and is currently a partner in the public law area of practice. In this capacity, he has been involved in several projects and transactions, mainly in public procurement, public regulation and matters concerning administrative concessions.

Rodrigo is the author of various articles and publications on matters within his fields of expertise, and is admitted to the Portuguese Bar Association.

## **CATARINA PINTO CORREIA**

*VdA Vieira de Almeida*

Catarina Pinto Correia has a law degree from the faculty of law of the Catholic University of Portugal, Lisbon and a master's degree in European community law from the College of Europe in Bruges, Belgium. She has a postgraduate degree in EC competition law from King's College London and a postgraduate degree in public procurement and concessions from the University of Lisbon faculty of law.

She joined VdA in 1996 and is a managing associate in the public law practice. In this capacity, she has been involved in several matters of administrative law (general and specific), including in the areas of public procurement, administrative concessions and public-private partnerships, and public regulation. She has participated in several transactions, mainly focused on the energy, postal, transport, infrastructure and telecom sectors.

Catarina is the author of various articles and publications on matters within her fields of expertise and is admitted to the Portuguese Bar Association.

## **ANA MARTA CASTRO**

*VdA Vieira de Almeida*

Ana Marta Castro has a law degree from the University of Lisbon faculty of law. She has a postgraduate degree in administrative law from the University of Lisbon faculty of law, and a postgraduate degree in public procurement law and practice from the Catholic University of Portugal, Lisbon, as well as a postgraduate degree in public procurement law, on 'New Frontiers for Public Procurement', from the University of Lisbon faculty of law.

She joined VdA in 2006 and is a managing associate in the public law practice, where she has been actively involved in several transactions, namely in the telecommunications, banking, education, energy, public health, transport and roads sectors. In this capacity, she has advised several leading clients, in Portugal and abroad, in the following areas: administrative law, public procurement, public regulation and administrative litigation.

Ana Marta delivers training courses and workshops on matters within her fields of expertise, including public procurement, and she is admitted to the Portuguese Bar Association.

## **VDA VIEIRA DE ALMEIDA**

Av Duarte Pacheco 26

1070-110 Lisbon

Portugal

Tel: +351 21 311 3400

Fax: +351 21 311 3406

[pp@vda.pt](mailto:pp@vda.pt)

[reo@vda.pt](mailto:reo@vda.pt)

[cpc@vda.pt](mailto:cpc@vda.pt)

[cma@vda.pt](mailto:cma@vda.pt)

[www.vda.pt](http://www.vda.pt)