

# Public Procurement 2019

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# Public Procurement 2019

**Contributing editor****Totis Kotsonis**

Eversheds Sutherland

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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](http://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

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

<b>Panama</b>	<b>178</b>	<b>Switzerland</b>	<b>218</b>
Khatiya Asvat and Joaquín De Obarrio Patton, Moreno & Asvat		Bernhard C Lauterburg and Philipp E Zurkinden Prager Dreifuss Ltd	
<b>Poland</b>	<b>184</b>	<b>Taiwan</b>	<b>225</b>
Witold Sławiński Wierzbowski Eversheds Sutherland		Edward Liu and HaoJou Fan Chen & Lin Attorneys-at-Law	
<b>Portugal</b>	<b>192</b>	<b>Tanzania</b>	<b>234</b>
Ana Marta Castro Vieira de Almeida		Sadock Magai and Burure Ngocho IMMMA Advocates	
<b>São Tomé and Príncipe</b>	<b>199</b>	<b>United Kingdom</b>	<b>241</b>
Ana Marta Castro and Raul Mota Cerveira Vieira de Almeida		Totis Kotsonis Eversheds Sutherland	
<b>Spain</b>	<b>204</b>	<b>United States</b>	<b>249</b>
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	
<b>Sweden</b>	<b>209</b>		
Fredrik Linder, Mikael Dubois and Martina Sterner Hamilton			

# Portugal

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## LEGISLATIVE FRAMEWORK

### Relevant legislation

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

The Public Contracts Code (PCC), approved by Decree-Law 18/2008 of 29 January, as amended, is the key legislation regulating the award of public contracts in the Portuguese legal system.

The most recently and significant amendment to the PCC was approved by Decree-Law 111-B/2017 of 31 August (of which the most recent wording derives from the amendments foreseen in Decree Law 33/2018 of 15 May), which transposed Directive 2014/23/EU (Concession Contracts Directive), Directive 2014/24/EU (the Public Procurement Directive) and Directive 2014/25/EU (Utilities Directive) into the Portuguese legal system. As a consequence, this provoked a profound revision to the previous legal regime, revoking 35 articles, adding 54 and changing 155, significantly modifying the legal regime applicable to the public procurement procedures and public contracts.

This amendment was complemented by both Decree ('Portaria') 371/2017 of 14 December, which established the model contract notices applicable to the pre-contractual procedures under the PCC and Decree 372/2017 of 14 December, which established the rules and terms concerning submission of the contractor's qualification documents.

Decree Law 123/2018 of 28 December, which regulates an organisational model for the implementation of electronic invoicing in public procurement, was also recently approved, and which foresees (i) a delay of the dates from which the electronic invoicing is mandatory in public procurement; and (ii) the delegation to the Public Administration Shared Services Entity (ESPAP) of the coordination of the implementation of electronic invoicing.

Also relevant is Law 96/2015 of 17 August, which establishes the legal framework for the access and use of electronic platforms for public procurement purposes, as well as Decree-Law 111/2012 of 23 May, which provides for a special legal framework for public-private partnerships (PPPs).

Portugal has two autonomous administrative regions – the islands of Madeira and Azores – each of which has adapted the national public procurement rules to the particularities of their territories.

In Madeira, the most relevant piece of legislation is the Regional Legislative Decree 34/2008/M of 14 August, as amended, which introduced minor adjustments to the national legal framework.

In the Azores, the Regional Government approved the Regional Legislative Decree 27/2015/A of 29 December, which consolidated the main provisions referring to the award of public contracts in this autonomous region and has transposed some provisions of the European Union (EU) Directives on public procurement.

Finally, there is also other relevant legislation, namely the Administrative Procedure Code (APC), approved by Decree-Law 4/2015

of 7 January, which establishes the general rules regarding the administrative procedures, the Administrative Courts Procedure Code (ACPC) and the Statute of Administrative and Tax Courts (SATC), both amended and republished by Decree-Law 214-G/2015 of 2 October, which are applicable to public procurement procedures in general.

### Sector-specific legislation

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

There is no special regime for public transport, utility procurement, or work or services concessions.

Nonetheless, regarding the defence and security sectors, Decree-Law 104/2011 of 6 October establishes a special legal framework for the award of contracts, which allow for more flexibility in procurement procedures. Moreover, in line with article 296 of the European Community (EC) Treaty, this Decree-Law also stipulates that some specific contracts are excluded from its scope of application.

### International legislation

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

Portugal is a member of the EU and is also a signatory to the World Trade Organization's (WTO) Agreement on Government Procurement (GPA), which provides for reciprocal market access commitments in procurement between the EC and other WTO members that are also signatories to the GPA.

The Portuguese legal framework on public procurement complements and details the EU directives on public procurement and extends the application of public procurement rules to a number of contracts that would otherwise not be subject to those directives owing to their nature and value.

### Proposed amendments

4 | Are there proposals to change the legislation?

As mentioned in question 1, the PCC was significantly amended by Decree-Law 111-B/2017 of 31 August, which transposed the 2014 EU Directives to the national legal framework.

Additionally, as a consequence of the entering into force of the General Data Protection Regulation (GDPR) on 25 May 2018, there are various implications for administrative activity and public procurement which will continue to operate in 2019.

Regarding the possible legislative amendments currently being considered, the Portuguese Parliament recently submitted and approved two bills regarding administrative and tax reform to the Portuguese legal framework. In addition to other measures, these bills aim to develop tools to speed up administrative justice and to fight against procedure delays.

## APPLICABILITY OF PROCUREMENT LAW

### Contracting authorities

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

The PCC enshrines a wide concept of contracting authorities. However, until the revision of the PCC introduced by Decree-Law 149/2012 of 12 July, certain public entities (eg, public foundations for university education or corporate public hospitals) were excluded from its subjective scope of application.

The PCC currently identifies three main categories of contracting authorities.

The first group of entities is referred to in article 2/1 of the PCC. It is generally composed of the traditional public sector. This group includes:

- the Portuguese state;
- the autonomous regions;
- regional authorities;
- local authorities;
- municipalities;
- public institutes;
- independent administrative authorities;
- the Central Bank of Portugal;
- public foundations;
- public associations; and
- associations financed, for the most part, by the previous entities or:
  - subject to management supervision of those aforementioned authorities or bodies; or
  - where the major part of the members of its administrative, managerial or supervisory board is, directly or indirectly, appointed by the aforementioned entities.

The second group of entities is foreseen in article 2/2 of the PCC, and is composed of bodies governed by public law, namely, entities with legal personalities, independent of their public or private natures, provided they:

- were established for the specific purpose of meeting needs in the general interest;
- do not have an industrial or commercial character; and
- are financed, for the most part, by any entity of the traditional public sector, or by:
  - other bodies governed by public law;
  - other entities that are subject to management supervision of those authorities or bodies governed by public law; or
  - bodies having an administrative, managerial or supervisory board, where more than half of the members are appointed by any entity of the traditional public sector or by other bodies governed by public law.

Finally, in accordance with article 7 of the PCC, the third group of contracting authorities is constituted by the entities operating in the utilities sector – water, energy, transport and postal services sector – that fall within the following three subcategories:

- (i) entities that possess legal personalities, independent of their public or private nature and:
  - are not considered a traditional public entity or a body governed by public law (even if established for the specific purpose of meeting needs in the general interest);
  - possess an industrial or commercial character;
  - operate in one of the utilities sectors; and
  - are directly or indirectly influenced by any entity considered a traditional public entity or a body governed by public law, through the public entity;

- holding the major part of the share capital or the major part of the voting rights;
  - holding the right of management supervision; or
  - holding the right to appoint the major part of the members of the entity's administrative, managerial or supervisory board.
- (ii) entities with a legal personality, independent of their public or private nature:
    - which are not considered a traditional public entity nor a body governed by public law; and
    - which hold special or exclusive rights that have not been granted within the scope of an internationally advertised competitive procedure, limiting the entity's exercise of activities in the utilities sector to prevent it from substantially affecting the ability of other entities to carry out such activity.
  - (iii) entities that were exclusively incorporated by the entities referred to in (i) and (ii) or:
    - are financed by the same, for the most part;
    - are subject to the management supervision of those authorities or bodies; or
    - that have an administrative, managerial or supervisory board where more than half of its members are appointed by the entities referred to in (i) and (ii); and
    - that jointly operate in the utilities sectors.

Further to the three main categories of contracting authorities referred to above, the PCC also extends its scope of application to entities that enter into public works contracts or public service contracts, provided those entities are directed and financed, for the most part, by other contracting authorities and the values of the contracts to be executed are greater than the relevant threshold.

Additionally, the PCC also extends the application of certain specific public procurement rules to contracts to be carried out by public works concessionaires or by entities holding special or exclusive rights, under certain circumstances expressly defined in articles 276 and 277 of the PCC.

### Contract value

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

Relevant thresholds (referring to the thresholds' value net of VAT), differ depending on the contracting authority at stake, and if the contracting authority pertains to the traditional public sector or to the utilities sector. Nevertheless, the award of certain contracts may be exempted from complying with procurement laws in some specific situations (eg, when imperative grounds of urgency so require).

All public contracts executed by entities pertaining to the traditional public sector or that are considered bodies governed by public law fall within the scope of procurement law. Nevertheless, contracts whose value is under the relevant threshold can be awarded through a non-competitive procedure (direct award) and their terms are also regulated by the PCC.

The scope of application of the direct award has been reduced with the latest amendment to the PCC with the inclusion of a new procurement procedure (prior consultation), which allows for the consultation of three entities for the award of a contract.

For entities pertaining to the traditional public sector or that are considered bodies governed by public law, the thresholds are:

- for public service, leasing contracts or public supply contracts: €20,000 for direct awards and €75,000 for prior consultations (€75,000 was the previous threshold for direct award in this scenario);

- for public works contracts: €30,000 for direct awards and €150,000 for prior consultations (€150,000 was the previous threshold for direct award in this case); and
- for other types of contracts: €50,000 for direct awards and €100,000 for prior consultations (€100,000 was also the threshold for direct award in this case).

For contracting authorities in the utilities sector, regardless of the general application of the public procurement principles to all contracts carried out by those entities, the thresholds are:

- for public service contracts, leasing contracts or public supply: €443,000;
- for public works contracts: €5,548,000; and
- for service contracts for social and other specific services: €1,000,000.

All public works concession contracts and all public service concession contracts, as well as all articles of associations, fall within the scope of the PCC, independently of their specific value.

### Amendment of concluded contracts

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

In accordance with the PCC, amendments to concluded contracts are permitted without a new procurement procedure only on public interest grounds or if the conditions under which the parties entered into the previous agreement have changed in an abnormal and unpredictable way and the contractor's new obligations would seriously increase the risks it assumes under the original contract.

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

The amendments introduced cannot alter the overall nature of the contract and cannot affect competition within the procurement procedure launched for the performance of said contract (ie, the changes to be introduced cannot alter the order of the bids previously evaluated had the tender specification contemplated this amendment).

Moreover, the amendment cannot result in an increase of 25 per cent of the initial contractual price in the first case, or 10 per cent in the second. It cannot lead to the introduction of changes which, if included in the contract documents, would objectively change the evaluation of the bids and change the economic balance of the contract in favour of the co-contracting party.

Portuguese courts, in relation to amendments introduced to concluded contracts, still follow the *Presstext* case law.

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

See question 7.

### Privatisation

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

Under the Portuguese legal framework, privatisation processes do not fall within the scope of the PCC and are regulated by specific legislation.

In relation to procedures for the disposal of shares held by public entities, there are several legal regimes potentially applicable, such as:

- the State-Owned Enterprises Law (approved by Decree-Law 133/2013 of 3 October, of which the more recent wording derives from the amendments foreseen in Law 42/2016 of 28 December);

- the law regarding the disposal of shares held by public shareholders, approved by Law 71/88 of 24 May (Law 71/88) and subsequently regulated by Decree-Law 328/88 of 27 September, which was amended by Decree-Law 290/89 of 2 September;
- the Framework Law on Privatisations, approved by Law 11/90 of 5 April, which was firstly amended by Law 102/2003 of 15 November and secondly amended by Law 50/2011 of 13 September.

Law 71/88 applies to regular privatisation procedures while Law 11/90 is a specific legal regime applicable to the reprivatisation procedures. The latter exclusively regulates the (re)privatisation processes of companies, nationalised after the end of the Portuguese dictatorial regime, which are intended to return to private ownership.

Under Law 71/88, with few exceptions specifically foreseen, privatisation can be held through a public tender or an initial public offering of shares, if the sale is of a majority shareholding and the value of the company is greater than a certain threshold (this is reviewed on an annual basis and is around €10.5 million), or through a direct negotiation in the other cases.

On the other hand, Law 11/90 stipulates that the reprivatisation process can be held through a public tender or an IPO. However, in certain circumstances – namely based on public interest grounds or on the specific strategy applicable to the economic sector of the company to be reprivatised – the reprivatisation process may be held through a limited tender with specific qualified bidders or through a direct negotiation.

### Public-private partnership

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

See question 1.

## ADVERTISEMENT AND SELECTION

### Publications

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

In accordance with the PCC, regulated procurement contracts must be advertised in the National Gazette only, or also in the Official Journal of the EU (OJEU), depending on their value.

### 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 PCC, which are equivalent to those 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 if they launch a limited tender with prior qualification, a negotiation procedure or a competitive dialogue.

All other public procurement procedures foreseen under the PCC do not permit the evaluation of bidders' qualifications and are actually forbidden to do so.

In accordance with the PCC, the evaluation of the bidder's qualification is made during the first phase of the above-mentioned competitive procedures and the qualitative criteria set out by the contracting authority must refer to 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.

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

Concerning the procedures with a pre-qualification phase (ie, negotiation procedure, restricted procedure with pre-qualification, competitive dialogue), the PCC foresees the possibility to restrict participation to a limited number of bidders.

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

There are two different legal systems for the limitation of the number of bidders ('qualification of bidders').

Under the first system – the 'simple system' – all bidders that demonstrate that they comply with all the minimum qualitative selection criteria established will be invited to the second stage of the tender.

In accordance with the second system for the qualification of bidders – the 'complex or selection system' – the economic operators are evaluated based on their economic and financial qualification as well as on their technical capability to carry out the contract. Only the highest evaluated bidders are invited to the second stage of the procedure. Under this system, the minimum number of invitations is five bidders for the limited tender with prior qualification and for the competitive dialogue, and three bidders for the negotiation procedure.

It is important to stress that economic operators can invoke the technical qualification of third parties in order to demonstrate full compliance with the qualification criteria. To do so, they must submit with their expression of interest a declaration in which they state that the third party at stake will perform the relevant part of the scope of the contract for which such expertise is required.

Finally, besides the pre-qualification procedures, the selection of the bidders in a non-competitive procedure, such as the direct award, is at the discretion 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', as specifically foreseen in the new EU public procurement directives, is now established under the Portuguese legal framework.

It is now possible for bidders to demonstrate the adoption of corrective measures aiming at the removal of an abstract cause of exclusion under the PPC, which may be granted, for example, by the adoption of adequate technical and organisational measures to avoid the existence of criminal faults or infractions.

## 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. In accordance with the Portuguese legal framework, the fundamental principles for tender procedures are the principles of transparency, equal treatment and competition, as well as the principles of mutual recognition, non-discrimination and proportionality.

### Independence and impartiality

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

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

The PCC establishes that before commencing their duties as members of a jury or of an evaluation team, individuals must declare the absence of any conflicts of interest using a specific form approved by the PCC.

Moreover, the APC, which subsidiarily applies to the PCC and to contracting authorities in general, foresees two different mechanisms to ensure impartiality: (i) situations under which members of contracting authorities are prohibited from interfering in the decisions taken in the public procurement procedure (eg, situations in which they have directly or indirectly a personal interest in the outcome of such procedure); and (ii) situations under which members of contracting authorities are able to ask, in specific situations, for their non-intervention in a certain procedure with the purpose of not raising any doubt about the impartiality of the decisions to be taken therein.

### 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?**

In the original version of the PCC, the involvement of a bidder in the preparation of a tender procedure would constitute an immediate ground for exclusion. However, since the revision of the PCC in 2012, and although that kind of involvement may still ground an exclusion decision, such decision will be issued exclusively in situations under which such specific intervention is considered to have conferred advantages to such bidder and prejudices competition.

### Procedure

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

Although contracting authorities still tend to award contracts on a direct award basis, the strict supervision of public contracts by the Court of Auditors in this last decade has reduced its number significantly.

The current amendment to the PCC, which reduces the grounds for the application of such procedure, will probably contribute to the continuous reduction of the use of the direct award. It is expected that the prior consultation procedure is going to be more frequently used in the near future by contracting authorities.

For competitive procurement procedures, the prevailing type is the public tender.

### Separate bids in one procedure

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

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



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 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.

### Negotiations with bidders

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

The use of procedures involving negotiation with bidders is limited to certain specific circumstances.

The PCC establishes two procedures that involve negotiation with bidders: the competitive dialogue and the negotiation procedure.

Currently, the PCC establishes that the adoption of a competitive dialogue or a negotiation procedure may occur if:

- the contracting authority's needs cannot be fulfilled, without adapting easily available solutions;
- the goods or services include the adoption of innovative solutions;
- it is not objectively possible for the contract award to occur without any previous negotiation due to the contract's specific nature, complexity or risk; and
- it is not objectively possible to precisely define, in a detailed manner, the technical solution to be implemented by referring to a certain rule or standard.

Besides the two situations mentioned above, provided that some requirements are fulfilled, the PCC recognises a negotiation phase in the procedures of direct award, prior consultation or public tenders.

#### 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?

The negotiation procedure is used more regularly, as its phases and organisation are simpler and similar to limited tenders with prior qualification. Before the recent amendment to the PCC, the negotiation procedure was often used by entities operating in the utilities sector, as the competitive dialogue procedure was not allowed. However, the rules have changed, and competitive dialogue is now permitted in the utilities sector too. Bearing this in mind, only time will tell if this procedure will be used more often.

### Framework agreements

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

Framework agreements may be concluded with one single entity only or with several entities, respectively, if the tender specifications have all been set forth in the tender documents, or with several entities if the tender specifications have not been all set forth in the tender documents.

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

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

A framework agreement may be concluded with several suppliers. In that case, the award of contracts under such an agreement will be preceded by an invitation to the selected suppliers to submit a proposal to the specific aspects of the contract that will be relevant for that specific contract and that will be evaluated.

On the contrary, if a framework agreement is concluded with a single supplier, contracts based on that framework agreement should be awarded within the limits of the terms laid down in the framework agreement. Those terms must have been sufficiently specified in the procurement procedure that preceded the execution of the framework agreement under which they were evaluated.

### 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 admitted in the course of a procurement procedure, since the PCC expressly stipulates that all the members of the consortium and exclusively those members must carry out the contract.

Nonetheless, it would be difficult not to accept a change in the members in the case of a merger or a spin-off of one of the members of the consortium, as it would have to be accepted in the case of a sole bidder.

### 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 Portuguese legislation allows for small and medium-sized enterprises to be positively discriminated in favour of, as it may be used as a tiebreaker award criterion in the presentation of a bidding offer by such enterprises.

### Variant bids

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

Variant bids are only admitted when the terms of reference of the procurement procedure at stake specifically authorise its submission.

#### 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 such offer.

## Award criteria

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

As a result of the amendment of the PCC in 2017, the award criterion is the most economically advantageous tender, which may assume one of two categories: (i) best price-quality relationship, in which the award criteria consist of a group of factors and subfactors concerning several aspects of the performance of the contract to be executed; or (ii) evaluation on the price or the cost, where the tender documents shall establish all other components of the performance of the contract to be executed. Nevertheless, the Portuguese legislation also establishes the possibility to award the contract to lowest price tender where this is the most appropriate award criteria.

Regarding the former, 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 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 bid whose proposed value appears to be abnormally low when referring to the object of the contract at stake.

The PCC stipulates that the contracting authorities may define the situations in which the price or cost of a proposal is abnormally low. Such determination must be well-founded and the criteria for such a decision must be clearly stated.

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 specification, and the bidder intends to submit an offer with a price that will be considered as an abnormally low bid under the awarding authority previous determinations, the awarding authority must exclude the offer, but giving the opportunity for the bidder to explain the reasons behind its abnormally low bid.

The 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;
- supplies or services proposed by the bidder;
- the specific conditions of work that the bidder benefits from; and
- the possibility of the bidder obtaining legal 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?

In Portugal, it is possible to challenge all decisions issued in public procurement procedures through administrative review proceedings that are regulated by the contracting authorities or through judicial review proceedings under the jurisdiction of administrative courts.

Review proceedings are not mandatory and are not often used.

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?

The review proceeding concerning procurement decisions is characterised by its pressing urgency, aimed at avoiding excessive delays in the procurement procedure, and it must be brought within five business days. Furthermore, whenever the review concerns the award, the qualification decision or the rejection of a complaint regarding any of these decisions, the contracting authority must invite other bidders to submit their views and must issue a final following decision within five business days.

Judicial reviews can be initiated before the contract is formally concluded, and also after its termination.

Judicial proceedings regarding pre-contractual litigation must be filed within one month after the relevant decision has been issued and notified to the bidder. After the conclusion of the contract, any unsuccessful bidder can also seek remedies within six months of the conclusion of the contract or of its notice.

Because of the importance of obtaining a swift ruling, this kind of judicial proceedings usually takes no less than six months to obtain the first instance decision.

36 | What are the admissibility requirements?

All procurement decisions and tender documents, as well as the signed contract, are justiciable. Any unsuccessful bidder can submit an application for review of a certain decision, tender document or contract, provided that it demonstrates it has been directly affected by the infringement at stake and that it will obtain an advantage with the review decision sought.

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 recent revision of the ACPC, the judicial proceedings on pre-contractual litigation filed to challenge the award decision of the contracting authority now have an automatic suspensive effect on the decision or on the contract's performance. Nevertheless, the court may decide to lift the suspensive effect of said decision during the judicial proceeding for public interest reasons and after a balanced consideration of all interests involved.

With regard to judicial proceedings that are not filed for challenging an award decision, Portuguese law also provides for administrative courts to grant interim measures if so requested by the plaintiff.

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

Although not 100 per cent, the rate of success of applications for the lifting of an automatic suspension is high, since administrative courts in Portugal tend not to challenge the arguments presented by public authorities.

**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 and the contract can only be signed after 10 business days of such notification have elapsed. In this respect, the PCC establishes a general standstill period of 10 days between the time of notification of the contract award decision and the execution of the contract, so that unsuccessful bidders can challenge the decision before the contract has been signed. Nevertheless, this standstill period shall not apply where:

- the contract is executed under a prior consultation procedure or a direct award or, in other procedures, where the notice has not been published in the OJEU;
- the contract pertains to a framework agreement executed with one entity only or to a framework agreement which terms cover all the aspects related to the contract's performance; or
- only one bid has been submitted.

**Access to procurement file**

**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, except in relation to documents that bidders requested to be classified.

Third parties may also have access to the procurement file, since the file is considered to be public. Nevertheless, applicants must demonstrate a legitimate interest in having access to such documents and information.

**Disadvantaged bidders**

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

Review applications are often filed, especially in cases in which 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, those situations are not very common.



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

**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?

Administrative appeal of contracting authorities' decisions does not have any cost to the challenging entity.

For judicial challenges, there is a judicial fee of €204 in the first instance, irrespective of the value of the action. In the case of appeal of the court's decision, a variable judicial fee will be charged in accordance with the value of the claim.

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