

Public Procurement 2019

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Published by

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First published 2005

Fifteenth edition

ISBN 978-1-83862-117-9

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



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.



London

April 2019

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This article was first published in June 2019

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LEGISLATIVE FRAMEWORK

Relevant legislation

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

There are two main legal instruments regarding the award of public contracts: the Public Procurement Code (PPC), approved by Law No. 88/VIII/2015, of 14 April 2015, amended by Law 44/IX/2018, of 31 December 2018, and the Legal Regime of Administrative Contracts, approved by Decree-Law No. 50/2015, of 23 September 2015 (LRAC). On one hand, the PPC sets out the rules for the public procurement procedures initiated by a public contracting authority after the date of its entry into force (which took place on 14 October 2015). On the other hand, the LRAC establishes the general rules applicable to the substantive regime of all administrative contracts, concerning the execution, modification and breach of contract, and specific rules regarding certain types of administrative contracts (for example, concessions of public works and public services).

There are other relevant legal regimes, namely Legislative-Decree No. 2/95, of 30 June 1995, Legislative-Decree No. 15/97, of 10 November 1997, and Legislative-Decree No. 16/97, of 10 November 1997, which provide the general framework for administrative procedure and for the organization of the Public Central Administration, as well as a set of rules regarding the substantive regime for administrative acts and regulations and for administrative complaints and administrative appeals.

Sector-specific legislation

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

No sector-specific procurement legislation supplements the general regime (PPC and LRAC).

International legislation

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 Trade Organization's (WTO) Agreement on Government Procurement (GPA), which has the fundamental aim of mutually opening its parties respective internal public procurement markets.

Although Cape Verde is not an EU member, nor a signatory to the GPA, the Portuguese legal framework has had a major influence on the drafting and implementing processes of the PPC and the LRAC, as well as on the other relevant legislation regarding this matter. For that reason, the PPC and the LRAC end up closely following and determining a framework similar to those of the EU or the WTO.

Proposed amendments

4 | Are there proposals to change the legislation?

With regard to the main legal regimes for the award of public contracts, the PPC was recently amended by Law 44/IX/2018, of 31 December 2018. The LRAC has not had any changes since it was approved in 2015. To the best of our knowledge, no proposals to change these and the rest of the above-mentioned legislation currently exist.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

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

From a positive perspective, we can state that the contracting authorities under PPC (pursuant article 5) are the following:

- the state and the services of the 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.

Therefore, all entities that are not included in this list are not considered to be a contracting authority.

Contract value

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

Article 30 of the PPC determines the thresholds under which contracts are excluded from the scope of procurement law.

Public tenders must be launched 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 is equal to or exceeds 5 million escudos.

Restricted tenders must be launched for public works whose contracts value is between 3.5 million and 10 million escudos, and for lease or purchase of goods or services contracts value 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 (lower than 3.5 million escudos for a public works

contract, and lower than 2 million escudos for a lease or purchase of goods or services contract).

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, according to articles 34, 35, 36, 37, 38 and 39 of the PPC.

Amendment of concluded contracts

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.

Whenever the amendment does not result from a change in the existing circumstances, it can only occur if the ordering of the tenders evaluated during the procurement procedure would not suffer any change due to the modification of the specifications or tender dossier.

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.

Privatisation

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, amended by Law No. 41/V/97 of 17 November 1997, and by Law No. 1/VII/2006, of 3 August 2006 (Privatisation Law). Nonetheless, in accordance with the Privatisation Law, the privatisation processes are generally 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, in certain cases (for example, if it is a strategic company belonging to a strategic sector for the contracting authority or due to the financial situation of the company).

Public-private partnership

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, establishes the Cape Verdean rules regarding the procedure and award of PPPs. The main issues concerning PPPs are related to their possible financial impact on public accounts and the model to be adopted for risk-sharing between the public and private parties.

Launching and awarding a PPP depends on compliance with certain legal requirements, such as (pursuant to article 9):

- 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.

The PPC has a subsidiary role in the setting up of a PPP, especially regarding the selection of the procedure that shall be launched for the award of a PPP contract.

ADVERTISEMENT AND SELECTION

Publications

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

Regulated procurement contracts must be advertised on the Public Acquisition Regulatory Authority's (ARAP) public procurement website.

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 not accepting contracting entities that fall within any of the exclusion grounds foreseen in the PPC (article 70 of 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 or a limited tender with prior qualification and if the rules of the specific procedure allow the evaluation of the bidder's technical and financial capacities (articles 74, 75, 76, 77 and 78 of the PPC).

The public tender has only one phase, but the contracting authority must analyse 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 phase in which candidates' capacity is evaluated and the following phase, in which bids are evaluated.

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 to award contracts for consultancy services that have an estimated value exceeding 4 million escudos, similar rules apply to the pre-qualification of the bidders. In said situations, the procedure is initiated by publication of a notice, after which there follows the bidders' pre-qualification phase, in which their technical and financial capacities are judged based upon the conditions set forth by the contracting authority in the terms of reference. Then, only pre-qualified bidders are invited 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 possible to impose certain economic and financial standings in public tenders in which the contracting authority has stipulated this kind of criterion, in limited tenders with prior qualification and in procedures for the award of consulting services the value of which is above a specific threshold. This will, consequently, limit (in theory) the number of bidders that are able to participate in the procedure.

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

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' 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

Fundamental principles

- 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, such as public interest, good faith, competition, equality, proportionality, transparency, impartiality, economy and efficiency, protection of the environment, stability, responsibility, annual programming and confidentiality. These principles are relevant since they provide guidelines to interpret rules and, consequently, identify possible obligations or limits to the activity of the contracting authorities.

Independence and impartiality

- 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.

Conflicts of interest

- 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, the members and staff of entities involved in a procurement procedure should disclose any personal interest towards a bidder or potential bidder and, if that is the case, request the suspension of their involvement in the procedure.

Bidder involvement in preparation

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

Anyone who has participated in the preparation of a public procurement procedure is not allowed to participate as a bidder in said procedure.

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.

Separate bids in one procedure

- 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 (article 69 of the PPC) Violation of such rule shall lead to the exclusion of both bidders.

There is no specific provision for related bidders (for example, 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.

Negotiations with bidders

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

Only the procurement procedure for the award of consultancy services foresees 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 among the proposals submitted by all the other bidders. The rules for the negotiation phase must be set out at the beginning of the procedure, in the terms of reference.

- 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?

Only the procurement procedure for the award of consultancy services foresees a negotiation phase.

Framework agreements

- 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 mentioned 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 specific circumstances that need to be grounded.

In some cases, the contracting authority may update the characteristics of the goods or services to be acquired under the framework agreement, modifying them or replacing them with others, provided that the type of supply and the objectives of the specifications are laid down in the framework agreement procedure and are justified by the occurrence of technological innovations.

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 entered into with more than one entity, the contracting authority must invite all of them to submit a proposal before awarding said contract.

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 PPC states that all consortia must be composed of the same members throughout the 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.

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?

Recent improvements in the openness and transparency of 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.

Variant bids

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?

Whenever the submission of variant bids is allowed by the procedure notice or by the tender specifications, contracting authorities must take them into account. In that case, said bids will only be excluded if the specific conditions for the submission of such bids are not fulfilled.

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 leads to the exclusion of the offer.

Award criteria

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

The PPC determines two different award criteria for the evaluation of the proposals: the lowest price and the most economically advantageous tender. At each procurement procedure, the criteria to be used must be disclosed in advance.

Regarding the latter (the most economically advantageous tender), many factors can be taken into consideration when evaluating the proposals, such as:

- 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.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

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

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

REVIEW PROCEEDINGS

Relevant authorities

- 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 (ie, the jury or awarding entities), or an appeal to either the Conflict Resolution Committee or ARAP. It is also possible to appeal to 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, depending on the powers and tasks of the author of the challenged act (in case of a claim). The remedies granted by ARAP or by the courts are also different, considering that the first is an administrative entity and the latter are judicial entities, specially with regard to the effects of their decisions.

Timeframe and admissibility requirements

- 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 said act. Other claims are submitted within five working days upon notification. Appeals to 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.

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?

Administrative challenges suspend the procurement procedure if that challenge occurs in one of the following phases: negotiation of the contract, award decision and execution of the contract.

- 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.



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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 at the same time of the award decision.

Access to procurement file

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

During the procurement procedure, all bidders have access at all time to the documents submitted by the parties and issued by the jury, as well as by the contracting authority.

Disadvantaged bidders

- 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 whenever the value of the contract is high enough (whether in financial or strategic terms).

Violations of procurement law

- 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 and usually have no practical effect, due to the fact that in cases in which judicial decisions determine that a concluded contract should be cancelled, the contracting authorities usually appeal such decisions. When final and non-appealable decisions are finally issued, the execution of the contracts is almost completed.

Legal protection

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

Yes.

Typical costs

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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