The Government Procurement Review

Fourth Edition

Editors
Jonathan Davey and Amy Gatenby

Law Business Research

The Government Procurement Review

The Government Procurement Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Government Procurement Review, 4th edition
(published in May 2016 – editors Jonathan Davey and Amy Gatenby).

For further information please email
nick.barette@lbresearch.com

The Government Procurement Review

Fourth Edition

Editors
Jonathan Davey and Amy Gatenby

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Thomas Lee

SENIOR ACCOUNT MANAGERS
Felicity Bown, Joel Woods

ACCOUNT MANAGERS
Jessica Parsons, Adam Bara-Laskowski, Jesse Rae Farragher

MARKETING COORDINATOR
Rebecca Mogridge

EDITORIAL ASSISTANT
Sophie Arkell

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Joanne Morley

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-96-7

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

www.TheLawReviews.co.uk

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

ARAP, NISHI & UYEDA ADVOGADOS

AUGUST & DEBOUZY

BAKER & McKENZIE

BENTSI-ENCHILL, LETSA & ANKOMAH

BIRD & BIRD LLP

CASTRÉN & SNELLMAN ATTORNEYS LTD

DE BRAUW BLACKSTONE WESTBROEK

ESTUDIO BECCAR VARELA

HERBERT SMITH FREEHILLS CIS LLP

LIEDEKERKE WOLTERS WAELBROECK KIRKPATRICK

MNKS

NADER, HAYAUX & GOEBEL, SC

PHILIPPI, PRIETOCARRIZOSA FERRERO DU & URIA

SETH DUA & ASSOCIATES

ŢUCA ZBÂRCEA & ASOCIAŢII

ÜNSAL GÜNDÜZ ATTORNEYS AT LAW

VIEIRA DE ALMEIDA & ASSOCIADOS

WOLF THEISS ATTORNEYS-AT-LAW

CONTENTS

EDITORS' PREFACE

We are delighted to introduce this, the fourth edition of *The Government Procurement Review*, which incorporates contributions from six continents and 23 countries (excluding the EU chapter).

Once again, the focus in terms of developments is on the EU, with the implementation of the three Directives adopted in 2014 now in full swing. At the time of writing, the mainstream 'classic' Directive has been implemented, or partially implemented, in 12 Member States, namely Austria, Bulgaria, Denmark, France, Germany, Hungary, Italy, Lithuania, the Netherlands, Portugal, Slovakia, Slovenia and the United Kingdom. Implementation of the Concessions and Utilities Directives is proceeding almost as quickly. Based on past experience, a considerable period of adjustment lies ahead of contracting authorities in assimilating all the changes and making full use of new procedures and freedoms.

Full e-procurement, mandatory from 18 April 2018, will also represent a challenge to smaller authorities.

In the UK, all the talk is of 'Brexit', the possibility that the UK may vote to leave the EU in the referendum planned for 23 June 2016. What exactly a 'leave' vote would mean for procurement law in the UK, as for the law in so many other diverse fields, is not known, but a period of several years of uncertainty is likely to follow a 'leave' vote. Of course, UK exporters will in any event have to stay abreast of the procurement rules if they wish to bid for public sector or utilities contracts elsewhere in Europe.

In Scotland, the Scottish government is responsible for the legislative framework for procurement. It has used the opportunity presented by the new EU Directives and the Procurement Reform (Scotland) Act 2014 to apply consistent rules to public contracts above and below the EU threshold contract values. The Act, which for the most part comes into effect during 2016, extends to lower value threshold contracts, general duties and specific measures for contracting authorities aimed at promoting good, transparent and consistent procurement practices. Regulations implementing the three EU Directives came into force in Scotland on 18 April.

Outside the EU, revision of national laws regulating government procurement also continues apace, with recurring themes in the trend towards mandatory e-procurement, encouragement of participation by small to medium-sized enterprises and measures to combat corruption.

International trade negotiations continue to have an important impact on procurement. It is estimated that the revised WTO Government Procurement Agreement that came into force in 2014 added US$80 to US$100 billion of business opportunities through further opening of procurement markets.[1] There is also a growing trend for government procurement provisions in regional trade agreements. Up until 2000, only 19 per cent of all regional trade agreements announced to the WTO had stand-alone provisions on procurement, but since then that figure has increased to 54 per cent.[2] The Comprehensive Economic and Trade Agreement between Canada and the EU, and the Trans-Pacific Partnership among 12 Pacific Rim countries (including Australia, Canada, Chile, Mexico and the US), both of which await ratification, include commitments on opening up access to procurement markets. Procurement is also a key area in the current negotiations between the US and the EU on a Transatlantic Trade and Investment Partnership.

When reading chapters regarding European Union Member Sates, it is worth remembering that the underlying rules are set out at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter to gain a fuller understanding of the relevant issues. As far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this edition as well as the tireless work of the publishers in ensuring a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that this edition is better than previous editions, and we trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2016

1 The European Parliament Directorate General for Internal Policies, 'TTIP: Opportunities and Challenges in the Area of Public Procurement', IP/A/IMCO/2014-14; PE 542.226, June 2015, p. 12: www.europarl.europa.eu/RegData/etudes/IDAN/2015/542226/IPOL_IDA(2015)542226_EN.pdf.

2 Lucian Cernat and Zornitsa Kutlina-Dimitrova, Chief Economist Note, 'International Public Procurement: From Scant Facts to Hard Data', Issue 1, April 2015, Figure 1: http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153347.pdf.

Chapter 18

PORTUGAL

Paulo Pinheiro, Rodrigo Esteves de Oliveira, Catarina Pinto Correia and Ana Marta Castro[1]

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 (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 (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, draft legislation regarding the implementation of the new Public Procurement Directives (Directives 2014/24/EU, 2014/25/EU and 2014/23/EU) is currently under

1 Paulo Pinheiro and Rodrigo Esteves de Oliveira are partners and Catarina Pinto Correia and Ana Marta Castro are managing associates at Vieira de Almeida & Associados.

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.

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 Procedural Code of Administrative Courts 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.

2015 witnessed no rulings likely to change the case law paradigm, only case law related to the normal 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 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, during the same period, 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 points during the procedures when 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.

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 Articles 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, has 24 months to implement the provisions of the new rules into national law.

Appendix 1

ABOUT THE AUTHORS

PAULO PINHEIRO

Vieira de Almeida & Associados

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 Vieira de Almeida & Associados 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.

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

RODRIGO ESTEVES DE OLIVEIRA

Vieira de Almeida & Associados

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 Vieira de Almeida & Associados 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.

He 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

Vieira de Almeida & Associados

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 Vieira de Almeida & Associados 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.

She 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

Vieira de Almeida & Associados

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 Vieira de Almeida & Associados 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.

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

VIEIRA DE ALMEIDA & ASSOCIADOS

Av Duarte Pacheco 26
1070-110 Lisbon
Portugal
Tel: +351 21 311 3400
Fax: +351 21 311 3406
lisboa@vda.pt
pp@vda.pt
reo@vda.pt
cpc@vda.pt
cma@vda.pt
www.vda.pt