The Government Procurement Review

Sixth Edition

Editors
Jonathan Davey and Amy Gatenby

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THE GOVERNMENT PROCUREMENT REVIEW

SIXTH EDITION

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PREFACE

It is our pleasure to introduce the sixth edition of *The Government Procurement Review*.

Our geographic coverage this year remains impressive, covering 19 jurisdictions, including the European Union, and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

In the United Kingdom and European Union, the topic of Brexit still looms large. It is apparent that the United Kingdom will continue to observe the importance of procurement law both during and beyond the planned transitional period. Her Majesty's Government has pronounced itself committed to the need for continued regulation of procurement, which is already reflected in the fact that three of the nine chapters of the Public Contracts Regulations 2015 concern domestic matters, as opposed to transposition of the EU Directives.

As indicated through a series of non-legislative procurement policy notes, the United Kingdom is seeking to regulate or alter procurement behaviour across a broad range of areas, including transparency and advertising, access for small and medium-sized enterprises (SMEs), and compliance with changing data-protection laws. At the time of writing, the government is consulting on possible measures to take into account, for procurement law purposes, the payment behaviour of larger firms in relation to their subcontractors, and increasing transparency and accountability. We believe that, whichever direction Brexit takes, detailed regulation of public procurement in the United Kingdom will continue.

Another prominent topic is the test for availability of damages in procurement cases, with the Supreme Court seemingly at odds with the EFTA Court on whether all or only 'sufficiently serious' breaches trigger a right to damages.

Looking further afield, other trends and developments that have caught our eye include:

a a pendulum swing towards deregulation in the United States on the back of President Donald Trump's drive to reduce regulation;

b the possible renegotiation of NAFTA, including the incorporation of anti-corruption provisions (Mexico and Canada);

c a desire to open up procurement to SMEs and use public procurement as a tool to drive socio-economic transformations (South Africa and Chile);

d the growing importance of electronic procurement internationally (Chile and Venezuela); and

e an increasing recognition of the importance of public procurement in international trade deals (for example, the CETA between Canada and the EU, the CPTPP (although at the time of writing, continued US participation remains in doubt) and NAFTA).

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

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this sixth 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 it is even better than the fifth edition and we trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
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Chapter 14

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 (WTO) Agreement on Government Procurement (GPA), which provides for reciprocal market access commitments in procurement between the European Commission (EC) and World Trade Organization members that are signatories to the GPA.

As an EU Member State, Portugal has implemented Directive 2014/23/EU (the Concession Contracts Directive), Directive 2014/24/EU (the Public Sector Directive) and Directive 2014/25/EU (the Utilities Directive) (together, 'the 2014 Directives').

These Directives were implemented into the Portuguese legal system through Decree-Law No. 111-B/2017 of 31 August 2017, which approved an amendment to the Public Contracts Code (PCC), first approved by Decree-Law No. 18/2008 of 29 January 2008, and subsequently amended. This large amendment to the PCC was the main mark of public procurement in Portugal in 2017, and implied a general revision to procurement procedures and public contracts.

In Portugal, the award of contracts is subject to compliance with the principles of the Treaty on the Functioning of the European Union, 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 2017, a major change to the Portuguese legal system was implemented through the 11th amendment to the PCC, approved by Decree-Law No. 111-B/2017 of 31 August, and the 12th and 13th amendments, which are ratifications to the 11th amendment. This amendment provoked a profound revision to the previous legal regime as it has revoked 35, added 54 and

1 Paulo Pinheiro, Rodrigo Esteves de Oliveira and Catarina Pinto Correia are partners and Ana Marta Castro is a managing associate at Vieira de Almeida (VdA).

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changed 155 Articles, modifying significant aspects of public procurement procedures and contracts. This amendment, in addition to the implementation of Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU, also intended to simplify the PCC, add transparency measures and reduce bureaucracy in the decision-making processes. Moreover, the new PCC intends to increase the access to small and medium-sized enterprises to the public contracts market, as it creates more flexible rules. The following are also relevant:

a Law No. 31/2017, dated 31 May 2017, which approves the rules and principles related to the organisation of the public tender procedures for the attribution, by contract, of concessions aimed at the exclusive operation of the low-voltage power distribution municipal networks;

b Decree-Law No. 93/2017, dated 1 August 2017, which creates the electronic notifications public service associated with the unique digital address;

c Decree No. 371/2017, dated 14 December 2017, which establishes the model contract notices applicable to the pre-contractual procedures under the PCC; and

d Decree No. 372/2017, dated 14 December 2017, which establishes the rules and terms concerning submission of the contractor's qualification documents on public contracts' pre-contractual procedure.

2017 witnessed no rulings likely to change the case law paradigm, only case law related to the regular interpretation of the Portuguese rules. In addition, 2017 saw significant efforts to improve administrative justice, namely by the appointment of 30 new judges to the Administrative Court of Lisbon, where most of the country's administrative litigation is held.

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 Portuguese state;
- autonomous regions;
- municipalities;
- public institutes;
- independent administrative authorities;
- the Bank of Portugal;
- public foundations;
- public associations; and
- associations either financed 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 of a public or private nature, governed by public law, as included in both the Utilities Directive and the Public Sector Directive (Article 2/2); and

c utilities in 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,

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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 the 2014 Directives and contracts for the acquisition of real estate (Article 4).

Certain 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, as specified in Section V.i.

As to defence procurement contracts, Decree-Law No. 104/2011, dated 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;

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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.

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; and
- existence of an exclusive co-contractor because the object of the contract is the creation or the acquisition of artwork or an artistic show, there is no competition for technical reasons or it is necessary to protect exclusive rights;

b for public works contracts:
- new repeated works similar to works previously awarded, subject to the conditions set forth in the law;
- works contracts under a determined threshold, for research and development (R&D), non-profit study or experimental purposes only; and
- performance of a work under a framework agreement;

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 under a determined threshold, produced for R&D, non-profit study or experimental purposes only;
- goods quoted and acquired in the Raw Materials and Commodities Exchange;
- special advantageous acquisitions;
- goods acquired under a framework agreement; and
- the acquisition of water or energy by a utility acting in the water or energy special sectors;

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 nature;
- services related to a real estate acquisition or lease;
- arbitration, mediation or conciliation services;
- certain R&D services;
- services acquired under a conception tender executed with one entity;
- services acquired under a framework agreement; and
- services acquired under especially advantageous conditions.

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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:

a affect the main scope of the contract;
b prevent, restrict or distort competition;
c imply that the order of the evaluated bids in the tender procedure for the award of the initial contract would have been altered, by objectively verifiable means, had the tender specifications contemplated this amendment; and
d produce an increase over either 10 or 25 per cent of the initial contract price, depending on the grounds of the variation.

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. Also, it is possible for the change of contracting parties to occur in a situation of breach of the contract by the co-contractor, and in such case a third party, chosen by the contracting authority considering the sequential order of the pre-contractual procedure, will become a party to the contract.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The public procurement regime set forth in the PCC deals with all special procedures (such as 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, if the tender specifications have all been set forth in the tender documents, or with several entities if the tender specifications have not all been set forth in the tender documents.

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. Further, the term of a framework agreement must not exceed four years and the termination of the framework agreement will not have any effect on the already initiated procedures or on the contracts executed under the framework agreement.

The contracting authorities covered by bounded procurement systems in a framework agreement are not bounded to such bond if they are able to demonstrate that, for a given acquisition, or lease of goods or services, the utilisation of the framework agreement would lead to the payment of a price, by unit of measure, of at least 10 per cent.

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).

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Central purchasing may be created for the purpose, among others, of awarding bids, leasing or acquiring goods or services, or executing framework agreements and centralising the procurement of several entities. Central purchasing must 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:

a concept tenders;

b dynamic acquisition systems intended to execute contracts for the acquisition or lease of goods or services of current use and public works contracts with a reduced complexity, by means of a totally electronic system;

c qualification systems, which may only be adopted in the context of executing contracts designed for activities in the special utilities sectors;

d specific rules for the alienation of movable property; and

e specific rules for the acquisition of social services, or health and administrative services in the social, educational and medical areas.

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, the carrying out of the essential part of the contracted party's activity (over 80 per cent) to the benefit of the contracting authority and the absence of private capital participation in the contracted party.

Accordingly, if a public–public joint venture 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, dated 23 May 2012, provide 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) may justify the adoption of a direct award procedure.

Special rules are set forth for special utilities sectors. Joint venture 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.

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 according to the Public Sector Directive, 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 Utilities Directive.

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

Decree No. 371/2017, of 14 December, establishes the model contract notices applicable to the pre-contractual procedures under the PCC, and the completion and submission of the contract notices set forth in this Decree are made electronically for publication in both the National Gazette and the OJEU. The completion of the contract notices to be published in the National Gazette must also be completed and submitted. When there is a need to rectify an already published notice, it is mandatory to publish a rectification notice, which must indicate the number and date of the rectified notice. All the notices submitted in the electronic platform set forth in this Decree are made available (free of charge) to all potential interested parties.

ii Procedures

The PCC provides for the following procurement procedures:

- *a* direct award: one bidder will be invited to submit bids;
- *b* prior consultation: at least three entities will be invited to submit bids;
- *c* open procedure: any interested entity is free to submit bids after the publication of a tender notice;
- *d* restricted procedure with pre-qualification (similar to (c) but comprising two stages: submitting technical and financial qualification documents, and selecting candidates; and submitting bids);
- *e* negotiated procedure: including the same two phases as the procedure in (d) and a third phase for the negotiation of bids;
- *f* 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; and
- *g* partnership for innovation: whenever a contracting authority intends the performance of R&D of goods, services or innovative works, with the intention of further purchasing it.

Both the prior consultation procedure and the partnership for innovation were introduced in the PCC with its 11th amendment.

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 two procedures: the negotiation procedure or competitive dialogue. 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 three procedures: competitive dialogue; a restricted procedure with pre-qualification (both governed by the rules of the PCC); and 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.

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iii Amending bids

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

The tender documents may be rectified by the contracting authority until two-thirds of the time limit for the submission of bids has elapsed. Interested parties are given until a third of the time frame has elapsed to identify errors and omissions in the tender specifications, which will subsequently be subject to approval by the contracting authority. Any rectification of errors and omissions after this deadline will be the cause for extension of the deadline for presentation of bids. Moreover, any rectification regarding errors and omissions must not imply amendments to any of the tender documents' essential aspects. Whenever such amendments occur, the deadline for presentation of bids should be extended.

Further, after the award decision and before the signing of the contract, the contracting authority may propose changes to the contract content, provided 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 sanctions for a serious professional breach;
d non-payment of tax obligations;
e non-payment of social security obligations;
f sanction for a breach of legal obligations in respect of employees subject to payment of taxes and social security obligations;
g conviction for crimes concerning criminal organisations, corruption, fraud or money laundering, as set in the PCC;
h direct or indirect participation in the preparation of tender documents, thus obtaining a special advantage;
i unlawful influence on the competent body for the decision to contract;
j conflict of interest; and
k significant faults on the execution of a previous public contract in the past three years.

In the situations referred to above in (b), (c), (f), (g) or (l), the PCC allows bidders to demonstrate that enough measures have been implemented in order to demonstrate a bidder's honesty and probity for the execution of the contract.

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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 may include factors linked to the bidder and not to the bid to be presented, as is the case 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 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.

According to the PCC, contracting authorities can award public contracts based on two criteria: the lowest price, as the only aspect of the contract to perform; and the most economically advantageous tender.

With the 11th amendment to the PCC it became mandatory for the rules of the procedure to establish a tie-breaker criterion for the choice of the best submitted offer. This can be related to the evaluation factors established or with the bidder being a social enterprise, or a small or medium-sized enterprise. The PCC specifically determines that the tie-breaker criterion cannot be the time when the offers were submitted.

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, aftersales service and technical assistance, delivery date and delivery period or period of completion.

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Once the proposals are submitted, the jury begins their 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, and 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 at least 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 requests 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 is 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, and does not submit it again for prior hearing.

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 must 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 are 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

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equal treatment, no bidder may be discriminated against on the basis of nationality (or on the location of 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 headquartered 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 this Decree-Law, contracting authorities in the defence sector must also award contracts based on the two above-mentioned criteria. Further, 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 does 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, contracting authorities must be transparent. This general obligation is enshrined in the requirement to properly publicise public tender proceedings, and to make public all procedure documents, which must also be transparent and clear, 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 in the PCC is given 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 submit a proposal, the PCC also stipulates a general 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.

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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. However, if after analysing the classified documents the contracting authorities consider there are 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. Further, whenever the review concerns the award, the qualification decision or the rejection of a complaint regarding any of these decisions, the contracting authority is obliged to invite other bidders to submit their views. Judicial review can be initiated before the contract is formally concluded, and also after its conclusion, and 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 movable 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.

Further, 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

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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.

Concerning 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. Further, 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 and entered into force on 17 April 2014, and Portugal has now fully implemented the provisions of the 2014 Directives, with the 11th amendment to the PCC. As recent amendments to the PCC entered into force on 1 January 2018, it is foreseeable that new challenges may arise in the Portuguese legal system in the coming year.

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