

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.

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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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LEGISLATIVE FRAMEWORK

Relevant legislation

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

The Regulation on Bids and Public Procurement (RBPP), approved by Law 8/2009 of 26 August 2009, is considered the key legislation regulating the award of public contracts in São Tomé and Príncipe. Also relevant is Dispatch 14/2009, which approves the structure and composition of an autonomous collegiate Appellate Body, which operates under the authority of the Prime Minister, and which is responsible for assessing and deciding, at the administrative level, on the appeals filed in relation to public works tenders and contracts and supply contracts to the State and Decree-Law 20/2015 of 11 December 2015, which establishes the Regulation on the activities of Public and Private Contractors (the Regulation).

Sector-specific legislation

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

The RBPP, the Dispatch 14/2009 and the Regulation are the main legal frameworks for public contracts. However, in some specific economic sectors, specific laws can be approved to safeguard the specific characteristics of those sectors.

International legislation

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

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

However, the Portuguese legal framework has had a major influence on the drafting and implementing processes of the RBPP, as well as on the other relevant legislation regarding the award of public contracts. For that reason, the RBPP and all relevant legislation 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?

To our knowledge, no future amendments to the public procurement legislation are envisaged.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

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

Under the RBPP, the contracting authorities correspond to the traditional public sector (central and local authorities). The group of entities considered in this regard is very wide and includes the bodies and agencies of the central administration, including public institutes, national agencies, public companies and publicly held companies, as well as the municipalities and the autonomous region of Príncipe.

Contract value

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

All public contracts concluded with contracting authorities fall within the scope of the RBPP and the type of procedures launched for the award of such contracts usually depend on the estimated value of the contract that is going to be awarded.

The RBPP provides for three distinct legal regimes:

- the general regime;
- the special regime; and
- the exceptional regime.

The general regime is applicable to the award of all public works contracts, supply of goods contracts, provision of services contracts, consulting services contracts and concession contracts that do not fall within the special regime or the exceptional regime. These contracts are generally awarded by means of a public or an international public tender, except for the concession contracts, which are awarded by means of a tender with prior qualification.

The special regime is applicable to the award of contracts in the following situations:

- contracts arising from any international treaty or any other type of international agreements and signed between São Tomé and Príncipe and any other state or international organisation, whenever its conclusion requires the adoption of a specific legal regime; or
- contracts concluded in the scope of public financed projects with resources originating from an official foreign cooperation agency or a multilateral financial body, whenever the adoption of a specific regime is a condition of the respective agreement or contract.

The specific rules to be applicable under the special regime are indicated in the relevant contract notices and tender documents.

Finally, there is the exceptional regime, applicable to the award of contracts that, on public interest grounds, cannot fall within the general

and the special regimes. In this exceptional regime, contracting authorities can select any of the following pre-contractual procedures:

- small-scale tender;
- tender with prior qualification;
- tender with two stages; and
- direct award.

Amendment of concluded contracts

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

It is possible to amend concluded contracts, provided the amendments have the appropriate grounds and are implemented by means of an amendment to the contract.

Public contracts may be amended whenever there is the need to alter:

- the ongoing project or its specifications to improve its adequacy to the contract's main object;
- the value of the contract, due to the increase or decrease of the quantities required for the contract's main object and aim;
- the implementation scheme of the public works, the provision of services or the supply of goods, due to the unenforceability of the original contracting terms; or
- the payment conditions, due to supervening circumstances.

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 São Tomé and Príncipe legal framework, privatisation processes do not fall within the scope of the RBPP.

Public-private partnership

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

PPPs are currently governed by Law 06/2018 of 10 April 2018.

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

Law 06/2018 of 10 April establishes the guidelines for the awarding process, implementation and monitoring of the three modalities of involvement of the private sector in the promotion of development of PPPs.

In accordance with the Law 06/2018 of 10 April, the setting up of a PPP usually follows the public tender regime and the RBPP is applicable on a subsidiary basis.

ADVERTISEMENT AND SELECTION

Publications

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

As a rule, regulated procurement contracts must be advertised online, free of any charge. It is also possible for regulated procurement contracts to be advertised in the most circulated newspapers in the country.

The contract notice must be publicly displayed in the contracting authority's head office and must be reported to the Bidding System Coordination Cabinet.

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 RBPP, contracting authorities are only allowed to assess whether private contracting entities are qualified to participate in a tender procedure if they launch a tender with prior qualification or if they want to award a consulting services contract.

In the first phase of the tender with prior qualification, bidders are invited to submit documents that demonstrate they comply with the technical and financial qualification requirements.

Subsequently, qualified bidders are shortlisted and invited to participate in the second phase of the procedure and to submit bids. In this phase, the procurement process follows the rules of the public tender.

Additionally, in specific tenders launched for the award of consulting services contract, contracting authorities may select a maximum of six consultants to participate in the competitive selection process.

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:

On the one hand, as referred in question 12, it is possible for such limitation to occur in the tender with prior qualification and in the specific tender launched for consultancy services.

On the other hand, whenever a contracting authority launches a direct award for the award of a specific contract, the selection of bidders that will participate in the procedure depends on a discretionary decision of said 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 in São Tomé and Príncipe. Economic operators that fall within any of the exclusion situations foreseen in the RBPP must wait for the lifting of the respective sanctions. They cannot participate in tender procedures until then.

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. The RBPP states that the fundamental principles for tender procedures are, among others, the principles of legality, equal treatment, competition, transparency, financial regularity, economy, efficiency and effectiveness, as well as pursuing public interest, reasonability, proportionality, publicity, impartiality, good faith, stability, motivation, responsibility and expediency.

Independence and impartiality

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

Yes. The RBPP has a specific provision regarding the principles of independence and impartiality applicable to the contracting authorities and also contains an extensive set of rules applicable to contracting authorities, which establish that they must act impartially, allow every interested party to participate in tender procedures on equal terms, and guarantee full publicity and transparency of all procurement procedures launched for the award of public contracts.

Additionally, the RBPP foresees different mechanisms to ensure impartiality: 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 a direct or indirect personal interest in the outcome of such procedure); and situations under which members of contracting authorities may request a specific person not to participate in specific procurement procedures to prevent potential conflict of interests and breaches of confidentiality rules.

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, directly or indirectly, in the preparation of a tender procedure constitutes an immediate ground for the bidder's exclusion.

Procedure

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

The prevailing types of procurement procedure used by contracting authorities are the public tender and the international public tender. These are the procedures followed under the general regime.

The public tender and the international public tender are divided into the following phases:

- preparation;
- launching;
- submission of bids and qualification documents;
- evaluation of bids and qualification documents;
- post-qualification of the tenderer with the lowest price offered;
- classification and recommendations of the jury;
- homologation;
- challenge of decisions taken in the procurement procedure, if applicable;
- award; and
- announcement of the final ranking of tenderers and bids.

Separate bids in one procedure

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

No. Bidders may participate in procurement procedures constituted as a consortium or association. But members of a consortium or an association cannot bid separately and/or as part of another consortium or an association, in the same tender.

Negotiations with bidders

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

The only procedure involving negotiations between contracting authorities and bidders is the one used for the award of consulting services contracts. The establishment of a negotiation phase is not mandatory and takes place before the award of the contract to the selected bidder. Nonetheless, only the first ranked bidder is invited to participate in the negotiation phase. Negotiations cover discussions on the terms of reference, methodology, personnel, expenses and contractual conditions. All negotiations must be noted in minutes and signed by both parties.

If negotiations are not satisfactory, the contracting authority may terminate the negotiations and invite the following ranked bidder to negotiate.

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?

There are no specific rules regarding the conclusion of framework agreements.

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

See question 23.

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 during the course of a procurement procedure. Nonetheless, it would be difficult not to accept a change in the membership if one of the members of the consortium is involved in a merger or a spin-off, 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?

RBPP has no specific rule or mechanism that would further the participation of small and medium-sized enterprises specifically.

In relation to the division of a contract into lots, there is a provision that establishes the rules for such contracts. In tenders in which the division of a contract into lots is admitted, the tender documents and the evaluation criteria must be adapted for that purpose.

Variant bids

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

Variant bids are only admitted when the specific provisions of the public procurement at stake expressly authorise its submission. In tenders in which variant bids are admitted, the tender documents and the evaluation criteria must be adapted for that purpose.

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?

Bidders cannot change the tender specifications. The RBPP establishes that bids which do not comply with the tender specifications or that contain unenforceable or abusive conditions shall be disqualified.

Award criteria

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

According to the RBPP, the award of public works contracts, supply of goods contracts and provision of services contracts shall be decided based on the lowest-price criterion.

However, the RBPP also allows contracting authority to use a combined criterion, under which the evaluation is based on the technical evaluation of the proposal submitted, as well as on the price offered, provided that the decision to choose this combined criteria results from a well-founded assessment.

Decisions based on the lowest-price criterion must always ensure that the selected bid has the necessary level of quality to pursue the public interest goals, in accordance with the tender documents.

In the event of a tie arising from the adoption of the lowest-price criterion, the final selection is determined by a sweepstake during a public session.

With regard to the award of public works concessions or services concessions, the RBPP stipulates that the contracting authorities may evaluate proposals based, individually or jointly, on the following criteria:

- the highest price offered for the concession;
- the lowest tariff or price to be charged to users; and
- the best quality of services or goods available to the public.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

The RBPP does not contain specific provisions regarding abnormally low bids.

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

See question 31.

REVIEW PROCEEDINGS

Relevant authorities

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

According to São Tomé and Príncipe's legal framework, it is possible to challenge all decisions taken under a specific procurement procedure, such as the qualification and disqualification decisions, as well as award decisions through administrative review proceedings.

Complaints must be filed within three business days of the notification of the challenged decision. This administrative review proceeding is assessed by the contracting authority, which must decide whether to accept or reject such complaint within five business days of receipt. The filing of a complaint does not require the payment of any fees.

Until the end of the deadline established, all tenderers have free access to the tender's administrative documents.

After the contracting authority's decision on the complaint filed, tenderers have three business days to react to such decision, after which a final decision is taken, through a hierarchical appeal.

The hierarchical appeal is assessed by ultimate authority of the contracting entity and a decision whether to accept or reject such hierarchical appeal must be taken within five business days of the filing date.

After the ultimate authority of the contracting entity's decision on the hierarchical appeal is filed, tenderers have three business days to react to such decision through another appeal to the appeal body, which must take a final decision within 10 business days of the filing date.

All administrative review proceedings described above have suspensive effects.

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?

See question 33.

36 | What are the admissibility requirements?

See question 33.

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

See question 33.

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?

All administrative review proceedings described in question 33 have suspensive effects.

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

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

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?

All documents issued during the procurement procedure are available to public consultation, free of charge, from the date of publication of the tender announcement until 60 days after the procurement procedure's conclusion.

Disadvantaged bidders

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

Although there are cases of disadvantaged bidders filing review applications, especially in the cases in which the value of the contract or its strategic relevance is high, most disadvantaged bidders abstain from such practice.

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?

Yes. A concluded contract may be cancelled or terminated following a review application of an unsuccessful bidder. Nonetheless, those situations are not very common.

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 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?

Any of the administrative review proceedings described in question 33 require the payment of fees.



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