

# Public Procurement

*Contributing editor*  
**Totis Kotsonis**



2018

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# Public Procurement 2018

*Contributing editor*  
**Totis Kotsonis**  
**Eversheds Sutherland**

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# Preface

## Public Procurement 2018

Fourteenth edition

**Getting the Deal Through** is delighted to publish the fourteenth edition of Public Procurement, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Cape Verde, Chile, Mozambique, Panama, São Tomé and Príncipe and Tanzania.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, Totis Kotsonis of Eversheds Sutherland for his assistance with this volume.

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London  
May 2018

# Cape Verde

Raul Mota Cerveira and Ana Marta Castro

Vieira de Almeida

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## Legislative framework

### 1 What is the relevant legislation regulating the award of public contracts?

There are two relevant pieces of legislation regarding the award of public contracts: the Public Procurement Code (PPC), approved by Law No. 88/VIII/2015 of 14 April 2015, and the Legal Regime of Administrative Contracts, approved by Decree-Law No. 50/2015 of 23 September 2015 (LRAC). The PPC establishes the rules on the procedures for procurement by contracting authorities. The LRAC regulates the implementation of public contracts.

There are other relevant diplomas, namely Decree-Laws No. 2/95 of 30 June 1995, and No. 15/97 and No. 16/97 of 10 November 1997, which provide jointly the general framework for administrative procedure, acts and regulations.

### 2 Is there any sector-specific procurement legislation supplementing the general regime?

No sector-specific procurement legislation supplements the general regime.

### 3 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Cape Verde is not a European Union (EU) member, nor is it a signatory to the World's Trade Organization (WTO) Agreement on Government Procurement (GPA), the fundamental aim of which is to mutually open government procurement markets among its parties.

Although Cape Verde is not a signatory to the GPA, the Portuguese legal framework is a major influence on the PPC, as well as on the other relevant legislation regarding the award of public contracts. For that reason, the PPC closely follows a framework similar to the EU's.

### 4 Are there proposals to change the legislation?

The PPC and the LRAC were approved in 2015. As such, no proposals to change the legislation currently exist.

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## Applicability of procurement law

### 5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Contracting authorities under PPC (article 5) are:

- the state and services of direct administration;
- municipalities;
- public institutes, including public foundations and regulatory authorities;
- public associations, associations of public entities and associations of public and private entities that are financed for the most part or subject to management control of the public entities referred to above; and
- concessionaries of public works or services, within the concession's scope.

### 6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

Articles 30 and 31 of the PPC establish the thresholds under which contracts are excluded from the scope of procurement law.

Public tenders must be adopted for public works contracts whose value is equal to or exceeds 10 million escudos, and for lease or purchase of goods or services contracts the value of which is equal to or exceeds 5 million escudos.

Restricted tenders should be adopted for public works contracts worth between 3,5 million and 10 million escudos, and for lease or purchase of goods or services contracts worth between 2 million and 5 million escudos.

The direct award procedure may only be adopted if the contract value is lower than the restricted tender thresholds for each of the relevant contracts.

Notwithstanding the above, certain procedures – such as the public tender with two phases, the limited tender with prior qualification, the restricted tender or the direct award – may be adopted regardless of contract value, based on certain material criteria, defined in Article 34 et seq of the PPC.

### 7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

In light of the LRAC, the contract may be amended:

- by mutual agreement of the contracting parties;
- by means of a judicial or arbitral decision; or
- by means of an administrative act to be issued by the contracting authority based upon grounds of public interest.

The amendment of the contract may occur as a result of an abnormal change of the circumstances under which the contract was signed, provided that such a change is not covered by the private party's contractual risk, or on the grounds of public interest, due to the emergence of new needs, or due to a different assessment of the existing circumstances.

The amendment of the contract cannot be carried out in such a way as to prevent or distort competition, or to change the overall nature of the contract.

### 8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

There has been no case law clarifying the application of the legislation in relation to amending concluded contracts.

### 9 In which circumstances do privatisations require a procurement procedure?

Privatisations are not subject to the PPC or the LRAC. They are governed by Law No. 47/IV/92 of 6 July 1992, and amended by Law No. 41/V/97 of 11 November 1997 and by Law no. 1/VII/2006 of 3 August 2006. Nonetheless, in accordance with the Privatisation Law, the general rule is for privatisation processes to be held through a public tender or a public offering, although they can also be held through a limited procedure or a direct sale procedure, if certain specific conditions are fulfilled.

### 10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Decree-Law No. 63/2015 of 13 November 2015 governs the procedure and award of PPPs.

The main issues surrounding PPPs are financial impact and risk-sharing between public and private parties.

Launching and awarding a PPP depends on compliance with certain requirements, such as:

- budget rules and regulations;
- clear proclamation of the partnership's purposes and the private partnership's expected results, allowing adequate sharing of burdens among parties;
- a partnership model that allows a fair trade-off between private and public party risk and consideration;
- previous assessment and compliance with the applicable rules and formalities, allowing full transmission of the performance risk to the private party;
- avoidance of models assuming long-term compensation clauses in favour of private parties; and
- identification of the public entity responsible for monitoring the execution of the contract.

In accordance with Decree-Law No. 63/2015, the PPC is applicable on a subsidiary role on the setting up of a PPP, especially in what refers to the procedure that shall be launched for the award of a PPP contract.

### Advertisement and selection

#### 11 In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the Public Procurement Regulatory Authority public procurement website.

#### 12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Apart from not accepting contracting entities that fall within any of the exclusion grounds foreseen in the PPC, contracting authorities are only allowed to assess whether private contracting entities are qualified to participate in a tender procedure if they launch a public tender and the rules of the procedure allow for the evaluation of a bidder's technical and financial capacities, or a limited tender with prior qualification.

The public tender has only one phase, but the contracting authority analyses the bidder's technical and financial capacities before evaluating the bids. Bids will not be evaluated if a bidder does not comply with the established technical and financial requirements.

The limited tender with prior qualification has two phases: the qualification of candidates phase and the selection of bids phase.

In the second phase of the limited tender with prior qualification, pre-qualified bidders are invited to submit bids. The evaluation and award of the contract follow the rules stipulated for the public tender, with some specificities, set forth in the PPC.

In the procedure for awarding contracts for consultancy services that have an estimate value exceeding 4 million escudos, similar rules apply to the pre-qualification of the bidder. In these situations, the procedure starts with a publication of a notice, and there is a pre-qualification process for bidders, judging their technical and financial capacities against conditions set by the contracting authority in the terms of reference. Only pre-qualified bidders are invited to participate in the second phase and to submit bids.

#### 13 Is it possible to limit the number of bidders that can participate in a tender procedure?

There are two ways to limit the number of bidders that can participate in a tender procedure.

It is permitted to base a selection limitation on bidders' economic and financial standings, in public tenders in which the contracting authority has stipulated this kind of criteria, limited tenders with prior qualification and procedures for the award of consulting services above a specific threshold. In such cases, the candidate is compared against criteria set forth in the terms of reference.

On the other hand, it is possible for a contracting authority to launch a restricted tender or a direct award. In both of these procedures, the selection of bidders that can participate in the procedures depends on the discretionary decision of the contracting authority.

#### 14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' is not yet established. Economic operators that fall within any of the exclusion situations foreseen in the PPC have to wait for the lifting of the respective sanctions.

### The procurement procedures

#### 15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The PPC and the LRAC provide for basic underlying principles, which are public interest, good faith, competition, equality, proportionality, transparency, impartiality, economy and efficiency. These principles are relevant since they provide guidelines to interpret rules and, as a result, offer effective limits to the activity of the contracting authorities.

#### 16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The PPC does not have a specific provision referring to the independence and impartiality of contracting authorities; however, the independence and impartiality of said authority result from the fundamental principles referred to in question 15.

#### 17 How are conflicts of interest dealt with?

Members or staff of contracting authorities, members of juries or any other entities involved in a procurement procedure, must comply with the general rules regarding conflicts of interest of holders and agents of the public administration.

In addition, members or staff of entities involved in a procurement procedure should disclose any personal interest towards a bidder or potential bidder and, in this particular case, request the suspension of their involvement in the procedure.

#### 18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

No one who participated in the preparation of a public procurement procedure is allowed to participate as a bidder in the said procedure.

#### 19 What is the prevailing type of procurement procedure used by contracting authorities?

The prevailing type of competitive procurement procedure used by contracting authorities is the public tender.

However, contracting authorities often choose to award contracts on a direct award basis, as it is the most time-saving procedure available.

#### 20 Can related bidders submit separate bids in one procurement procedure?

The PPC has specific provisions under which a group of economic operators participating in a procurement procedure as a group are not entitled to participate in the same procedure, either solely or as members of other groups. Violation of such rule shall lead to the exclusion of both bidders.

There is no specific provision for related bidders (eg, different companies within the same group) submitting separate bids in the same procedure. Nonetheless, in most cases this situation could lead to the exclusion of both bidders. In fact, if certain companies belong to the same economic group, it would be very hard for them to demonstrate that they are independent and are not distorting competition, which constitutes another ground for exclusion.



**21 Is the use of procedures involving negotiations with bidders subject to any special conditions?**

Only the procedure for the award of consultancy services permits the establishment of a negotiation phase (article 170 of the PPC). Such negotiations may only occur between the contracting authority and the bidder whose proposal was the best qualified. The rules established for the negotiation phase must be set out at the beginning of the procedure, in the terms of reference.

The negotiation may only address a certain number of topics (as defined by law), namely, the clarification of unclarified aspects and agreements regarding the final payment and personal deployment.

**22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?**

See question 21.

**23 What are the requirements for the conclusion of a framework agreement?**

Under a framework agreement, the choice of the procurement procedure determines the total value of the contracts that will be awarded under the framework agreement. In fact, the signature of contracts under a specific framework agreement will only be accepted if the sum of the contractual prices of all contracts to be executed under the agreement is less than the thresholds applicable to the choice of each procedure.

Framework agreements cannot last for more than four years, except under rare circumstances that need to be very well grounded.

When a framework agreement is entered into with only one entity, the PPC states that all future contracts to be executed shall be awarded through a direct award.

**24 May a framework agreement with several suppliers be concluded?**

Yes. When a framework agreement is concluded with more than one entity, the contracting authority must invite all of them to submit a proposal before awarding the said contract.

**25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?**

The PPC states consortia must be composed by the same entities in the course of a procurement procedure. However, it would be difficult not to accept a change in the members in case of a merger or a spin-off of a consortium member.

**26 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?**

Yes. Recent improvements in openness and transparency of the public procurement procedures are expected to generate this outcome.

In addition, the PPC sets out specific rules in order to preferentially assign contracts to national companies or to favour goods extracted from Cape Verde, as well as services provided by Cape Verdean companies. The PPC's provision of national tenders (ie, tenders restricted to tenderers, or candidates registered or headquartered in Cape Verde) is also likely to bring about the same effect, increasing access of national companies (normally small and medium-sized enterprises (SMEs)) to public procurement.

Additionally, some rules may ease the increase of the participation of SMEs in procurement procedures, such as:

- the possibility of awarding contracts divided into lots;
- the possibility that, when a consortium or group of companies bid together, the criteria of technical or financial capacity may be fulfilled by only one or only two members of the consortium; and
- the obligation to submit a bond in cases of contracts of high values.

**27 What are the requirements for the admissibility of variant bids?**

Variant bids may be submitted only if duly authorised by the procedure notice or by the tender specifications.

**28 Must a contracting authority take variant bids into account?**

Where variant bids are allowed, contracting authorities must take them into account. Variant bids will be excluded if variant bids are not allowed and if the specific conditions for the submission of such bids are not respected.

**29 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?**

Any violation of the tender specifications that are not subject to competition and evaluation leads to the exclusion of the offer.

**30 What are the award criteria provided for in the relevant legislation?**

There are two award criteria provided in the PPC: the lowest price and the most economically advantageous tender. The criteria to be used must be disclosed in advance.

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.

**31 What constitutes an 'abnormally low' bid?**

An 'abnormally low' bid is one whose proposed value appears to be abnormally low when referring to the object of the contract at stake.

Provided that the contracting authority has stipulated in the tender specifications any estimated value for the contract, the PPC stipulates that a tender will be considered as an 'abnormally low bid' if the proposed price is 40 per cent less than the estimated price in case of public works contracts or 50 per cent less than the estimated price in case of any other contract.

If there is no estimated value of the contract in the tender specifications, the decision to exclude a bid for being considered abnormally low must be very well grounded.

**32 What is the required process for dealing with abnormally low bids?**

Abnormally low bids usually lead to the exclusion of the offer, except when the bidder is capable of justifying their proposal.

**Review proceedings****33 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?**

In Cape Verde, administrative challenges can be either a claim to the author of the challenged act, or an appeal to either the Conflict Resolution Committee or the Public Acquisition Regulatory Authority (ARAP).

Non-judicial remedies (administrative challenges) are claims before the author of the act (ie, the jury or awarding entities) and appeals before the ARAP, while judicial remedies are sought before the courts.

**34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?**

Yes. See question 33.



**35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?**

The timescale may vary according to the complexity of the case, or the court of submission itself, but usually decisions are taken within one year.

**36 What are the admissibility requirements?**

All procurement decisions, documents and contracts are justiciable, as long as the unsuccessful bidder proves that the procurement caused it some type of damage.

**37 What are the time limits in which applications for review of a procurement decision must be made?**

Claims against the jury's decisions during the public act are submitted during the said act. Other claims are submitted within five working days upon notification. Appeals to the ARAP are submitted within 10 working days upon notification, except appeals against the jury's decisions during the bid that opens the public act, which are submitted within five working days.

Administrative challenges do not suspend the procedure, except in what concerns the following acts: negotiation of the contract, award decision and execution of the contract.

**38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?**

See question 37.

**39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?**

The PPC does not provide for the possibility to lift an automatic suspension.

**40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?**

All bidders are notified at the same time of the award decision.

**41 Is access to the procurement file granted to an applicant?**

During the whole public procurement procedure, all bidders have access to the documents submitted by the parties and issued by the jury as well as by the contracting authority. Full access to the procedure's documents is an important principal of the procurement legislation in Cape Verde.

**42 Is it customary for disadvantaged bidders to file review applications?**

Disadvantaged bidders will most likely file review applications if they finish second in a competitive tender and where the contract value is high (whether in financial or strategic terms).

**43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?**

Yes.

**44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?**

A concluded contract may be cancelled or terminated following a review application by an unsuccessful bidder. Nonetheless, those situations are uncommon.

In the cases in which judicial decisions determine an executed contract should be cancelled, contracting authorities usually appeal such decisions. When final and non-appealable decisions are finally issued, contracts are almost completed.

**45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?**

Yes.

**46 What are the typical costs of making an application for the review of a procurement decision?**

Appeals to the ARAP are free.



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