



The
LEGAL
500

**COUNTRY
COMPARATIVE
GUIDES 2022**

The Legal 500 Country Comparative Guides

Portugal

PUBLIC PROCUREMENT

Contributing firm

VdA



Rodrigo Esteves de Oliveira

Public Law Partner | reo@vda.pt

Catarina Pinto Correia

Public Law Partner | cpc@vda.pt

This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Portugal.

For a full list of jurisdictional Q&As visit legal500.com/guides

PORTUGAL PUBLIC PROCUREMENT



1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL)

As a member of the European Union, Portugal's public procurement legislation is highly shaped by the European Law - namely by the two 2014 Directives, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services, both of the European Parliament and of the Council, of 26 February 2014. Such rules on public procurement play a major role within the European common market, having been implemented to the Portuguese legal system by means of the amendment to the Portuguese Public Contracts Code ("PCC") approved by Decree-Law no. 111-B/2017, of 31 August 2017. This amendment significantly modified the legal regime applicable to the public procurement procedures and public contracts set forth in the PCC, revoking 35 articles, adding 54 articles and changing 155 articles.

Being the European Union (including all its 27 members) a signing party of the World Trade Organization's Agreement on Government Procurement ("WTO GPA"), Portugal is also bound to the WTO GPA.

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements?

The general legal framework is set forth in the PCC, approved by Decree-Law no. 18/2008, of 29 January 2008, as amended. The last amendment was approved by Law no. 30/2021, of 21 May 2021.

The contracts that are subject to procurement regulation

are those which scope is, or may be, subject to competition. In accordance with the PCC (Article 16/2), the following contracts are considered to be subject to competition, among other:

- a. public works contracts;
- b. public works concessions;
- c. public services concessions;
- d. acquisition or lease of goods;
- e. acquisition of services; and
- f. company contracts.

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.

Portugal has two autonomous administrative regions, Madeira and 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 no. 34/2008/M, of 14 August 2008, as amended, which introduced minor adjustments to the national legal framework.

In Azores, the regional government approved Regional Legislative Decree no. 27/2015/A, of 29 December 2015, which consolidated the main provisions referring to the award of public contracts in the region and has implemented some provisions of the European Union (EU) directives on public procurement not yet transposed into the national framework, at that date.

In connection with public procurement in the defence and security sector, Decree-Law no. 104/2011, of 6 October 2011, has implemented the Directive 2009/81/EC, of the European Parliament and of the Council, of 13 July 2009, on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

Regarding entities operating in the utilities sector (water, energy, transport and postal services), they may be considered as contracting authorities under the terms and conditions of Article 7 of the PCC. In this case, the public procurement rules apply only to the following types of contracts:

- a. public works contracts;
- b. public works concessions;
- c. public services concessions;
- d. acquisition or lease of goods; and
- e. acquisition of services;

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.

Reference must be made to the Administrative Procedure Code ("APC"), approved by Decree-Law no. 4/2015, of 7 January 2015, and to the Administrative Courts Procedure Code ("ACPC") and the Statute of Administrative and Tax Courts ("SATC"), both amended and republished by Decree-Law no. 214-G/2015, of 2 October 2015 and by Law no. 118/2019, of 17 September 2017, as amended; all three apply to public procurement procedures and contracts in general.

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction?

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

For entities pertaining to the traditional public sector or that are considered bodies governed by public law, all contracts are subject to public procurement rules regardless of the value. The following thresholds apply:

- a. For provision of services, supply of goods or lease of goods contracts:
 - a. direct award may be adopted for contracts which value is below € 20,000;
 - b. prior consultation may be adopted for contracts which value is below € 75,000; and
 - c. public tender or limited tender with prior qualification (or negotiation procedure or competitive dialogue,

when the respective conditions are met) without notice in the Official Journal of the European Union (OJEU) may be adopted for contracts which value is below the European thresholds (€ 139,000 or € 214,000, depending on whether the contracting authority is the State or other entities, respectively).

- b. For public works contracts:
 - a. direct award may be adopted for contracts which value is below € 30,000;
 - b. prior consultation may be adopted for contracts which value is below € 150,000; and
 - c. public tender or limited tender with prior qualification (or negotiation procedure or competitive dialogue, when the respective conditions are met) without notice in the OJEU may be adopted for contracts which value is below the European thresholds (€ 5,350,000).
- c. For other types of contracts:
 - a. direct award may be adopted for contracts which value is below € 50,000; and
 - b. prior consultation may be adopted for contracts which value is below € 100,000.

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, which means that contracts are subject to public procurement rules when the respective value equals or exceeds the European thresholds, which are currently as follows:

- a. for provision of services, supply of goods or lease of goods contracts: € 428,000;
- b. for public works contracts: € 5,350,000; and
- c. for service contracts for social and other specific services: € 1,000,000.

Finally, all public works concession contracts and all public service concession contracts, as well as companies' incorporation contracts (the latter except in case of contracting entities in the utilities sector), fall within the scope of the PCC, regardless of their value.

4. Are procurement procedures below the

value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

As referred to above, 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 which value is under certain amounts can be awarded through a non-competitive procedure (direct award) and their terms are also regulated by the PCC.

Moreover, in case of the contracts which are excluded from the application of public procurement rules – including for reason of the respective value as it is the case for contracts awarded by entities in the utilities sector –, the general principles of administrative activity set forth in the APC and the general principles of public procurement set out in the PCC must be followed.

5. For the procurement of complex contracts*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes?

It is assumed that complex contracts include complex or highly specialized contracts as well as high value contracts.

Open and competitive procedures, such as public tender and limited tender with prequalification, are the general rule. Complex contracts may require the use of procedures involving prequalification phase or negotiation with bidders – public tender with negotiation, limited tender with prequalification, negotiated procedure, competitive dialogue or even a partnership for innovation.

With the exception of the direct award and of the prior consultation procedures, all public procurement procedures are required to be advertised in advance in the national gazette (*Diário da República*) only, or also – if the European thresholds are reached – 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 no. 371/2017, of 14 December 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 tender notices, among other:

- a. The identity of the contracting authority;
- b. The internet address where the procurement documents will be available;
- c. The type of contracting authority and main activity;
- d. A description of the procurement (nature and extent of works, nature and quantity or value of supplies, nature and extent of services);
- e. The estimated total order of magnitude of contract;
- f. Admission or prohibition of variant bids;
- g. The timeframe for delivery or provision of supplies, works or services and, as far as possible, duration of the contract;
- h. The conditions for participation;
- i. The type of award procedure, and, where appropriate, reasons for use of an accelerated procedure;
- j. Criteria to be used for award of the contract or contracts; and
- k. 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).

Also in accordance with 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 may 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

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 of 26 February 2014, 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.

As mentioned above, complex contracts may require that a prequalification phase is set forth, by means of adoption of a limited tender with prequalification or a

negotiation procedure which also has a prequalification phase. Or they may require that a procedure with negotiation is adopted, by means of a public tender with negotiation, a negotiated procedure, a competitive dialogue or a partnership for innovation.

The following deadlines for submission of prequalification applications or for submission of bids apply:

a. Public tender with negotiation:

i. Submission of bids:

- If the notice is not subject to publication in the OJEU, the minimum time limit is 6 days after the notice is sent for publication for the provision of services or supply or lease of goods contracts, and 14 days for public works contracts, except if the works are of significant simplicity, in which case the time limit of 14 days can be reduced to 6 days);
- If the notice is publicised in the OJEU, the minimum time limit is 30 days after the notice is sent for publication, 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, or for contracts in the utilities sector.

b. Limited tender with prequalification:

i. Submission of applications for technical and financial pre-qualification:

- If the tender is not subject to publication in the OJEU, the minimum time limit is 6 days 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, which can be reduced to 15 days in case of urgency duly reasoned by the awarding entity, or of contracts in the utility sector.

ii. Submission of bids:

- If the tender is not subject to publication in the OJEU, the minimum time limit is 6 days after the invitation is sent for the provision of services or supply or lease of goods contracts, and 14 days for public works contracts, except the works are of significant simplicity, in which case the time limit of 14 days can be reduced to 6 days;
- If the tender is subject to publication in the OJEU, the minimum time limit is 25 days, which can be reduced to 10 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.

c. Negotiated procedure:

i. Submission of applications for technical and financial pre-qualification:

- the minimum time limit is 30 days after notice is sent to publication, which can be reduced to 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;
- ii. Submission of bids:
- If the tender is not subject to publication in the OJEU, the minimum time limit is 6 days after the invitation is sent for publication for the provision of services or supply or lease of goods contracts, and 14 days for public works contracts, except the works are of significant simplicity, in which case the time limit of 14 days can be reduced to 6 days;
 - If the tender is subject to publication in the OJEU, the minimum time limit is 25 days, which can be reduced to 10 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.
- d. Competitive dialogue:
- i. 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;
- ii. Submission of bids:
- If the tender is not subject to publication in the OJEU, the minimum time limit is 6 days after the invitation is sent for the provision of services or supply or lease of goods contracts, and 14 days for public works contracts, except the works are of significant simplicity, in which case
- the time limit of 14 days can be reduced to 6 days;
- If the tender is subject to publication in the OJEU, the minimum time limit is 25 days, which can be reduced to 10 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.
- e. Partnership for innovation:
- i. Submission of applications for technical and financial pre-qualification: the rules applicable to the negotiation procedure also apply to the partnership for innovation procedure;
- ii. 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.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders?

When a procedure with pre-qualification phase is adopted, the technical and financial qualification of the interested parties will be evaluated and ranked.

There are two qualification models: (i) simple qualification model and (ii) complex qualification model or selection system.

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 are 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, in case 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).

The minimum technical capacity criteria must be adequate to the nature of the services object of the contract to be signed, describing situations, qualities, characteristics or other factual elements related, namely [Article 165(1) of the PCC]:

- a. The curricular experience of the candidates;
- b. The human, technological, equipment or other resources used by the candidates in any capacity;
- c. The organisational model and capacity of the candidates, namely as regards the direction and integration of specialised skills, the supporting information systems and the quality control systems;
- d. The capacity of candidates to adopt environmental management measures in the implementation of the contract to be concluded.

As per the minimum financial criteria they cannot exceed twice the value of the contract, except in duly justified cases, namely when related to the special risks associated to the nature of the contract, and must refer to the estimated capacity of the candidates to mobilize the financial means foreseeably necessary for the full compliance with the obligations resulting from the contract to be signed [Article 165(3) of the PCC].

Also, in the case of public works contracts or concessions, the minimum requisites of technical capacity and financial capacity required in the tender documents are based on factual elements already taken into consideration for the concession of the license or registration title containing the appropriate and necessary qualifications for the execution of the work to be done, such requisites must be more demanding than those legally foreseen for that concession. 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.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so what are those grounds of mandatory exclusion?

Article 55 of the PCC establishes the eligibility criteria for a bidder to participate in a tender procedure. In case of non-compliance with these requirements, candidates or bidders will be deemed as having an impediment to participate in the procedure and they will mandatory not be admitted to participate and/or be disqualified and excluded from the procedure (depending on the phase of the procedure).

The impediments are the following:

- 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 on 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 prove a bidder's probity for the performance of the contract and avoid exclusion. In these situations, and based on the degree of severity and specific circumstances of the offence or fault committed, the contracting authority may take the decision not to consider the impediment as relevant, as per Article 55-A of PCC. Nevertheless, in case of such sanctions of prohibition to participate in tender procedures have been imposed or considered valid by

final court decision, they shall not be relieved.

The law sets forth also causes of exclusion of pre-qualification applications or of bids, that are mandatory applied by awarding entities. However, these are addressed to the pre-qualification applications or to bids, and not to the participation of candidates or bidders in the tender.

8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures.

As mentioned above, the usual procurement procedures that the PCC provides for in cases of complex contracts are the- public tender with negotiation, the limited tender with prequalification, the negotiated procedure, the competitive dialogue or even the partnership for innovation.

A public tender with negotiation may be adopted in the following cases (Article 149 of the PCC):

- a. For public works concession or service concession contracts, regardless of the value of the contract;
- b. For public works contracts which value is below the threshold referred to in Article 474(3)(a) (€ 5,350,000);
- c. In the formation of leasing contracts or acquisition of goods and services which value is inferior to the threshold referred to Article 474(3)(b) (€ 139,000).

The negotiation phase may be restricted to the bidders whose bids are ordered in the first places or open to all the bidders whose bids are not excluded.

A limited tender with prequalification may be adopted in all cases where a public tender may also be adopted (Articles 19, 20 and 21 of the PCC). In case of complex contracts, awarding entities may choose to prequalify interested entities, in order to assure that they have the necessary and adequate technical and financial qualification for the execution of the contract.

Currently, the PCC, in Article 29 establishes that the adoption of a competitive dialogue or a negotiation procedure may occur if:

- a. The contracting authority's needs cannot be fulfilled, without adapting easily available solutions;
- b. The goods or services include the adoption of innovative solutions;

- c. 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
- d. 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.

The competitive dialogue is aimed for the tenders on which the contracting authority is not able to specify a definitive and concrete solution for the contract and launches a tender to which bidders submit solutions.

The contracting authorities may also adopt a 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 (Article 30 of the PCC).

The standard stages of each of these procedures are the following:

- a. A public tender with negotiation:
 - i. An initial phase for the submission of the bids and its evaluation;
 - ii. A second phase for negotiation of the bids;
 - iii. A final phase for the evaluation of the final bids and subsequent award.
- b. A limited tender with prequalification:
 - i. A pre-qualification phase, comprising the submission of technical and financial qualification documents and the selection of the bidders qualified to submit a bid;
 - ii. A second phase for the submission of the bids, its evaluation and subsequent award.
- c. Negotiation procedure:
 - i. A pre-qualification phase, comprising the submission of technical and financial qualification documents and the selection of the bidders qualified to submit a bid;
 - ii. A second phase for the submission of the bids and its evaluation;
 - iii. A third phase for negotiation of the bids;
 - iv. A final phase for the evaluation of

- the final bids and subsequent award.
- d. Competitive dialogue:
- i. A pre-qualification phase, as described above;
 - ii. A phase for the bidders to submit their solutions and dialogue with the contracting authority;
 - iii. A final phase for the evaluation of the bids and subsequent award.
- e. Partnership for innovation (the phases may be adapted depending on its special complexity or financial relevance):
- i. A phase for the submission of the manifestations of interest, which may be preceded of a pre-qualification phase if the special technical complexity of the matter requires so;
 - ii. A phase for the submission of the projects' proposals;
 - iii. A final evaluation phase and subsequent celebration of the partnership.

The total length of each procedure may vary depending on the existence of a negotiation phase (which would imply a more extent procedure) but we can say that, approximately, this kind of complex procedures take at least 6 months and may be longer up to one year or more.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured?

Contracts which value is under the above mentioned amounts can be awarded through non-competitive procedures – simplified direct award, direct award and prior consultation.

The main difference between a direct award and the prior consultation procedure is that the prior consultation procedure requires the previous consultation of three entities to submit bids for the award of the contract, whilst the direct award implies the invitation to submit bid to one entity only. Both are formal procedures that initiate with the invitation to submit bids and the tender specifications.

The simplified direct award may be adopted in case of contracts for the acquisition or lease of goods or acquisition of services, which contractual value does not exceed € 5,000, or in the case of public works contracts

which contractual value does not exceed € 10,000. In such cases the tender is de-formalised and the award may be made by the competent body for the decision to contract, directly, based on an invoice or equivalent document only, with exemption from electronic processing.

In such non-competitive procedures, the selection of the invited entity(ies) is at the discretion of the awarding entity. In any case, in case of the value of the contract in question is above the relevant threshold the rules for the tender procedure are the same, regardless of whether it exceeds by less than 50% or more the value of such threshold.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

Even in cases that a non-competitive procedure may be applicable, the thorough compliance with all the principles governing public procurement listed in Article 1-A of the PCC (such as the principles of legality, public interest, impartiality, proportionality, good faith, reliability, sustainability and accountability, as well as the principles of competition, publicity and transparency, equal treatment and non-discrimination) correspond to best practices in public procurement procedures.

Furthermore, it is worth noting that the Portuguese Competition Authority (*Autoridade da Concorrência*) issues several reports and recommendations – based out in sector enquiries with the purpose of identifying possible restrictions to competition in certain markets or economic sectors – establishing the best practices in order to avoid anti-competition barriers or behaviors.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

The law sets forth as the only award criteria, the most economically advantageous bid, which may assume one of two types:

- multifactor, according to which the award criterion is densified by a set of factors, and possible sub-factors, corresponding to various aspects of the execution of the contract to be concluded; or
- mono-factor, according to which the award criterion is densified by a factor corresponding

to a single aspect of the performance of the contract to be concluded, namely price.

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, among others, 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.

It is mandatory for the rules of the procedure to establish a tie-breaker criterion in case of tied evaluation of bids (which cannot be the time when the bids were submitted). This tie-breaker criterion must be connected with the object of the contract and it should be selected in accordance with the objectives and needs of the contracting authority.

12. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder.

One of the most important public procurement principles is the principle of transparency, which shall guide the contracting authorities throughout the entire procedure. Such principle is enshrined in the requirement to properly publicize 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 must be disclosed in every tender is the criteria and evaluation methodology of the bidders, in case there is a pre-qualification phase, and of the bids.

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.

Moreover, each relevant decision of the contacting authority (as well as each decision proposal presented by the jury of the procedure) shall be notified to all interested parties, including unsuccessful bidders.

Thus, all entities or bidders that submit a pre-qualification application or a bid are notified and informed of the preliminary evaluation report that contains the proposal of (i) evaluation, as well as exclusion or admission of application or of bids, (ii) qualification of bidders to submit bids and (iii) award decision. This report should include adequate and sufficient reasoning of the decisions proposed.

At this stage, candidates and bidders are granted a period of at least five working days, of prior hearing (*direito de audiência prévia*), to submit their comments on the proposed decisions in writing. In the prior hearing, they can claim against the proposed decisions and reasoning of the awarding entity, including their exclusion or the admission of other bidders.

After prior hearing is ensured, 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. This final report should address the arguments invoked by candidates or bidders and be duly reasoned.

Finally, the PCC provides that the qualification decision and the contract award decision are notified simultaneously to all candidates or bidders participating in the procedure, together with the final report prepared by the jury. As procedures run on electronic platforms, the relevant entities are alerted through a notification in the platform.

13. What remedies are available to unsuccessful bidders in your jurisdiction?

First of all, it shall be noted that 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 is signed.

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

- a. 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;
- b. The contract refers to a framework agreement which terms cover all the aspects related to the performance of the contract or to a framework agreement executed with one entity only; or
- c. Only one bid has been submitted.

As per the remedies, it is possible to challenge all final decisions issued in public procurement procedures (including qualification or non-qualification of candidates, admission or exclusion of bidders) through administrative review proceedings or through judicial review proceedings. The administrative claim is addressed to the contracting authorities (the competent body for the contracting decision). The judicial appeal is under the jurisdiction of administrative courts.

Additionally, in case of breach of public procurement rules the administrative courts can decide to annul a procedure or a contract, as well as to award damages (e.g., the bid's preparation costs).

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), if it is filed within a period of 10 days after notification of the decision. The suspensive effect can, however, be ended if so requested by the contracting authority and 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 (i.e., not an award decision), the proceeding shall not have automatic suspensive effect, but the administrative court may be requested to adopt interim measures aimed to ensure the effectiveness of the final judgment.

14. Are public procurement law challenges common in your jurisdiction?

There is no statistic data regarding the number of procurement claims, nevertheless experience is showing that procurement claims have grown. It is common to challenge decisions, players in some sectors being more active (as it is the case of public works), as a rule, than

others.

The reputation harm and mainly the harm in future positioning in future proceedings of the same awarding entity are normally considered when analyzing the pros and cons of possible claims, especially when judicial challenges are at stake.

Regarding the costs, if the bidder opts for an administrative appeal of the decision, there is no fee or administrative cost applicable.

On the other hand, a judicial challenge has an initial cost of € 204, regardless the value of the action. The additional costs with the judicial challenge may vary depending on the value of the action, the complexity of the case and the eventual need of expert assessments, for example.

15. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case).

Administrative claims tend to be decided very swiftly.

On the contrary, judicial proceedings usually take no less than six months to obtain the first-instance decision.

The public procurement disputes are considered to be urgent disputes and have special procedural rules set forth in the ACPC, so to avoid excessive delays in the procurement procedure. The usual stages of a dispute of this kind are the following:

- a. Claim: filed within 10 days (if one wishes to obtain immediate suspensive effect) and within the maximum of one month of the relevant decision being issued and notified to the bidder;
- b. Answer by the contracting authority (or any eventual interested party): 20 days from the notice of the claim;
- c. Trial: if applicable, to be scheduled by the judge;
- d. Closing statements: if demanded by the complexity of the matter, within 20 days from the end of the trial session;
- e. Final decision: the law foresees a deadline of 10 days, but usually it takes longer.

16. What rights/remedies are given to bidders that are based outside your

jurisdiction?

The rights/remedies are the same.

17. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract?

The rights of access and remedies are the same. Please note that, for contracts which value equals or exceeds the European thresholds, the launched procedures have to be noticed in the OJEU, and the right of access are the same, at least for European entities.

18. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues?

In accordance with Law no. 13/2002, of 19 February 2002, that approved SATC, the Administrative Courts are responsible for solving disputes concerning the validity of pre-contractual acts and the interpretation, validity and performance of administrative contracts or any other contracts entered into under public procurement law by legal persons governed by public law or other contracting authorities. Moreover, Decree-Law no. 174/2019, of 13 December 2019, has created a special public procurement section within the Administrative Court of Lisbon.

19. Are post-award contract amendments/variations to publically procured, regulation contracts subject to regulation in your jurisdiction?

In accordance with the PPC, post-award contract amendments are permitted without a new procurement procedure only if (Article 312):

- a. The contractual clauses indicate clearly, precisely and unequivocally the scope and nature of possible modifications, as well as the conditions under which they may be applied;
- b. There is an abnormal and unforeseeable alteration of the circumstances in which the parties have based their decision to contract, as long as the requirement of the obligations undertaken by them seriously affects the principles of good faith and is not covered by the risks inherent to the contract; or

- c. There are reasons of public interest arising from new needs or from a new consideration of the existing circumstances.

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 (Article 313):

- a. Introduce modifications that, if initially provided for in the set of specifications, would have caused in the tender procedure, in an objectively demonstrable manner, a change in the qualification of the candidates, a change in the ranking of the evaluated bids, the non-exclusion or the submission of other candidatures or bids;
- b. Alter the economic balance of the contract in favour of the co-contractor so that he is placed in a more favourable situation than that resulting from the balance initially established;
- c. Considerably extend the scope of the contract.

It is important to note that the limitations listed above are not applicable in the following cases [Article 313(3)]:

- a. Modifications with a value lower than the European thresholds referred to in paragraphs 2, 3 or 4 of article 474, as the case may be, and less than 10% or, in public works contracts, 15% of the initial contractual price;
- b. Modifications resulting from circumstances that a diligent contracting authority could not have foreseen, provided that the long-lasting nature of the contractual relationship and the lapsing of time justifies them, and provided that their value does not exceed 50% of the initial contractual price.

The above mentioned European thresholds are the following:

- a. For public works or public services concession contracts, € 5,350,000;
- b. For public works contracts, € 5,350,000;
- c. For provision of services contracts, goods supply or leasing contracts; € 139,000 or € 240,000 depending on whether the contracting authority is the State or other entities, respectively;
- d. For service contracts for social and other specific services, € 750,000;
- e. For contracting authorities in the utilities

sector, the European thresholds are:

- i. For provision of services, supply of goods or lease of goods contracts: € 428,000;
- ii. For public works contracts: € 5,350,000; and
- iii. For service contracts for social and other specific services: € 1,000,000.

In the case of successive modifications, the value to be considered for the effects of the exemptions above mentioned is, in the case of a), that of the accumulated modifications and, in the case of b), that of each modification.

Furthermore, in the cases of a public works contract the contracting authority may require the performance of supplementary works (those which type or quantity is not foreseen in the contract) as long as the launching of a new tender for a new co-contractor (Article 370):

- a. Could not be carried out for technical reasons, notably in view of the need to ensure interchangeability or interoperability with existing equipment, services or installations; and
- b. Would result in a considerable increase in costs for the contracting authority.

In any case, the value of the supplementary works cannot exceed, in accumulated form, 50% of the initial contract price.

A subjective modification, as a change to the identity of the supplier, is never admissible in case of the awarding of the contract through a direct award procedure based on the circumstance that there was only one entity to perform the contract (exclusive rights or other).

In all other cases, the possibility of subjective modification must be expressly provided for in the contract, except given that there is a transfer, either universal or partial, of the co-contractor's position, following a corporate restructuring, namely a public tender offer, acquisition or merger, in favour of an assignee that meets the minimum requirements of qualification and technical capacity and of economic and financial capacity required of the co-contractor or when the contracting authority itself assumes the obligations of the co-contractor vis-à-vis the subcontractors.

The authorization of the assignment also requires:

- a. the submission of the same qualification documents that were presented by the original co-contractor in the tender procedure,

regarding the assignee; and

- b. the fulfilment, by the assignee, of the minimum requirements of technical capacity and financial capacity required of the original co-contractor for the purposes of pre-qualification, if applicable to the procedure at stake.

Finally, the contract may also foresee that, in the case of non-compliance, by the co-contractor, of its obligations, that meets the requirements for the termination of the contract, the co-contractor assigns its contractual position to the bidder which has been evaluated in second place in the sequential order, to be indicated by the contracting authority.

20. How common are direct awards for complex contracts (contract awards without any prior publication or competition)?

As we mentioned above, a direct award may be adopted depending on the value of the contract and the relevant thresholds, namely:

- a. For provision of services contracts, goods supply or leasing contracts, a direct award may be adopted for contracts which value is below € 20,000;
- b. For public works contracts, a direct award may be adopted for contracts which value is below € 30,000;
- c. For other types of contracts, a direct award may be adopted for contracts which value is below € 50,000.

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:

- a. 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 set of specifications is not substantially altered;
- b. 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;
- c. The services covered by the contract are mainly to enable the awarding authority to

provide one or more telecommunications services to the public; and

- d. 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 procedure 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.

Direct award is commonly adopted for contracts with a value exceeding the thresholds, especially in cases where one entity only may execute the contract at stake due to the existence of exclusive rights, or in cases of extreme urgency that should not be imputable to the awarding entity.

21. Have your public procurement rules been sufficiently flexible to allow contracting authorities to respond to the ongoing COVID-19 pandemic? What measures have been most used and in what areas have any difficulties arisen? How have these evolved over the past year and is it likely that lessons learned from procurement during this period will give rise to longer term changes?

The ongoing COVID-19 pandemic has been a challenge that public procurement procedures in Portugal have been trying to address, as flexibly and efficiently as possible, including with the approval of several legislation to overcome some of the arising obstacles.

An example of this is Decree-Law no. 19-A/2020, of 30 April 2020, that establishes, in the context of the COVID-19 pandemic:

- a. 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
- b. An exceptional regime that limits the non-

contractual liability of the State.

This Diploma was adapted to the Autonomous Regions of Madeira through Article No 5 of Regional Decree no. 9/2020/M of 28 July 2020.

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:

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

More recently, with the approval of Law 30/2021, of 21 May 2021, some special measures have been approved for public procurement procedures (applicable for procedures initiated after 20 June 2021), namely for projects financed or co-financed by European funds, housing and decentralisation, information and knowledge technologies, health and social support, implementation of the Economic and Social Stabilisation Programme and the Recovery and Resilience Facility, fuel management within the scope of the Integrated Management System for Rural Fires (SGIFR) and also agri-food goods.

A specific regime of three simplified procedures - simplified public tender, simplified limited tender with prior qualification and simplified prior consultation - is created for the conclusion of contracts relating to the implementation of projects financed or co-financed by European funds, housing and decentralisation, information and knowledge technologies, health and social support, implementation of the Economic and Social Stabilisation Programme and the Recovery and Resilience Facility, with its own procedure, adapted for the required flexibility and urgency in contracting.

With regards to these special regimes, we highlight the following:

- a. The simplified direct award procedure may be used in contracts whose value is equal to or less than € 15,000, provided that they relate to:
 - i. The implementation of projects financed or co-financed by

- European funds;
 - ii. Housing and decentralisation;
 - iii. Information and knowledge technologies;
 - iv. Health and social support;
 - v. The implementation of the Economic and Social Stabilisation Programme and the Recovery and Resilience Facility.
- b. With respect to contracts for the acquisition of agri-food goods, the simplified direct award may be adopted if its value is equal to or less than € 10,000, provided that:
- i. The agri-food goods come from organic production;
 - ii. The agri-food goods are supplied by holders of the of the Family Farming Statute, approved by Decree-Law 64/2018, of 7 August
- 2018;
- iii. The agri-food goods are supplied by holders of the status of Young Rural Entrepreneur, approved by Decree-Law 9/2019, of 18 January 2019.
 - c. The adoption of such simplified regimes exempts the contracting authority from the duties of motivation of the decision to not to contract in lots (which is the rule, as foreseen under Article 46-A(2) of the PCC) and of fixing the base price (under the terms of Article 47(3) of the PCC);
 - d. The deadline for the bidders' prior hearing on the preliminary report of evaluation of prequalification or of bids is 3 days, in the simplified prior consultation, and 5 days, for the simplified public tender and simplified limited tender with prior qualification;
 - e. The need for the awardee to provide a performance bond may be waived.

Contributors

Rodrigo Esteves de Oliveira
Public Law Partner

reo@vda.pt



Catarina Pinto Correia
Public Law Partner

cpc@vda.pt

