

# Public Procurement 2020

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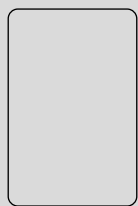
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# Public Procurement 2020

**Contributing editor****Totis Kotsonis****Pinsent Masons**

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Lexology Getting The Deal Through is delighted to publish the sixteenth 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 new chapters on Greece, Israel, Mexico, Nigeria and Romania.

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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 Pinsent Masons, for his continued assistance with this volume.



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# São Tomé e Príncipe

Ana Marta Castro and Raul Mota Cerveira

VdA

## 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 and complaints filed in relation to public works tenders and contracts and supply contracts to the state. Also relevant is Decree-Law 20/2015 of 11 December 2015, which approves 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, Dispatch 14/2009 and the Regulation are the main legal frameworks for public contracts. However, in some specific economic sectors (such as energy, electricity and telecoms) specific laws have been enacted to safeguard the 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 European Union or the World Trade Organization.

### Proposed amendments

- 4 | Are there proposals to amend 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 are subject to procurement regulation?

Under the Regulation on Bids and Public Procurement (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 outside the scope of procurement regulation? 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 contract award 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 case law clarified the extent to which it is permissible to amend a concluded contract without a new contract award procedure?

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

#### Privatisation

9 | In what circumstances do privatisations require the carrying out of a contract award 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 the carrying out of a contract award 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 are calls for the expression of interest in regulated contract awards 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 any limits on the ability of contracting authorities to determine the basis on which to assess whether an interested party is qualified to participate in a contract award procedure?

Apart from not accepting contracting entities that fall within any of the exclusion grounds foreseen in the Regulation on Bids and Public Procurement (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 contract award procedure?

There are two ways to limit the number of bidders that can participate in a tender procedure. On the one hand, it is possible for this 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 procedure for the award of a specific contract, the selection of bidders that will participate in the procedure depends on a discretionary decision of that authority.

#### Regaining status following exclusion

14 | How can a bidder that could be excluded from a contract award procedure because of past irregularities regain the status of a suitable and reliable bidder?

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 require compliance with certain fundamental principles when designing and carrying out a contract award procedure?

Yes. The Regulation on Bids and Public Procurement (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 case law require that a contracting authority is 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 | Does the legislation address expressly the issue of conflicts of interest?

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.

## Bidder involvement in preparation

18 | Are there any restrictions on the ability of a bidder to be involved in the preparation of a contract award procedure?

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 | Which procurement procedure is primarily used for the award of regulated contracts?

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 the same 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?

The only procedure involving negotiations between contracting authorities and bidders is the one used for the award of consulting services contracts.

## 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 | Is it possible to conclude a framework agreement with several suppliers?

Yes, it is possible to conclude a framework agreement with several suppliers.

## Changing members of a bidding consortium

25 | Is it possible to change the members of a bidding consortium during the course of a contract award 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 rules that seek to encourage the participation of small and medium-sized enterprises in contract award procedures?

The 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 tenders

27 | What are the requirements for the admissibility of variant tenders? Are bidders free to decide whether to submit a variant tender or is this subject to the contracting authority expressly permitting it in the tender documentation?

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 | Is a contracting authority obliged to consider any variant tenders that might have been submitted?

Variant bids are only admitted when the specific provisions of the public procurement at stake expressly authorise their submission. The contracting authority should not consider any variant bid that is submitted when the public procurement documents do not allow it.

### Tender specifications

29 | What are the consequences if a tender does not comply with the tender specifications?

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 | Does the relevant legislation specify the criteria that must be used for the evaluation of submitted tenders?

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 tenders

31 | Does the relevant legislation specify what constitutes an 'abnormally low' tender?

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

32 | Does the relevant legislation specify how to deal with abnormally low tenders?

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

## REVIEW PROCEEDINGS

### Competent review bodies

33 | Which bodies are competent to review alleged breaches of procurement legislation? Is it possible to appeal against a review body's decisions?

According to São Tomé and Príncipe's legal framework, it is possible to challenge all decisions taken under a specific procurement procedure, such as qualification and disqualification decisions, and 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 the 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 the decision, after which a final decision is taken, through a hierarchical appeal.

The hierarchical appeal is assessed by the ultimate authority of the contracting entity and a decision on whether to accept or reject the 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 the 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 | Do the powers of competent review bodies to grant a remedy for a breach of procurement legislation differ?

Yes. The courts have the power to annul or declare any decision null and void owing to a breach of the applicable legislation or the documents pertaining the public procurement procedure. The courts only have the power to deal with legal defects of the decision. The administrative authorities, both the contracting authority and the body that stands above it in the administrative hierarchy, may declare the decision null and void (they cannot annul it) or can revoke it based on public interest reasons. This means that both the merits and the legal issues of the decision can be dealt with by the administrative authorities.

### Time frame and admissibility requirements

35 | How long do administrative or judicial review procedures generally take?

Administrative or judicial review procedures can take up to 30 days from the date of the original decision.

36 | What are the admissibility requirements for an application to review a contracting authority decision?

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 the complaint within five business days of receipt. The filing of a complaint does not require the payment of any fees.

**37 | What are the time limits within which applications for the review of contracting authority decisions must be made?**

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 the complaint within five business days of receipt. The filing of a complaint does not require the payment of any fees.

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

The hierarchical appeal is assessed by the ultimate authority of the contracting entity and a decision on whether to accept or reject the 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 the decision through another appeal to the appeal body, which must take a final decision within 10 business days of the filing date.

**Suspensive effect**

**38 | Does an application for the review of a contracting authority decision have an automatic suspensive effect on the contract award procedure?**

All administrative review proceedings have suspensive effects.

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

The Regulation on Bids and Public Procurement does not provide for the possibility to lift an automatic suspension.

**Notification of unsuccessful bidders**

**40 | Is the contracting authority required to notify unsuccessful bidders of its intention to conclude the contract with the successful bidder and, if so, when does that obligation arise?**

All bidders are notified at the same time of the award decision.

**Access to procurement file**

**41 | Is it possible for an applicant seeking the review of a contracting authority's decision to have access to that authority's procurement file?**

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.

**Challenges to contracting authority decisions**

**42 | How customary is it for contracting authority decisions to be challenged?**

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 this practice.

**Violations of procurement law**

**43 | If a violation of procurement law is established in review proceedings, can this lead to the award of damages?**

Yes, disadvantaged bidders can claim for damages.

**44 | Is it possible for a concluded contract to be set aside following successful review proceedings?**

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 afforded to parties interested in a contract that might have been awarded without an advertised contract award procedure?**

Legal protection is still available in these situations.

**Typical costs**

**46 | What are the typical costs involved in making an application for the review of a contracting authority decision?**

All administrative review proceedings require the payment of fees. These are determined on a case-by-case basis but cannot exceed 10 per cent of the value of the proceedings, which usually mirrors the value of the bid.

**UPDATE AND TRENDS**

**Emerging trends**

**47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or, on the contrary, been restricted?**

No updates at this time.

**Coronavirus**

**48 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?**

Considering the public health emergency caused by the covid-19 pandemic and the need to take the necessary action towards the prevention and fight against the spread of covid-19, the government of São Tomé and Príncipe has enacted a set of measures aimed at implementing the recommendations issued by the World Health Organization (WHO). Therefore, to protect the community, the government enacted a state of emergency to contain the spread of the disease.

As some of these measures entail undermining rights, freedoms and guarantees protected by the Constitution of the Democratic Republic of São Tomé and Príncipe – notably the freedom of movement, the right to work, employees' rights and the right to private



property and initiative (with the possibility of requisition of equipment or activities (or both), expropriation of assets and prohibition of certain activities) – the President, after consulting with the government and following the authorisation of the National Assembly, has extended for the third time the state of emergency in all national territory through Presidential Decree No. 8/2020 of 28 April.

The state of emergency was regulated by the government through Decree-Law No. 6/2020 of 6 May (Decree-Law No. 6/20) and Decree-Law No. 7/2020 of 7 May.

The disruptions caused by covid-19 have resulted in the suspension of all contract awards for works and services by the public administration, with the exception of those directly concerned with fighting the disease. Also, Decree-Law No. 6/20 suspended all deadlines for the execution of public works, provisions of services and judicial proceedings.

The possible consequences of the covid-19 pandemic are as follows:

- it may be qualified as a force majeure event, as grounds for not complying, in whole or in part, with obligations provided for in an administrative contract, in particular with regard to deadlines (depending on what the contract specifically provides for and provided that a causal link between the illness and the impossibility of meeting deadlines is evidenced), as well as the impossibility or unenforceability of taking alternative measures, or their insufficiency, and always without prejudice to the counterparty's duty to inform;
- parties may claim the occurrence of an abnormal and unforeseeable change in circumstances as grounds for amending the contract or restoring the financial balance;
- parties may claim a 'justifiable reason' as a ground for excusable non-compliance with deadlines before the public administration (or at least as a ground for requesting an extension of the deadline); and
- the disruption that has been caused could be grounds to release a bidder from the bid submitted provided that it is duly justified (this disruption must be an event that the bidder was not required to be aware of at the time of preparation of the bid and that demonstrably renders performance impossible or excessively burdensome).



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Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

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