

Public Procurement 2019

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Public Procurement 2019

Contributing editor**Totis Kotsonis**

Eversheds Sutherland

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Public Procurement*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 Italy.

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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.

Lexology 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, Totis Kotsonis of Eversheds Sutherland, for his continued assistance with this volume.

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Contents

| | | | |
|--|-----------|--|------------|
| EU Court guidance on the use of framework agreements | 5 | France | 87 |
| Totis Kotsonis Eversheds Sutherland | | Boris Martor, Bruno Richard and François Lichère Eversheds Sutherland LLP | |
| Angola | 8 | Germany | 93 |
| Ana Marta Castro and Raul Mota Cerveira Vieira de Almeida | | Carsten Eichler and Annkathrin Hoffmann Eversheds Sutherland (Germany) LLP | |
| Belgium | 14 | Ghana | 101 |
| Emmanuel Van Nuffel and Kevin Munungu Daldewolf | | David Ofosu-Dorte, Ferdinand Adadzi and Sena Abla Agbekoh AB & David | |
| Bolivia | 24 | India | 107 |
| Alejandra Guevara and Jorge Inchauste Guevara & Gutiérrez SC | | Sumeet Kachwaha Kachwaha and Partners | |
| Bulgaria | 30 | Ireland | 114 |
| Boryana Boteva and Galabina Ruseva Sabev & Partners Law Firm | | Áine Smith and Peter Curran Eversheds Sutherland | |
| Canada | 38 | Italy | 123 |
| Ben Mills, Paul D Conlin and Drew Tyler Conlin Bedard LLP | | Filippo Satta and Anna Romano Satta Romano & Associati Studio Legale | |
| Cape Verde | 45 | Korea | 131 |
| Ana Marta Castro and Raul Mota Cerveira Vieira de Almeida | | Jongseok Lee, Whee-Un You and Jaeyoung Chang Lee & Ko | |
| Chile | 51 | North Macedonia | 138 |
| Felipe Bahamondez and Paulina Farías DLA Piper Chile | | Jasmina Ilieva Jovanovik and Dragan Dameski Debarliev, Dameski & Kelesoska Attorneys at Law | |
| China | 57 | Malta | 148 |
| Joline Chen and Karl Zhang Shanghai Lee, Tsai & Partners Attorneys at Law | | Antoine Cremona and Clement Mifsud-Bonnici GANADO Advocates | |
| Cyprus | 65 | Mozambique | 156 |
| Alexia Kountouri Tassos Papadopoulos & Associates LLC | | Ana Marta Castro and Raul Mota Cerveira Vieira de Almeida | |
| European Union | 70 | Netherlands | 162 |
| Totis Kotsonis Eversheds Sutherland | | Michel Chatelin Eversheds Sutherland Netherlands | |
| Finland | 78 | Norway | 168 |
| Kristiina Hirva and Tuija Kaijalainen DLA Piper Finland Attorneys Ltd | | Trygve Olavson Laake Difi – Agency for Public Management and eGovernment | |

| | | | |
|--|------------|---|------------|
| Panama | 178 | Switzerland | 218 |
| Khatiya Asvat and Joaquín De Obarrio Patton, Moreno & Asvat | | Bernhard C Lauterburg and Philipp E Zurkinden Prager Dreifuss Ltd | |
| Poland | 184 | Taiwan | 225 |
| Witold Sławiński Wierzbowski Eversheds Sutherland | | Edward Liu and HaoJou Fan Chen & Lin Attorneys-at-Law | |
| Portugal | 192 | Tanzania | 234 |
| Ana Marta Castro Vieira de Almeida | | Sadock Magai and Burure Ngocho IMMMA Advocates | |
| São Tomé and Príncipe | 199 | United Kingdom | 241 |
| Ana Marta Castro and Raul Mota Cerveira Vieira de Almeida | | Totis Kotsonis Eversheds Sutherland | |
| Spain | 204 | United States | 249 |
| Alberto Dorrego and Andrés Jiménez Eversheds Sutherland Nicea | | Jeffrey P Bialos, Francis X Nolan, Brittany M Cambre and Erin D Park Eversheds Sutherland (US) LLP | |
| Sweden | 209 | | |
| Fredrik Linder, Mikael Dubois and Martina Sterner Hamilton | | | |

Angola

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LEGISLATIVE FRAMEWORK

Relevant legislation

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

The Public Contracts Law (PCL), approved by Law 9/16 of 16 June 2016 – which repealed earlier legislation, in particular Law 20/10 of 7 September 2010 – is considered to be the key legislation regulating the award of public contracts. The PCL is complemented by Presidential Decree 199/16 of 26 September 2016, which sets out the regime applicable to both the public procurement procedures and the execution of framework agreements and, in particular, by Presidential Decree 201/16 of 27 September 2016, which establishes the standard draft contracts relating to public works, public supply and public services.

Also relevant is Presidential Decree 202/17 of 6 September 2017, which establishes the legal framework for the access and use of the National E-Procurement System.

Moreover, a reference must be made to the Public-Private Partnerships Law, approved by Law 2/11 of 14 January 2011, which sets forth the regime applicable to the State intervention and participation in tender procedures, the award, the execution and the oversight of public-private partnerships.

Finally, reference must be made to Decree Law 16-A/95 of 15 December, as amended, which approved the Administrative Procedure and Administrative Activity Code. This Law was partially repealed by the PCL, but it is still relevant as it is subsidiarily applicable to the public tender procedures.

Sector-specific legislation

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

Owing to the strategic and operational role of petroleum activities in Angola, there is a special regime that regulates access to petroleum activities: the Petroleum Activities Law, approved by Law 10/04 of 12 November 2004.

International legislation

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

Angola is not a European Union member, or a signatory to the World Trade Organization's (WTO) Agreement on Government Procurement (GPA), the fundamental aim of which is to mutually open government procurement markets between its parties.

Although Angola is not part of the GPA, the Portuguese legal framework has a major influence not only on the PCL, but also on other relevant legislation regarding the award of public contracts, and for that

reason the PCL's framework closely follows that of the EU's procurement directives.

Proposed amendments

4 | Are there proposals to change the legislation?

Since the PCL, approved by Law 9/16, of 16 June 2016, is a recent piece of legislation, at this stage, no new amending proposals are expected.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

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

Under the PCL, 'contracting authorities' are traditional public sector entities such as central and local authorities. The entities considered to be in this group include:

- the President of the Republic;
- the central and local administrative bodies;
- the National Assembly;
- the courts;
- the Attorney General's Office;
- the independent administrative authorities;
- Angola's representation offices abroad;
- municipalities;
- public institutes;
- public funds;
- public associations;
- public companies; and
- publicly held companies.

Contract value

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

The PCL is not applicable to public contracts entered into by public companies and publicly held companies pertaining to (i) public works, public works concessions and public services concessions that fall below the 500 million Angolan kwanzas threshold and to (ii) leases, acquisitions of goods and acquisitions of services that fall below the 182 million Angolan kwanzas threshold. All other public contracts concluded with contracting authorities fall within the scope of the PCL. The type of procedure differs depending on the estimated value of the contract at stake. Nevertheless, the award of certain contracts may be exempted from complying with procurement law in some situations (for instance, when imperative grounds of urgency so require) and contracts with a value falling below the 5 million Angolan kwanzas threshold can

be awarded through a direct award (ie, a non-competitive procedure), although its terms are also regulated by the PCL.

Amendment of concluded contracts

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

Amendments to concluded contracts are permitted without a new procurement procedure on public interest grounds, and if the conditions under which the parties entered into the previous agreement changed in an abnormal and unpredictable way leading to a serious increase in the risks initially assumed by the original contractor.

Amendments can be introduced by a unilateral decision of the contracting authority based on public interest grounds, by an agreement entered into between both parties or by a judicial or arbitral decision.

The amendments introduced cannot alter the overall nature of the contract and cannot affect the competition which lied at the base of the procurement procedure. This means, for instance, that the changes to be introduced cannot alter the order in which the bids were previously evaluated.

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

No, there has been no case law clarifying the application of the legislation in relation to amendments to concluded contracts.

Privatisation

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

Under the Angolan legal framework, privatisation processes do not fall within the scope of the PCL and are regulated by specific legislation, namely by Law 10/94 of 31 August of 1994.

The Angolan Privatisation Law applies to the disposal of shares held by public entities and prescribes that privatisation processes must be held via a public tender. Exceptionally, in some limited cases, the Angolan Privatisation Law also foresees that a privatisation process may be held through a limited tender with specific pre-qualified bidders or via a direct award.

Public-private partnership

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

In accordance with the Public-Private Partnerships Law, approved by Law 2/11 of 14 January 2011, the setting up of a PPP is regulated by the applicable tender procedure in accordance with the terms set out in the PCL.

ADVERTISEMENT AND SELECTION

Publications

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

Regulated procurement contracts must be advertised in the National Gazette, in the Public Procurement Portal and in a major newspaper.

Participation criteria

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 being prevented from accepting contracting entities that fall within any of the exclusion grounds foreseen in the PCL, contracting authorities may only assess whether private contracting entities are qualified to participate in a tender procedure if such authorities launch a limited tender with prior qualification, a restricted procedure or a simplified procurement procedure.

In a public tender, it is not possible to evaluate the technical and financial qualifications of bidders.

In a limited tender with prior qualification, the evaluation of bidders' qualifications is made during the first phase of this procedure, in which bidders submit their applications. The qualitative criteria set out by the contracting authority to evaluate bidders' capacities must refer to bidders' economic and financial standing and their technical and professional abilities. Those qualitative criteria must be related and proportionate to the subject matter of the contract.

In respect of the other public procurement procedures referred to above (ie, the restricted procedure and the simplified procurement procedure), there are no specific phases in which the qualification of bidders formally takes place, since the selection of the bidders invited to participate is discretionary and is made prior to the launch of the such procedures.

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

Following the assessment of the bidders and their compliance with the qualitative selection criteria referred to in question 12, a limitation on the number of bidders may occur.

In accordance with the PCL, if bidders demonstrate they comply with all the minimum qualitative selection criteria established, they will be invited to the second stage of the tender in which they will be invited to submit a bid.

Regaining status following exclusion

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' has not been formally established in the legal framework prescribed by the PCL. However, if the rehabilitation of a bidder has occurred, the bidder will not be excluded.

It is important to note that there is a list compiled and advertised in the Public Procurement Portal (www.contratacao publica.minfin.gov.ao/PortalSNCP) identifying those economic operators deemed as having not complied with their contractual obligations in previous contracts. Such economic operators are kept on the said list for at least three years.

THE PROCUREMENT PROCEDURES

Fundamental principles

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

Yes. PCL states that the fundamental principles for tender procedures include the principles of pursuit of the public interest, justice, equal treatment, competition, impartiality, transparency, probity, economy, efficiency, effectiveness and of respect for public heritage.

Independence and impartiality

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

Yes. Articles 3 and 8 of the PCL establish the principles of independence and impartiality as far as contracting authorities are concerned. In particular, article 8 prescribes an extensive set of rules applicable to public officials responsible for the public procurement procedures, and specifically stipulates that they shall act impartially and in accordance with the public interest prevent conflicts of interests, respect confidentiality rules and follow all rules and regulations regarding the conduct and the legal impediments of public officials.

Additionally, the PCL contains different mechanisms that aim to ensure impartiality. In certain situations, members of contracting authorities are prohibited from interfering in the decisions taken in a given public procurement procedure when, for example, they have a direct or indirect personal interest in the outcome of the procedure. In other cases, and under specific situations, members of contracting authorities may decide not to participate in certain procedures, with the purpose of not raising any doubts regarding the impartiality of the decisions to be taken.

It is also important to note that most public procurement procedures are accompanied by an Evaluation Committee that holds a wide range of powers to ensure compliance with all legal requirements throughout the procedure.

Conflicts of interest

17 | How are conflicts of interest dealt with?

See question 16.

Bidder involvement in preparation

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

The involvement of a bidder in the preparation of a tender procedure may be grounds for a decision of exclusion. However, this exclusion decision is only issued when such intervention is considered to have conferred advantages to the bidder and prejudiced competition.

Procedure

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

The prevailing type of procurement procedure used is the public tender.

Separate bids in one procedure

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

The PCL has a specific provision under which economic operators participating in a procurement procedure as a consortium are not entitled to participate in the same procedure individually or as members of other consortia. Violations of this rule lead to the exclusion of both bidders.

There is no specific provision that states that related bidders (as in the case of different companies within a same group, for example) must submit separate bids in the context of the same procedure. Nonetheless, in most cases, this situation would probably 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 that they are not distorting competition, which constitutes another ground for exclusion.

The situation of a subcontracting party participating as a subcontracting party in more than one bid in the same procedure could also lead to the exclusion of all the bids in which the said subcontracting party participated, since that would probably lead to the conclusion that competition was distorted. Nevertheless, such a situation would entail a lesser degree of risk when compared to the case of related bidders submitting separate bids in the same procedure.

Negotiations with bidders

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

The inclusion of a negotiation phase is possible in all public procurement procedures outlined in the PCL, depending on a discretionary decision of the contracting authority at stake.

There are two main methodologies for selecting bidders to the negotiation phase: (i) all bidders that have previously submitted valid bids are invited; and (ii) bidders whose bids are classified in the first-ranked positions are invited.

The maximum number of bidders that may be invited to the negotiation phase has to be previously stated in the tender documents.

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.

Framework agreements

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

Both the PCL and the Presidential Decree 199/16 of 23 September 2016 regulate the regime applicable to framework agreements, which allow public contracting entities to set the terms and conditions applicable to contracts that will be entered into with one or more contracting entities or suppliers for a given period of time.

The PCL allows for two different types of framework agreements: (i) a single supplier agreement or (ii) a several suppliers agreement.

A framework agreement usually follows a public tender or a limited tender with prior qualification, since those procurement procedures do not have any thresholds. On the contrary, if a framework agreement is awarded through a direct award procedure, the global value of the contracts to be executed under such framework agreement cannot exceed the respective threshold.

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

A framework agreement may be entered into with several suppliers. The awarding of contracts under such agreements is preceded by an invitation sent to the previous selected suppliers (ie, the future contracting parties of the framework agreement) to submit a proposal regarding the specific aspects of the contract, and that will be evaluated.

In contrast, if a framework agreement is concluded with a single supplier, contracts based on that framework agreement will be awarded within the limits of the terms laid down in that same framework agreement. Those terms must also have been sufficiently specified in the procurement procedure that preceded the award of the framework agreement.

Changing members of a bidding consortium

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

The general rule is for changes in a consortium not to be allowed during a procurement procedure, since the PCL expressly stipulates that all the members of a consortium, and only those members, may sign the contract. Nonetheless, it would be difficult not to accept a change to the composition of a certain consortium in the case of a merger or spin-off of a given member, since, conversely, such a change would necessarily have to be accepted if there were only one bidder in the procedure.

Participation of small and medium-sized enterprises

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?

The PCL has no specific rule or mechanism that furthers the participation of small and medium-sized enterprises (SMEs) as far as procurement procedures are concerned. However, the PCL prescribes specific rules in order to preferentially assign contracts to national economic operators as well as to prioritise national production. It is important to stress that the PCL grants a certain number of advantages to national SMEs.

In terms of division of a contract into lots, there is a specific provision which states that the relevant threshold to be taken into account for the selection of the applicable procurement procedure shall be the total sum of all the estimated amounts associated with each lot.

There is no rule or case law that limits the number of lots single bidders can be awarded.

Variant bids

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

The PCL defines variant bids as those bids that propose alternate conditions in respect of one or more contractual clauses included in the tender specifications. Variant bids are only admitted when specific provisions in the procedure documents expressly authorise their submission.

Moreover, bidders must, notwithstanding, submit a standard bid that is based on the requirements laid out in the tender specifications.

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

See question 27.

Changes to tender specifications

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 respective bid.

Award criteria

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

There are two award criteria provided for in the PCL – the lowest price and the most economically advantageous tender – which 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, such as:

- quality;
- price;
- technical characteristics;
- aesthetic and functional characteristics;
- environmental characteristics and impact on public health;
- running costs;
- cost-effectiveness;
- after-sales service and technical assistance;
- delivery date; and
- delivery period or period of completion.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

What specifically constitutes an 'abnormally low' bid is under the discretion of the Evaluation Committee, or other contracting authority. The Committee or other authority can require a bidder to submit a justification for their low bid.

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

If contracting authorities have stipulated the estimated price for the contract in the tender specifications and the bidder intends to submit an offer with a price that may be considered as 'abnormally low', the bidder must submit a declaration setting out the grounds for the submission of such a price. Otherwise, the Evaluation Committee may ask the bidder for an explanation. Failure to present an explanation or to objectively justify the submission of an abnormally low-priced bid constitute grounds for exclusion.

The mentioned explanations may refer to several factors, such as:

- the economics of the manufacturing process;
- the technical solutions chosen or any exceptionally favourable conditions available to the bidder;
- the originality of the works;
- the supplies or services proposed by the bidder;
- the specific conditions of work that the bidder benefits from; and
- the possibility of the bidder obtaining state aid.

REVIEW PROCEEDINGS

Relevant authorities

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

The PCL repealed most of the regulation regarding appeals against review decisions prescribed in the Administrative Procedure and Administrative Activity Code.

According to the PCL, it is possible to challenge all decisions issued in the context of public procurement procedures either through administrative review proceedings, which are regulated by the contracting authorities, or through judicial review proceedings, under the jurisdiction of administrative courts.

Regarding this type of decision, it is important to mention the establishment of the Cabinet of Public Procurement, which is charged with supporting the executive branch in defining and implementing policies and practices on public procurement, judging administrative proceedings during reviews of procurement decisions and controlling the legality of the such procedures.

Administrative review proceedings in this context may not be refused on any grounds by the relevant administrative bodies.

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

See question 33.

Timeframe and admissibility requirements

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

Review proceedings for procurement decisions are characterised by a pressing urgency aimed at avoiding excessive delays in the procurement procedure. In this sense, the review request should be brought within five business days following the decision that is being challenged. Furthermore, if the review concerns an award or qualification decision, the contracting authority must first invite other bidders to submit their views and only thereafter issue a final decision, within five business days counting from the deadline established for the other bidders to submit their views.

Judicial reviews can be initiated before the contract is formally signed and after its termination. Usually it takes no less than six months to obtain a first-instance decision.

Judicial proceedings regarding pre-contractual litigation must be filed within 60 days after the relevant decision has been issued and the bidder notified.

36 | What are the admissibility requirements?

All procurement decisions, as well as signed contracts, are justiciable. Any unsuccessful bidder can submit an application for the review of a decision or contract, provided the bidder demonstrates that it has been directly affected by an infringement and that it will obtain an advantage with the review decision being sought, based either on the legality or on the merits of the decision in question.

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

See question 35.

Suspensive effect

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

According to the PCL, the administrative procedure for reviewing procurement decisions does not automatically suspend the continuation of the procurement procedure. However, while there is no review decision on the case or while the legal deadline for such a decision has not yet expired, the contracting authorities cannot, depending on the stage of the procedure, qualify bidders, initiate the negotiation phase, award the contract or sign the contract.

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

See question 38.

Notification of unsuccessful bidders

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

All bidders are notified of the award decision. The successful bidder is notified first and, as soon as the successful bidder pays the bond, the other bidders are notified. In public procurement procedures in which no bond is due, all bidders are notified of the award decision at the same time.

Access to procurement file

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

Throughout the public procurement procedure, all bidders have access to all the documents submitted by the parties and issued by the jury and by the contracting authority, except documents that bidders request to be classified.

Disadvantaged bidders

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

Review applications are often filed, especially in those cases where the value or the strategic relevance of the contract is high.

Violations of procurement law

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

Yes, disadvantaged bidders can claim for damages.

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 of an unsuccessful bidder. Nonetheless, these situations are not very common.

Legal protection

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

Legal protection is still available in these situations.

Typical costs

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

The typical costs of making an application for the review of a procurement decision rise to around 25 per cent of the value of the contract, but in the absence or impossibility of such a determination, costs are established in accordance with the subsidiary rules stipulated in civil proceedings.



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