

Defence & Security Procurement

Contributing editor
Matthew L Haws



2019

GETTING THE
DEAL THROUGH

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Matthew L Haws
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CONTENTS

Global overview	5	Norway	47
Matthew L Haws Jenner & Block LLP		Christian Bendiksen and Alexander Mollan Brækhus Advokatfirma DA	
Australia	6	Poland	53
Anne Petterd, Geoff Wood and Sally Pierce Baker McKenzie		Maciej Zalewski and Maciej Szymański White & Case	
Canada	12	Portugal	60
Ben Mills Conlin Bedard LLP		Ana Marta Castro Vieira de Almeida	
Germany	17	Qatar	64
Wolfram Krohn and Tobias Schneider Dentons Europe LLP		Arnaud Depierrefeu Simmons & Simmons Middle East LLP	
Italy	23	Turkey	69
Anna Masutti LS LexJus Sinacta – Avvocati e Commercialisti		Şafak Herdem Herdem Attorneys at Law	
Japan	29	United Kingdom	73
Kohei Masuda, Ryuichi Nozaki, Yuri Suzuki and Yuko Nihonmatsu Atsumi & Sakai		Elizabeth Reid, Simon Phippard, Brian Mulier, Michael Stocks, Lucy England and Chris Murray Bird & Bird LLP	
Korea	36	United States	79
Wonil Kim, Sang-Hyun Ahn, Jin Kee Jung and Sung Duk Kim Yoon & Yang LLC		Matthew L Haws, Grant B Schweikert, Marc A Van Allen and Carla J Weiss Jenner & Block LLP	
Mexico	42		
Sergio Chagoya Díaz and Elías Zaga Belzer Santamarina y Steta SC			

Preface

Defence & Security Procurement 2019

Third edition

Getting the Deal Through is delighted to publish the third edition of *Defence & Security Procurement*, which is available in print, as an e-book and online at 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 a new chapter on Mexico.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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 also extend special thanks to the contributing editor, Matthew L Haws of Jenner & Block LLP, for his assistance in devising and editing this volume.

GETTING THE
DEAL THROUGH 

London
December 2018

Portugal

Ana Marta Castro

Vieira de Almeida

Legal framework

1 What statutes or regulations govern procurement of defence and security articles?

The basic procurement rules for defence and security contracts are set forth by the Public Procurement Law in the Fields of Defence and Security (PPDS), approved by Decree-Law 104/2011 of 6 October 2011, which implemented the EU Directive 2009/81/EC into Portuguese Law. The PPDS establishes the fundamental principles and rules applicable to the award of certain contracts in the areas of defence and security.

The PPDS establishes the special rules applicable to procurement in the sectors of defence and security, but the Portuguese Public Contracts Code (PCC), approved by Decree-Law 18/2008 of 29 January 2008, which is considered the key legislation regulating the award of public contracts and was recently amended by Decree-Law 111-B/2017 of 31 August 2017, is the main legal reference applicable on a subsidiary basis.

Finally, reference must be made to the Administrative Procedure Code, approved as an appendix to Decree-Law 4/2015 of 7 January 2015 and the Administrative Courts Procedure Code, approved by Decree-Law 214-G/2015 of 2 October 2015, which are all applicable to public procurement procedures in general.

2 How are defence and security procurements identified as such and are they treated differently from civil procurements?

A procurement by a Portuguese contracting authority falls within the scope of the PPDS when contracts have a value excluding value added tax above the threshold established in article 8 of EU Directive 2009/81/CE and whose object is:

- the supply of military equipment, including any parts, components or sub-assemblies thereof;
- the supply of sensitive equipment, including any parts, components or sub-assemblies thereof;
- works, supplies and services directly related to military or sensitive equipment for any and all elements of its life cycle; and
- works and services for specifically military purposes or sensitive works and sensitive services.

Military equipment is defined as the type of product included in the list of arms, munitions and war material, approved by the Decision of the Council No. 255/58 of 15 April, interpreted according to the progressive character of said technology, procurement policy and the military requirements, on the basis of the Common Military List of the European Union.

As mentioned above, defence and security procurement is subject to a special procurement regime and, although the regime is similar to the general public procurement rules in terms of structure and basic principles, it differs from the general rules in various aspects owing to the sensibility and importance of the sector. Moreover, defence and security contracts present, as the principal object, elements related to sensitive work, equipment and services for security purposes. In general, defence and security procurements are treated differently because they require the application of particular protection measures.

3 How are defence and security procurements typically conducted?

There are four procurement procedures under the PPDS: negotiation procedure with a prior notice; negotiation procedure with no prior notice; competitive dialogue; and limited tender with prior qualification.

The general rule is for procurement procedures being conducted through a negotiation procedure with a prior notice or a limited tender with prior qualification. Nonetheless, the competitive dialogue and the negotiation procedure with no prior notice can be implemented provided such decision is well-grounded.

As mentioned above, defence and security procurements are typically conducted following the rules provided by the PPDS and the PCC.

Most procedures involve a pre-qualification process at the first phase of the competitive procedure, during which tenderers must demonstrate their financial and technical capability, including experience in similar contracts.

4 Are there significant proposals pending to change the defence and security procurement process?

In Portugal, there is no particular legal update process or a significant proposal regarding defence and security procurement processes.

5 Are there different or additional procurement rules for IT versus non-IT goods and services?

The national legal framework does not provide for different or additional procurement rules for IT procurement.

6 Are most defence and security procurements conducted in accordance with the GPA or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?

Portugal is a member of the European Union and has signed the Agreement of Government Procurement (GPA). For that reason and following the implementation of EU Directive 2009/81/EC on contracts in the fields of defence and security into Portuguese Law through Decree-Law 104/2011, in most procurement procedures Portugal follows the GPA and the EU principles and rules on public procurement in the defence sector.

However, in some cases, the national security exemption and the exemption for armament and information pursuant to article 346 TFEU is still used. Nonetheless, the use of these exemptions is declining.

Disputes and risk allocation

7 How are disputes between the government and defence contractor resolved?

Disputes between the public contracting authorities and private contractors are dealt with according to the general regulations concerning settlements between contract authorities and economic operators.

Under Portuguese law, the disputes between public and private contractors in the defence and security sectors are usually resolved in judicial courts. However, some recently signed contracts already contain arbitration clauses.

8 To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

Alternative dispute resolution is a possible instrument considering what is prescribed in the Portuguese legal framework and can be used to solve conflicts in public procurement in general, as well as in the defence and security fields, especially through arbitration, which is starting to be viewed as a more efficient alternative to the common judicial litigation. In fact, for a dispute related to defence and security procurement, the arbitration procedure ensures a very swift procedure.

9 What limits exist on the government's ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement?

The defence and security sectors do not contain any specific rule regarding the ability to indemnify. In general, the government – as any private party – must indemnify the contractor for damages arising from a breach of contract by the government, provided that damages are reasonably and foreseeably caused by the breach. Vice versa, the private contractor also has to indemnify the government for the damages that arise from a breach by the contractor. Therefore, the government administration's liability obligation is not limited by specific elements. The administrative courts or the arbitration courts have the powers to define the value of the contractor's compensation and the relative government obligations in accordance with the rules concerning administrative proceedings.

10 Can the government agree to limit the contractor's liability under the contract? Are there limits to the contractor's potential recovery against the government for breach?

The government is free to negotiate and accept a limitation of liability of the contractor. There are no statutory or regulatory limits to the contractor's potential recovery against the government.

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

In Portugal, public contracting authorities – as well as any private party – are bound by the contracts they have entered into, regardless of whether adequate funds are available. Therefore, a contractor may take legal action against the government for default and enforce a judgment against the government at any time.

12 Under what circumstances must a contractor provide a parent guarantee?

A contractor has to provide a parent guarantee only if the contractor itself does not meet the minimum requirements for financial and economic standing set by the contract.

Defence procurement law fundamentals

13 Are there mandatory procurement clauses that must be included in a defence procurement contract or that will be read into the contract regardless of their actual inclusion?

There are no mandatory procurement clauses that must be included in, or that will be read into, a defence contract as a matter of law, except for certain requirements relating to the protection of classified information as well as certain price control rules.

However, there are specific rules applicable to contracts involving access to classified information at levels 'Confidential' or higher. These contracts must include certain clauses obliging the contractor to observe the applicable rules and procedures for the protection of such information.

Contracts are construed in accordance with the PCC, including the principles applicable to public law contracts, as the principle of good faith.

14 How are costs allocated between the contractor and government within a contract?

Costs regarding defence procurement contracts are allocated between the contractor and the government and, usually, costs concerning the contractual documentation are carried by the economic operators. However, the specific allocation of costs between the contractor

and government in these cases depends on the particular agreement signed.

15 What disclosures must the contractor make regarding its cost and pricing?

Contracting authorities may require some additional explanations on the prices proposed so that they can verify their adequacy.

16 How are audits of defence and security procurements conducted in this jurisdiction?

Generally, procurement is subject to audit by the Court of Auditors as well as a control done by the Contracting Authority about the actual existence of general requirements and the professional competence of economic operators. The administration verifies whether economic operators are qualified to perform public works, and verifies the technical, professional, economic and financial capacities to confirm whether the defence and security purposes can be met by the economic operators.

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

The allocation of intellectual property rights created during the performance of the contract may vary from case to case, depending on the specific contract signed.

Nonetheless, the general rule applicable is the rule contained in the Public Contracts Code and applicable to the defence and security contracts, under which the ownership rights to intellectual property belong to the contracting authority.

18 Are there economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement-related benefits?

In Portugal, there are no specific economic zones or special programmes that are reserved for foreign economic operators.

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

Portuguese company law has two main types of incorporated entities: the public limited liability company (SPA) and the private limited company (SRL).

The SPA has the following characteristics. It has a minimum of five members, designated by holders, which may be natural or legal persons and does not accept industry contributions. The SPA can be constituted with a single shareholder provided that the partner is a company. The liability of members is limited to the value of the shares subscribed for themselves. The capital cannot be less than €50,000 and is divided into equal par value. The name of the company shall contain the words limited liability company or SA.

The SRL has the following characteristics. It has two or more members that can be natural or legal persons. It does not accept industry contributions. The liability of members is limited to the capital, except in cases where the law provides otherwise. Social capital can be set freely by the partners, except in companies regulated by special legislation. The share value (quota value) can be variable, but not less than €1. The contract of the company shall state the amount of each share and the identification of the respective holder. The name of the company must contain the words 'Limited' or 'Ltd'.

20 Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?

Under the general principle of transparency and according to the general duty of administrative bodies to state the reasons of their decisions, all public procedures are public and anyone who demonstrates a legitimate interest in having access to information (documents and others) regarding a certain procedure is entitled to it and even to ask for copies of the documents of such procedure.

As regards public procurement procedures, Law 96/2015 of 17 August 2015 establishes the legal framework for the access and use of electronic platforms for public procurement purposes, which allows

for all communications and decisions taken under a certain public procurement procedure to be public to all the bidders at the same time. In fact, 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, except in relation to documents that bidders have requested to be classified.

Despite the general principle of transparency, there are certain exceptions to this principle. Public authorities may decide not to disclose certain information, including in relation to public procurement procedures, when and insofar as its release would impede law enforcement or otherwise be contrary to the public interest, in particular to the interests of defence and security, harm the legitimate commercial interests of economic operators or could prejudice fair competition between them.

21 What are the rules regarding eligible suppliers and supply-chain management and anti-counterfeit parts for defence and security procurements?

According to Law 49/2009 of 5 August 2009, all companies engaged in defence activities are subject to an authorisation (licence) issued by the Minister of Defence. Besides that authorisation, there are no specific rules regarding the eligibility of suppliers in the defence and security sectors. The general rule applicable for defence and security contracts is the same applicable in accordance with the PCC.

Apart from not accepting contracting entities that fall within any of the exclusion grounds foreseen in the PCC, which are equivalent to the ones foreseen in the EU Public Procurement Directives, contracting authorities are only allowed to assess whether private contracting entities are qualified to participate in a tender procedure in accordance with the economic and financial standing of the bidder and to its technical and professional ability. Those qualitative criteria must be related and proportionate to the subject matter of the contract.

There are no specific requirements regarding supply-chain management and no specific rules regarding anti-counterfeit parts for defence and security procurements either.

International trade rules

22 What export controls limit international trade in defence and security articles? Who administers them?

Law 37/2011 of 22 June 2011 transposed to the national framework Directive 2009/43/EC of 6 May 2009 and Directive 2010/80/EU, of 22 November 2010, which aims to simplify the rules and procedures applicable to the Intra-Community transfer of defence-related products to ensure the proper functioning of the internal market.

The Portuguese government (the Ministry of Defence) is the national authority responsible for the authorisation of the transfer of defence-related products between member states. Moreover, exportation is subject to various layers of national control performed by different authorities, such as the Foreign Ministry, the Defence Ministry and also by the customs authority.

23 What domestic preferences are applied to defence and security procurements? Can a foreign contractor bid on a procurement directly?

There are no domestic preferences applied to defence and security procurement since Portuguese public procurement procedures, including in the fields of defence and security, are based on competition, equal treatment and non-discrimination.

Foreign contractors can bid on procurements directly. Under the PPDS, tenderers who, under the law of the member state in which they are established, are entitled to participate in public procurement procedures, shall not be rejected solely on the ground that under the Portuguese law they would be required to be either natural or legal persons.

24 Are certain treaty partners treated more favourably?

There are no rules providing for more favourable treatment of contractors from any particular country.

25 Are there any boycotts, embargoes or other trade sanctions between this jurisdiction and others?

Portugal is a member of the United Nations and the European Union and adheres to the boycotts, embargoes and other trade sanctions put in place by these organisations.

The UN Security Council imposes sanctions through Security Council Resolutions. The European Union acts on these by adopting a common position and where appropriate, an EU regulation directly applicable to member states is introduced.

26 Are defence trade offsets part of this country's defence and security procurement regime? How are they administered?

Portugal used to have an offset legal regime. Nonetheless, after the approval of Directive 2009/81/EC and its transposition into the Portuguese legal framework, defence trade offsets are no longer possible in Portugal since those kinds of agreements are incompatible with EU public procurement principles.

Ethics and anti-corruption

27 When and how may former government employees take up appointments in the private sector and vice versa?

Under Portuguese law, government employees and public administration employees are not able to cumulate the exercise of public and private activities, although there are certain exceptions specifically provided in the law.

In relation to former government employees being able to take up appointments in private sector and vice versa, the rule is the same and the introduction of a cooling-off period is common. Nonetheless, no limitation is applicable when the future functions are not related to the defence and security sectors and the impartiality of the decisions (prior and future) will not be affected.

28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

Contractors are obliged to commit themselves to transparency standards during the execution of activities related to defence and security procurement contracts.

29 What are the registration requirements for lobbyists or commercial agents?

Portugal does not have any legislation regarding lobbyists, so lobbyists and commercial agents are not generally required to register with any government entity (in addition to general business registration requirements).

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

Law 49/2009 of 5 August 2009, provides that all intermediation acts must be authorised in advance by the Portuguese Minister of Defence.

Moreover, the Portuguese Minister for Foreign Affairs is required to give its opinion on the opportunity and convenience of the intermediation act in as regards foreign policy issues.

Aviation

31 How are aircraft converted from military to civil use, and vice versa?

There is a distinction between military-use aircraft and civil-use aircraft. Military aircraft belong to a special category because of their military end-use and are registered in accordance with specific principles and rules. Accordingly, civil-use aircraft are subject to a specific registration process led by the Portuguese Civil Aviation authority.

There may be circumstances in which civil aircraft can be used as military aircraft. The use of a civil aircraft for military purposes requires that the aircraft is under control of the military, and the prior approval by the inspection and by the office of the Portuguese military.

32 What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?

The aviation laws and regulations ruling the inspection, approval and operation of unmanned aircraft are approved by the National Civil Aviation Authority.

The National Civil Aviation Authority also approved, on 14 December 2016, Regulation No. 1093/2016, which provides a framework for the operation of drones in Portugal. The regulation applies to all civil drones, except those operating in closed or covered areas. The Regulation entered into force on 13 January 2017.

Miscellaneous**33 Which domestic labour and employment rules apply to foreign defence contractors?**

Domestic labour and employment rules apply to foreign defence contractors who execute contract activities in Portugal. Foreign defence contractors must observe Portuguese labour and employment rules to the extent that they run operations in Portugal.

34 Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?

There are no specific rules applicable to contractors, foreign or domestic, in defence contracts, except in what refers to confidentiality issues and classified information.

In fact, if contracts refer to confidential or classified information, contractors need a specific authorisation to access that information.

The Portuguese legal framework has several rules ensuring the protection of classified information.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?

Contractors performing work abroad are bound by the international rules applicable to defence contracts. Moreover, they are also bound by the laws and regulations of the country in which they are performing the specific work at stake.

36 Must directors, officers or employees of the contractor provide personal information or certify that they fulfil any particular requirements to contract with a government entity?

All directors, officers or employees of the contractor shall ensure that they comply with the general eligibility criteria established for public procurement contracts. Otherwise, if they fail to comply with said criteria, they may see the current or future offers being rejected on that grounds.

Moreover, if the contracts at stake involve access to classified information, higher security measures are applicable.

37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?

Law 49/2009, of 5 August 2009, sets forth the conditions to carry out military activities.

In accordance with said law, military activities shall be executed in accordance with the general principles applicable to the safeguard of national defence and security and with the international agreements entered into by the Portuguese Republic.

Moreover, any activity regarding the practice of goods and military technology market and industry have to be licensed by the Ministry of Defence.

38 What environmental statutes or regulations must contractors comply with?

Environmental protection during the execution of a public procurement contract is an important issue that contractors must consider.

The Portuguese legal framework concerning public procurements, including defence and security procurements, provides for specific obligations concerning environmental protection.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

In Portugal, there are no specific environmental standards for the defence sector. Nonetheless, the general environmental standards are also applicable to the defence sector and some contracting authorities may also include environmental criteria relating to the subject matter of the contract, such as energy efficiency or emissions, into the technical specifications or the award criteria.

40 Do 'green' solutions have an advantage in procurements?

Green solutions only provide advantages in procurement if environmental criteria are established for the evaluation of the offers submitted.



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