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Public Procurement & Government Contracts

Portugal

Law and Practice

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VdA

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Law and Practice

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1. GENERAL

1.1 Legislation Regulating the Procurement of Government Contracts

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

The last significant amendment to the PCC was approved by Decree-Law 111-B/2017 of 31 August 2017, which transposed Directive 2014/23/EU (Concession Contracts Directive), Directive 2014/24/EU (the Public Procurement Directive) and Directive 2014/25/EU (Utilities Directive), all dated 26 February 2014, to the Portuguese legal system. This amendment significantly modified the legal regime applicable to public procurement procedures and public contracts, revoking 35, adding 54 and changing 155 articles.

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

Further Relevant Laws

Also relevant is Law 96/2015, of 17 August 2015, 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 2012, amended by Decree-Law 84/2019, of 28 June and Decree-Law 170/2019, of 4 December 2019, which provides for a special legal framework for public-private partnerships (PPPs).

Additionally, it is also relevant that the Decree-Law No 28/2019 of 15 February 2019 was established in the context of SIMPLEX+, a programme that foresees a set of measures to simplify and modernise Portuguese Public Administration.

As such, the Portuguese government has promoted the implementation of digital receipts/electronic invoicing. The main objective of this measure was to reduce paper tax invoices and stimulate digital transition, as well as to promote less bureaucracy in Public Administration and cutting down on the use of paper.

The deadlines for implementing electronic invoicing in public entities are as follows:

- 31 December 2020 for large companies;
- 30 June 2021 for small and medium-sized companies; and
- 31 December 2021 for micro companies.

Autonomous Administrative Regions

Portugal has two autonomous administrative regions, Madeira and the Azores, each of which has adapted regional 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 2008, as amended, which introduced minor adjustments to the national legal framework.

In the Azores, the regional government approved Regional Legislative Decree 27/2015/A, of 29 December 2015, which consolidated the main provisions referring to the award of public contracts in the region and implemented some provisions of the European Union (EU) directives on public procurement not yet transposed into the national framework.

The APC and ACPC

Reference must be made to the Administrative Procedure Code (APC), approved by Decree-Law 4/2015, of 7 January 2015, and to the Administrative Courts Procedure Code (ACPC) and the Statute of Administrative and Tax Courts, both amended and republished by Decree-Law 214-G/2015, of 2 October and by Law No 118/2019, of September 2017; all three apply to public procurement procedures in general.

Moreover, 2020 was a very exceptional year, also with regards to public procurement. One must consider the exceptional and temporary regime regarding public procurement procedures adopted as from March 2020, due to the pandemic COVID-19, and dealing with the pandemic as it related to public acquisitions, as set forth in **5.4 Legislative Amendments under Consideration**.

1.2 Entities Subject to Procurement Regulation

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

Portuguese legislation currently recognises three main categories of contracting authorities.

Category One

Article 2(1) of the PCC enshrined the first group of entities; it is generally composed of the traditional public sector and includes:

- the Portuguese state;
- the autonomous regions;
- 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 the 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.

Category Two

In accordance with Article 2(2) of the PCC, the second group of entities is made up of bodies governed by public law, including:

- bodies governed by public law that, regardless of their public or private nature:
 - (a) were established for the specific purpose of meeting needs in the general interest;
 - (b) do not have an industrial or commercial character (ie, not subject to competition); and
 - (c) are financed, for the most part, by any entity of the traditional public sector or by other bodies governed by public law, or are subject to their management supervision, or where more than half of the members of its administrative, managerial or supervisory board is, directly or indirectly, appointed by the aforementioned entities;
- any entities that are under the same situation set forth in the previous paragraph in relation to an entity that is a public contracting authority under the same paragraph; and
- associations financed, for the most part, by the previous entities; or subject to management supervision of the 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.

Category Three

Finally, the third group of contracting authorities is foreseen in Article 7 of the PCC and is composed of entities operating in the utilities sectors (water, energy, transport and postal services) that fall within the following three subcategories:

- legal entities that are not included in the categories of Article 2 above, that operate in one of the utilities sectors and concerning which any of the entities referred to above may exercise, directly or indirectly, a dominant influence;
- legal entities that are not included in the categories of Article 2 above, and which hold special or exclusive rights that have not been granted by means of an internationally advertised competitive procedure, with the effects of reserving to itself or jointly with other entities the exercise of activities in the utilities sector and substantially affecting the ability of other entities to carry out such activities; and
- entities that were exclusively incorporated by the entities referred to in the two paragraphs above, that are financed by the same, for the most part, or are subject to the management supervision of said entities, or that have an administrative, managerial or supervisory board where more than half of its members are directly or indirectly appointed by said entities, provided that they are destined to jointly operate in the utilities sectors.

Further Categories

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 associated public service contracts, provided those contracts are directly financed, for more than 50% of the contractual price, by contracting authorities

and the values of the contracts to be executed are equal or greater than the relevant thresholds (Article 275 of the PCC).

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.

1.3 Types of Contracts Subject to Procurement Regulation

The contracts that are subject to procurement regulation are those whose scope is, or may be, subject to competition. In this sense, in accordance with the PCC, the following contracts are considered to be subject to competition, without limitation:

- public works contracts;
- public works concessions;
- public services concessions;
- acquisition or lease of goods;
- acquisition of services; and
- company contracts.

Relevant thresholds (referring to the thresholds' value net of VAT) may vary depending on the contracting authority and on whether the contracting authority pertains to the traditional public sector or to the utilities sector.

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, regardless of the contract value. Nevertheless, contracts whose value is under certain amounts 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 by the latest amendment to the PCC, with the inclusion of a new procurement procedure (prior consultation) that imposes the consultation of three entities for the award of a contract.

The Utilities Sector

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 European thresholds apply and are currently as follows:

- for provision of services contracts, goods supply or leasing contracts – EUR428,000;
- for public works contracts – EUR5,350,000; and
- for service contracts for social and other specific services – EUR1,000,000.

All public works concession contracts and all public service concession contracts, as well as companies' incorporation contracts, fall within the scope of the PCC, regardless of their value.

1.4 Openness of Regulated Contract Award Procedure

The PCC does not establish any restrictions on the opening of contract award procedures. However, the regulated competitive public procurement procedures must be advertised in the national gazette (*Diário da República*), and also in the Official Journal of the European Union (OJEU) if their value is over the European thresholds.

1.5 Key Obligations

According to Portuguese legislation, the award of contracts is subject to compliance with the principles of the Treaty on the Functioning of the European Union, in particular, the free movement of goods, freedom of establishment and freedom to provide services, as well as with the prin-

ciples deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality, competition and transparency.

Additionally, the law sets forth key obligations regarding opening and selection of procurement procedure, notices, tender documents, procedure phases and the course of the procedure, bidders' requirements and impediments, qualification and bid submission and evaluation, award, contract execution and performance.

2. CONTRACT AWARD PROCESS

2.1 Prior Advertisement of Regulated Contract Award Procedures

Regarding the advertising of contract award procedures, contracting authorities are obliged to adopt two types of notices.

Prior Information Notices

According to Article 34(1) of the PCC, prior to the formal opening of the pre-contractual procedures, and in accordance with the transparency principle, the contracting authorities should disclose their annual procurement plan in a prior information notice that complies with the model provided in Article 48(1) of Directive 2014/24/EU for publication in the OJEU, provided that the aggregate contractual value of the contracts to be executed during the following 12 months equals or exceeds the European thresholds (see **1.3 Types of Contracts Subject to Procurement Regulation**).

In accordance with the Article 34(2) of the PCC, contracting authorities may also send a prior information notice for publication in the OJEU that complies with the model provided in Article 31(2) and (3) of Directive 2014/23/EU, in the case of service contracts for social and other specific services listed in Appendix IV of the Directive.

Additionally, pursuant to Article 35 of the PCC, contracting entities in the special utilities sector may send an indicative periodical notice for publication in the OJEU, with the mentions provided for in Article 67 of Directive 2014/25/EU, and covering a period of 12 months as a rule.

Contract Notices

As mentioned in **1.3 Types of Contracts Subject to Procurement Regulation**, depending on the value and the scope of the contract, public contract authorities are, as a rule, bound to advertise the awarding procedures: with the exception of the direct award and the prior consultation procedures, all public procurement procedures are required to be advertised in advance in the *Diário da República*, and in certain cases, also in the OJEU.

The information to be included in the contract notices is provided for in Annex V of Directive 2014/24/EU (for announcements to be published in the OJEU) or in Ministerial Order 371/2017 (for notices to be published in the *Diário da República*), and varies according to the type of procedure. However, regardless of the type of procedure, the following information is expected to be disclosed in all advertisements:

- the identity of the contracting authority;
- the internet address at which the procurement documents will be available;
- the type of contracting authority and main activity;
- a description of the procurement (nature and extent of works, nature and quantity or value of supplies, nature and extent of services);
- the estimated total order of magnitude of the contract;
- admission or prohibition of variant bids;
- the timeframe for delivery or provision of supplies, works or services and, as far as possible, duration of the contract;
- the conditions for participation;

- the type of award procedure, and, where appropriate, reasons for use of an accelerated procedure;
- criteria to be used for award of the contract or contracts; and
- the time limit for receipt of tenders (open procedures) or requests to participate (restricted procedures, competitive procedures with negotiation, dynamic purchasing systems, competitive dialogues, innovation partnerships).

2.2 Preliminary Market Consultations by the Awarding Authority

Significant amendments to the PCC in 2017 included the introduction of Article 35-A, regarding “preliminary market consultations”. As a result of this, the awarding authorities may conduct informal market consultations before the launch of the contract award procedure, namely requesting the opinion of experts, independent authorities or economic operators.

2.3 Tender Procedure for the Award of a Contract

The PCC provides for the following procurement procedures:

- direct award – one bidder will be invited to submit bids;
- prior consultation – at least three entities will be invited to submit bids;
- open procedure – any interested entity is free to submit bids after the publication of a tender notice;
- restricted procedure with pre-qualification – similar to open procedure but comprising two stages – submitting technical and financial qualification documents, and selecting candidates; and submitting bids, evaluating bids and award;
- negotiated procedure – including the same two phases as restricted procedure with pre-

qualification and a third phase for the negotiation of bids;

- competitive dialogue – whenever a contracting authority is not able to specify a definitive and concrete solution for the contract and launches a tender to which bidders submit solutions; and
- partnership for innovation – whenever a contracting authority seeks to contract the performance of activities of R&D of goods, services or innovative works, with the intention of further purchasing it.

Both the prior consultation procedure and the partnership for innovation were introduced in the PCC in its 11th amendment, of 2017.

Negotiation with Bidders

The use of procedures involving negotiation with bidders in Portugal is limited to certain specific circumstances, and the PCC establishes two procedures that involve negotiation with bidders: the competitive dialogue and the negotiation procedure.

Currently, the PCC provides 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, legal or financial assemble 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.

In addition to the two cases referred to above, provided that some requirements are fulfilled (in particular if it is provided for in the procedure programme), a negotiation phase can be carried out in the procedures of direct award, prior consultation or in public tenders, including, for example, in public tenders for the award of public works or public services concession contracts, or for the award of public works, supply or lease of goods or services provision contracts whose contract value is below certain amounts.

2.4 Choice/Conditions of a Tender Procedure

In general, awarding authorities may freely choose to adopt an open procedure or a restricted procedure with pre-qualification.

For contracts designed for the utilities sector, awarding authorities may freely choose between the open procedure, the restricted procedure with pre-qualification, the negotiation procedure, the competitive dialogue or, if the respective requirements are fulfilled, the partnership for innovation. Also, for public works or public services concessions, as well as for company incorporation contracts, awarding authorities may freely choose between the open procedure, the restricted procedure with pre-qualification, the negotiation procedure or the competitive dialogue. In both cases, other procedures may be adopted provided certain criteria legally set forth – based on the value of the contract or material criteria – are met.

Regarding the defence and security sector, Decree-Law 104/2011 provides three procedures: competitive dialogue; a restricted procedure with pre-qualification (both governed by the rules of the PCC); and the negotiation procedure, which may or may not be preceded by a contract notice.

Special procedural instruments are also set forth for design procedures, dynamic purchasing systems and qualification systems, the latter applicable to the utilities sector.

As the EU directives state the importance of simplifying and dematerialising procurement procedures with a view to ensuring greater efficiency and transparency, the PCC opts unequivocally for electronic procurement, and the awarding authorities are bound to adopt electronic procurement procedures.

Further to the above, there are certain criteria that are relevant and have to be fulfilled for the adoption of certain types of procedures – based on the contract value, material criteria, or the type of contract.

Criteria Based on Contract Value

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

- For provision of services contracts, goods supply or leasing contracts:
 - (a) direct award may be adopted for contracts whose value is below EUR20,000;
 - (b) prior consultation may be adopted for contracts whose value is below EUR75,000 (EUR75,000 was the previous threshold for direct award); and
 - (c) public tender or limited tender with prior qualification (or negotiation procedure or competitive dialogue when respective conditions are met), without notice in the OJEU, may be adopted for contracts whose value is below the European thresholds (EUR139,000 or EUR214,000, depending on whether the contracting authority is the State or other entities, respectively).
 - For public works contracts:
 - (a) direct award may be adopted for contracts whose value is below EUR30,000;
 - (b) prior consultation may be adopted for contracts whose value is below EUR150,000 for prior consultations (EUR150,000 was the previous threshold for direct award); and
 - (c) public tender or limited tender with prior qualification (or negotiation procedure or competitive dialogue when respective conditions are met), without notice in the OJEU, may be adopted for contracts whose value is below the European thresholds (EUR5,350,000).
 - For other types of contracts:
 - (a) direct award may be adopted for contracts whose value is below EUR50,000; and
 - (b) prior consultation may be adopted for contracts whose value is below EUR100,000 (EUR100,000 was also the previous threshold for direct award).
 - 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 European thresholds apply and are currently as follows:
 - for provision of services contracts, goods supply or leasing contracts – EUR428,000;
 - for public works contracts – EUR5,350,000; and
 - for service contracts for social and other specific services – EUR1 million.
- However, in some situations, a direct award or a prior consultation may be adopted irrespective of the contract value, in particular when the following material criteria are met, inter alia:
- no participant has presented any bid, or all bids have been excluded in a previous open procedure or restricted procedure with pre-qualification, if the specifications and the

- minimum technical and financial requirements are not substantially altered;
- in so far as is strictly necessary and for reasons of extreme urgency resulting from unforeseeable events by the awarding authority, the deadlines concerning other procedures cannot be fulfilled, provided that the circumstances invoked are not in any way attributable to the awarding authority;
 - the services covered by the contract are mainly to enable the awarding authority to provide one or more telecommunications services to the public; and
 - the contract can only be allocated to a determined entity, when the scope of the procedure is the creation or the acquisition of a work of art or an artistic event, when there is no competition for technical reasons, or when it is necessary to protect exclusive rights (namely, intellectual property rights).

Other material criteria are set forth in the law, specifically for each type of contract (Articles 24 to 27 of the PCC).

Even when one of the material criteria for the adoption of a direct award or a prior consultation is met, the law specifies that prior consultation should be adopted whenever the recourse to more than one entity is possible and compatible with the criteria used for the adoption of such a procedure.

Negotiated procedures and competitive dialogues

The awarding authorities can adopt the negotiated procedure or the competitive dialogue, when:

- their needs cannot be met without adapting easily available solutions;
- the goods or services include the design of innovative solutions;
- it is not objectively possible to award the contract without prior negotiation due to specific

- circumstances related to its nature, complexity, legal and financial arrangement or due to the risks associated with it; or
- it is not objectively possible to precisely define the technical specifications by reference to a standard, European Technical Approval, common technical specifications or technical reference.

Partnerships for innovation

The awarding authorities may adopt the partnership for innovation when they intend to carry out research activities and the development of innovative goods, services or works, irrespective of their nature and areas of activity, according to their subsequent acquisition, provided that they correspond to the levels of performance and prices previously agreed between it and the participants in the partnership.

Mixed contracts

Finally, there are also specific rules and conditions for the adoption and scope of a specific procedure for the award of mixed contracts.

2.5 Timing for Publication of Documents

As a rule, apart from procedures where the submission of a proposal depends on an invitation (ie, direct award and prior consultation), the award authorities shall provide free, unrestricted and full direct electronic access to the procurement documents, from the date of publication of the notice. In the other cases, ie, when direct award or prior consultation is adopted, the documents of the procedure shall accompany the invitation.

Additionally, the PCC also establishes the obligation to disclose, in the public procurement portal (called BASE), the information related to the pre-contractual procedure and performance of public contracts, through a form conforming to the model in Annex III of the PCC.

In this respect, the Ministerial Order 57/2018, of 26 February 2018, regulates the operation and management of the public procurement portal. This portal was designed to centralise the most important information relating to all pre-contractual procedures, which must be carried out electronically as required by the PCC. It is a virtual space where the elements regarding the pre-contractual procedure and performance of public contracts are publicised, thus enabling their follow-up and monitoring.

See also **2.1 Prior Advertisement of Regulated Contract Award Procedures.**

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The PCC establishes the minimum timescales to present applications (technical and financial qualification documents) or tenders. Pursuant to Article 63(1) of the PCC, the awarding entity may broaden the timescales in the procedure documents, with respect for the following time limits stipulated by the PCC:

- direct award – no minimum time limit (nevertheless, the courts consider that the time limit should not be less than the period considered reasonable for the submission of the proposal); and
- prior consultation – no minimum time limit (nevertheless, the courts consider that the time limit should not be less than the period considered reasonable for the submission of the proposal).

Open Procedure

If the notice is not subject to publication in the OJEU, the PCC establishes a minimum time limit to submit bids of six days after notice is sent to publication, unless the proceeding concerns the formation of public works contracts, in which case the time limit is 14 days. If the works are

of significant simplicity, the time limit of 14 days can be reduced to six days. If the notice is publicised in the OJEU, the minimum time limit is 30 days, which can be reduced to 15 days in cases of urgency duly reasoned by the awarding entity or if a prior information notice has been published complying with certain conditions set forth in the law. In urgent open procedures, the time limit is 24 hours on working days for acquisition or lease of goods or acquisition of services, and 72 hours on working days for public works contracts.

Restricted Procedure with Pre-qualification

- Submission of applications for technical and financial pre-qualification – if the notice is not subject to publication in the OJEU, the minimum time limit for the presentation of the application is six days (14 days for public works contracts) after notice is sent to publication. If the notice is subject to publication in the OJEU, the minimum time limit for presenting the application is 30 days (reduced to 15 days in case of urgency duly reasoned by the awarding entity, or of contracts in the utility sector).
- Submission of bids – the minimum time limit is six days after the invitation is sent if the notice is not subject to publication in the OJEU, unless the proceeding concerns the formation of public works contracts, in which case the time limit is 14 days. If the works are of significant simplicity, the time limit of 14 days can be reduced to six days. If the notice is publicised in the OJEU, the minimum time limit is 25 days, which can be reduced to ten days in cases of urgency duly reasoned by the awarding entity or if a prior information notice has been published complying with certain conditions set forth in the law, or for contracts in the utilities sector.

Negotiated Procedure

- Submission of applications for technical and financial pre-qualification – according to the PCC, the time limit for the presentation of the applications is 30 days after notice is sent to publication, or 25 days if a prior information notice has been published complying with certain conditions set forth in the law. If the notice is sent electronically to publication, this timescale may be reduced by seven days.
- Submission of bids – the rules concerning restricted procedure apply.

Competitive Dialogue

The minimum timescale to submit tenders is 40 days after the invitation is sent. Regarding prior phases for submission of applications for technical and financial pre-qualification and for submission of solutions, there are no minimum deadlines set forth in the law, the awarding entity being bound to indicate the same in the notice and in the invitation, respectively.

Partnership for Innovation

- Submission of applications for technical and financial pre-qualification – the rules applicable to the negotiation procedure also apply to the partnership for innovation procedure.
- Submission of proposals for R&D projects – there are no minimum deadlines set forth in the law, the awarding entity being bound to indicate the same in the invitation.

2.7 Eligibility for Participation in a Procurement Process

Public procurement law sets forth conditions for interested parties to participate in tenders, and if a bidder does not comply with these requirements it will be disqualified and excluded from the tender. These requirements certify the professional and personal suitability of bidders and are distinct from the technical and financial capacity requirements whereby candidates' technical and financial qualification is assessed.

Eligibility criteria include:

- (a) insolvency or similar;
- (b) conviction for crimes affecting professional reputation;
- (c) administrative sanctions for a serious professional breach;
- (d) non-payment of tax obligations;
- (e) non-payment of social security obligations;
- (f) sanction of prohibition to participate in public tenders set forth in special legislation;
- (g) sanction for a breach of legal obligations in respect of employees subject to payment of taxes and social security obligations;
- (h) conviction for crimes concerning criminal organisations, corruption, fraud or money laundering, as set out in the PCC;
- (i) direct or indirect participation in the preparation of tender documents, thus obtaining a special advantage;
- (j) unlawful influence on the competent body for the decision to contract, or obtainment of confidential information granting undue advantages, or provision of misleading information;
- (k) conflict of interest; and
- (l) significant faults in the performance of a previous public contract in the past three years.

In the situations mentioned in b), c), g), h) or l), the PCC allows bidders to demonstrate that enough measures have been implemented in order to demonstrate a bidder's probity for the performance of the contract.

Besides these eligibility criteria, in procedures allowing for a pre-qualification phase, contracting authorities may establish criteria to evaluate bidders' technical and financial capacity. These may include factors linked to the bidder and not

to the bid to be presented, as is the case in the EU directives.

2.8 Restriction of Participation in a Procurement Process

In procedures with a pre-qualification phase – restricted procedure with pre-qualification, negotiated procedure, and competitive dialogue – it is possible to restrict participation to a limited number of qualified interested parties.

Following the assessment of the interested parties and their compliance with the technical and financial qualification criteria, a limitation of the number of bidders may occur. There are two different legal systems for the selection of the qualified interested parties and limitation of the number of entities that will be invited to submit a bid (“qualification of bidders”), at the free choice of the awarding entity.

Simple and Complex Systems

Under the first system, the simple system, all interested parties that comply with the minimum technical and financial criteria set forth in the tender documents shall be invited to participate and submit their bids.

In accordance with the second system, the complex or selection system, the technical and financial qualification of the interested parties will be evaluated and ranked, with the criteria of the higher technical and financial capacity prevailing, and only the highest qualified parties being qualified for the submission of bids.

If the complex or selection system of pre-qualification is adopted, a minimum of five (or a minimum of three, where a competitive dialogue procedure is at stake) interested parties shall be qualified and invited to submit their bids, unless the number of entities that comply with the minimum technical and financial criteria of

pre-qualification is less than five (or three in the case of competitive dialogue).

It is important to stress that economic operators may resort to the technical qualification of third parties in order to demonstrate full compliance with the qualification criteria. To do so, they must submit with their qualification documents 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.

Non-competitive Procedures

Beyond the pre-qualification procedures, in non-competitive procedures, such as the direct award, the selection of the invited entity(ies) is at the discretion of the awarding entity.

In direct award or prior consultation procedures, the selection of the invited entity(ies) for submission of bids is at the discretion of the awarding entity – one entity only in direct awards and a minimum of three entities for prior consultations.

2.9 Evaluation Criteria

As a result of the 11th amendment to the PCC, the only award criterion is the most economically advantageous bid, which may assume one of two types:

- best price-quality ratio, where the award criteria are composed of a group of factors and sub-factors concerning several aspects of the performance of the contract to be executed; or
- evaluation of the price or of the cost, in which case the tender documents shall set forth all other aspects of the performance of the contract to be executed.

Subject to grounded reasoning, the awarding entity may choose not to submit to competition and not to evaluate the price or cost, in which

case it shall establish in the tender documents a fixed or maximum price.

The factors and sub-factors of the evaluation criteria should have a connection to the subject matter of the public contract in question, comprising all, and only, the aspects of performance of the contract to be executed. They may include 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, environmental or social sustainability.

With the 11th amendment to the PCC, it became mandatory for the rules of the procedure to establish a tie-breaker criterion in case of tied evaluation of bids. This can be related to the evaluation factors established, or to the bidder being a social enterprise or a small or medium-sized enterprise. The PCC specifically determines that the tie-breaker criterion cannot be the time when the bids were submitted.

3. GENERAL TRANSPARENCY OBLIGATIONS

3.1 Obligation to Disclose Bidder/ Tender Evaluation Methodology

According to the PCC, contracting authorities must be transparent. This general obligation is enshrined in the requirement to properly publicise public tender proceedings, and to make public all procedure documents, which must also be transparent and clear, thereby ensuring a level playing field among bidders.

One of the elements that has to be disclosed is the criteria and evaluation methodology of the bidders (pre-qualification phase, where it exists) and of the bids evaluated.

In accordance with the PCC, there is a general provision that demands the absolute disclosure at the beginning of the procedure of all features of the evaluation methodology that cannot be altered during its course. Thus, the relevant pre-qualification criteria for the selection of bidders, as well as the criteria for the selection of bids and their corresponding weight, the evaluation methodology, the scoring system for every single criterion, factor and sub-factor must be clearly specified in the tender documents at the beginning of the procedure.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Any relevant decisions of the contracting authority shall be notified to all interested parties, including unsuccessful bidders. Also, all proposed decisions taken by the jury of the procedure shall be notified to the same entities.

Thus, all entities or bidders that submit a pre-qualification application or a bid are notified and informed of the preliminary evaluation report, including the unsuccessful bidders. At this stage, bidders are granted a brief period, usually of at least five working days, to comment on the analysis made by the jury. They have the opportunity to present a formal request asking for a modification of the preliminary report if they do not agree with its content. A final report and final decision on the pre-qualification or on the evaluation of bids and award of contracts is issued and also notified to all participating parties, successful or not.

3.3 Obligation to Notify Bidders of a Contract Award Decision

The PCC provides that the contract award decision is notified simultaneously to all bidders participating in the procedure together with the final report prepared by the jury, which must also include the reasoning of the decision. As procedures run on electronic platforms, the relevant

entities are alerted through a notification in the platform.

3.4 Requirement for a “Standstill Period”

The PCC stipulates a general standstill period of ten days between the time of notification of the contract award decision in writing to all bidders and the execution of the contract, so that unsuccessful bidders are allowed to challenge the decision before the contract has been signed.

However, the referred ten-day period shall not apply where:

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

4. REVIEW PROCEDURES

4.1 Responsibility for Review of the Awarding Authority’s Decisions

As referred to in **3.2 Obligation to Notify Interested Parties Who Have Not Been Selected**, the preliminary evaluation report issued by the jury of the tender should be notified to all bidders, allowing them to submit their views, and said report may be reviewed by the jury in the final report.

In Portugal, it is possible to challenge all decisions issued in public procurement procedures through administrative review proceedings that address the contracting authorities (the competent body for the contracting decision) or

through judicial review proceedings under the jurisdiction of administrative courts.

4.2 Remedies Available for Breach of Procurement Legislation

The PCC sets forth fines that may be applied for breach of procurement rules and that depend on the seriousness and degree of fault of the defaulting party.

Also, the sanction of prohibition to participate in subsequent public procurement procedures may apply for a maximum period of two years.

Additionally, the courts can decide to annul a procedure or a contract due to breach of procurement rules, as well as to award damages (eg, the bid’s preparation costs).

4.3 Interim Measures

Whenever a public procurement procedure refers to the conclusion of a public works contract, a public works concession, a public services concession, an acquisition or lease of goods, or an acquisition of services, the judicial challenge of the award decision taken by the contracting authority automatically suspends the effects of the awarding decision or the performance of the contract (if it has already been concluded). The suspensory effect can, however, be ended if so requested by the contracting authority and if the administrative court considers that the damages resulting from the suspension are greater than the ones resulting from its withdrawal.

When the judicial proceeding refers to a different decision taken in the context of a public procurement procedure (ie, not an award decision), the proceeding shall not have an automatic suspensory effect, but the administrative court may be requested to adopt interim measures aimed to ensure the effectiveness of the final judgment.

4.4 Challenging the Awarding Authority's Decisions

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

4.5 Time Limits for Challenging Decisions

The appeal proceedings concerning procurement decisions are characterised by their pressing urgency, aimed at avoiding excessive delays in the procurement procedure. An administrative appeal must be brought within five business days. Judicial proceedings regarding pre-contractual litigation must be filed within one month of the relevant decision being issued and notified to the bidder.

4.6 Length of Proceedings

Administrative claims tend to be decided very swiftly. Judicial proceedings usually take no less than six months to obtain the first-instance decision.

4.7 Annual Number of Procurement Claims

There is no statistical data regarding this matter. That said, it is evident that the number of procurement claims is growing.

4.8 Costs Involved in Challenging Decisions

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

Judicial challenge has an initial cost, in the first instance, regardless of the value of the action, of EUR102. However, in the event of appeal of the court ruling, a variable judicial fee will be charged depending on the value of the claim.

5. MISCELLANEOUS

5.1 Modification of Contracts Post-award

According to the PCC, amendments to concluded contracts are permitted without a new procurement procedure only on public interest grounds, if the conditions under which the parties entered into the previous agreement have changed in an abnormal and unpredictable way, and if 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).

In fact, the amendment cannot substantiate an increase of 25% of the initial contractual price, in the mentioned case of change of circumstances, and of 10% in the case of amendments based on public interest. 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 *Pressetext* case law.

5.2 Direct Contract Awards

The legislation permits direct contract awards under the circumstances established in **1.3 Types of Contracts Subject to Procurement Regulation**.

5.3 Recent Important Court Decisions

Several decisions have been taken in relation to public procurement matters, of which the following should be highlighted.

Decision of the Supreme Administrative Court of 9 July (Case 0357/18.7BEFUN)

The Supreme Administrative Court considered that the expression of interest directed by a tenderer (legal person) with a corporate object not related to the final contract must not be accepted, for violation of the law.

However, this should only occur if the corporate object is patently not related to the final contract. When in doubt, the judge should not sanction the tenderer.

Decision of the Central South Administrative Court of 4 January 2021 (Case 1169/06.6BELSB)

In a works contract based on series of price, it is licit to adopt a measurement criterion that implies that the remuneration of the contractor for the excavation work is based on the final measurement of the overall volumes of excavated earthworks, from which, for quantification purposes, the volumes of excavated earthworks that are 20% or less below those foreseen in the project are deducted.

5.4 Legislative Amendments under Consideration

COVID-19: Exceptional Measures

Given the exceptional circumstances caused by the COVID-19 pandemic, several measures have been taken by the government in regard to judi-

cial terms, relationship with the administration and public procurement.

The following legislative acts have been approved, among others:

- Resolution of the Council of Ministers No 10-A/2020, of 13 March 2020;
- Decree-Law 10-A/2020, of 13 March 2020;
- Law No 1-A/2020, of 19 March, amended by Law No 4-B/2021 of 1 February 2021;
- Parliament Resolution No 16/2020, of 19 March 2020; and
- Decree-Law 19-A/2020, of 30 April 2020.

Resolution of the Council of Ministers No 10-A/2020

This Resolution sets forth an increased duty of co-operation by the public contractor, in particular with regard to payment of contractual debts.

Decree-Law 10-A/2020, of March 13th

Decree-Law 10-A/2020 establishes an exceptional public procurement regime for the execution of public works, lease or purchase of goods and services supply contracts by entities in the public administrative sector, public companies and local authorities, provided that they are related to COVID-19, ie, the purpose of which is the “prevention, contention, mitigation and treatment” of COVID-19 and the “replacement of normality”. The intention of this regime is to ensure the swift availability of products and services considered essential in the combat against COVID-19, by simplifying and accelerating public procurement procedures in the context of COVID-19.

It has been in force since 13 March 2020 and, despite being an exceptional and temporary regime, there is no indication of its term. Thus, it will be in force until revoked by a new legislative act or until the conditions set forth for its application cease to exist. As it applies to contracts

related to the replacement of normality, it can be assumed it will be the new normal for quite some time to come.

COVID-19-related events could justify adopting direct award procedures for reasons of “extreme urgency”. The following amendments introduced by Decree-Law 10-A/2020 must be highlighted.

- Possibility of direct award on the grounds of “extreme urgency” by the State, the Autonomous Regions of the Azores and Madeira, municipalities, independent agencies, public institutes, public foundations, public associations and “public law bodies”, for the execution of public works, lease or purchase of goods and services procurement contracts, provided that they are related to COVID-19 (Articles 1.3 and 2.1, as amended by Decree-Law No 10-E/2020, of 24 March 2020).
- Possibility of simplified direct award where the contractual price of public works, goods or services procurement contracts does not exceed EUR20,000 (Article 2.2).
- Possibility of simplified direct award, to the necessary extent and for duly justified reasons of extreme urgency (which cannot be attributed to the contracting authority), regardless of the price and up to budgetary ceiling, for the execution of contracts for the acquisition of the necessary equipment, goods and services for the prevention, containment, mitigation and treatment of COVID-19, or related purposes, notably personal protective equipment, goods required for testing COVID-19, equipment and materials for intensive care units, medicines (including medical gases), and other medical devices and logistics and transport services (including air transportation), related thereto, or with the respective distribution to entities supervised by the member of the government responsible for the health sector or to other public entities or entities of public interest for

which they are intended (Article 2-A/1 and 3, as amended by Decree-Law No 18/2000, of 23 April 2000; also applicable to the Autonomous Regions of Madeira, mutatis mutandis, through Article 4.2 of Regional Decree No 9/2020/M).

- Application of the regime above, both to the contracting of goods and services to reinforce the provision of services through digital means and contact centres with citizens, in particular channels for assistance and support to the use of those public services, and to the contracting of road passenger transport vehicles to reinforce the rail and road networks (Articles 13/2 and 13-A/5, respectively, of Decree-Law No 10-A/2020, as amended by Decree-Law No 99/2020, of 22 November 2020).
- Exceptionally, to the extent strictly necessary and on duly grounded reasons of extreme urgency, a group of contracting entities (with a representative appointed by the Council of Ministers, which also establishes the powers of each of the members) may be assembled for the execution by direct award of the contracts for the acquisition of space for institutional advertising related or associated to COVID-19, before national, regional and local media, through television, radio, printed and/or digital means, up to an overall amount of EUR15 million, including VAT (Article 2-B of Decree-Law No 10-A/2020, added by Decree-Law No 20-A/2020, of 6 May 2020). The entities benefiting from these aids, were designated through Resolution of the Council of Ministers No 38-B/2020, of 15 May 2020, as amended by the Declaration of Rectification No 22/2020, of 27 May 2020.

On duly grounded reasons of extreme urgency, and for an 18-month period, the acquired space shall be strictly necessary for instructional advertising on:

- the public health pandemic situation and, among others, advertising on preventive and containment measures for the transmission of the virus, good social and hygiene practices, periodic reports and information on the public services in question;
- legislative measures adopted to contain the pandemic, as well as the public or social means available to rescue, monitor, inform or oversee;
- legislative measures adopted to balance the economy on a cross-sectoral or sectoral basis, as well as the public or social means available to rescue, monitor, inform or oversee;
- legislative measures adopted for the progressive recovery of life and economy in a pandemic and post-pandemic context, as well as the public or social means available to rescue, monitor, inform or oversee;
- ancillary measures in the health area, such as the call for vaccination and the use of primary and emergency health services;
- measures in the area of education to inform the educational community of their rights and duties, deadlines, timetables, teaching and auxiliary resources as well as the means available to implement them;
- raising awareness on the prevention of forest fires in a pandemic year;
- social and humanitarian causes, such as domestic violence, violence against the elderly or minors, sharing of domestic and parental responsibilities, fighting discrimination, raising awareness of mental illness, and helplines and services in times of pandemic;
- the promotion of media literacy and dissemination of cultural activities during and in the aftermath of the pandemic; as well as other areas and matters serving similar purposes;
- removal of the limits to repeated procurement set out in Article 113.2 and 113.5 of the Public Contracts Code (CCP), where economic operators who have already concluded

high-value contracts by direct award in the previous two years, as well as those who, during this period, have executed works, supplied goods or services, free of charge, to the contracting authority, may be invited to submit a bid in these direct award procedures (Article 2.3);

- removal of the obligation to invite more than one entity, even where possible, due to the urgency of the procurement, as set forth in Article 27-A of the CCP (Article 2.3); and
- contracts concluded as a result of direct award procedures are not subject to the prior clearance of the Court of Auditors (Article 6.1).

Law No 1-A/2020, of 19 March, amended by Law No 4-B/2021 of 1 February 2021 and Law No 13-B/2021 of 5 April 2021

This Law determines the suspension of the deadlines for procedural acts, applying the court holidays regime. However, with the amendment introduced by Law No 4-B/2021, if the parties and the judge decide to pursue the procedure there is no suspension of deadlines. This suspension however does not apply to urgent processes, which include pre-contractual administrative litigation relating public procurement. With the Law No 13-B/2021, of 5 April 2021, the regime of suspension of deadlines was revoked.

However, in order to reduce the impact of such measure, it was determined that the administrative deadlines expiring during the suspension period would end in 20 business days after the entry into force of this Law.

Parliament Resolution No 16/2020, of 19 March 2020

This Resolution determines the cessation of the validity of Decree-Law 170/2019, of 4 December, which established the tenth amendment to the Public Procurement Code, and the reinstatement

ment of the legal regime applicable before such amendment.

Considering the challenges of the difficult times that are now upon us, it may be that new exceptional measures are enacted regarding public procurement, public expense and public contracts.

Decree-Law 19-A/2020, of 30 April 2020

Decree-Law 19-A/2020 of 30 April 2020 establishes, in the context of the COVID-19 pandemic:

- an exceptional regime for the financial re-balance of long-term contracts to which the State or any other public entity is a party (including public-private partnership); and
- an exceptional regime that limits the non-contractual liability of the State.

This Diploma was adapted to the Autonomous Region of Madeira through Article No 5 of Regional Decree No 9/2020/M.

This exceptional regime will terminate upon the World Health Organization determining that the SARS-Cov-2 virus's epidemiological situation and the COVID-19 disease no longer qualify as a pandemic. However, all effects that, given their nature, should occur or become effective after this WHO determination are safeguarded or upheld, such as:

- the exercise, at a later stage, of the right to a compensation grounded on the pandemic;
- the suspension or reduction beyond the term of this regime of obligations of road concessionaires/subconcessionaires; and
- the reduction of payments resulting from such suspension or reduction of obligations that should survive this regime.

Legislative Proposals

Through a new proposed law (Law No 41/XIV/1.^a) the Portuguese government intends to approve specific public procurement measures for projects co-financed by EU Funds for housing, decentralisation, Information Technologies (IT), PEES Program (“Economic and Social Stabilisation Programme”), fuel management within the Integrated Management System for Rural Fires (SGIFR) and agrifoodstuffs.

Such measures include the reduction of time limits to submit expressions of interest, as well as specific solutions regarding direct awards in contracts related to the above-mentioned areas.

The proposed law has not been approved, as the President of the Republic has vetoed such law.

At this moment, the Parliament is amending the proposed law to reflect the concerns of the President of the Republic.

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